COURT OF APPEAL FOR ONTARIO

CITATION: Ahluwalia v. Ahluwalia, 2023 ONCA 476
DATE: 20230707
DOCKET: C70439

Benotto, Trotter and Zarnett JJ.A.

BETWEEN

Amrit Pal Singh Ahluwalia

Applicant
(Appellant)

and

Kuldeep Kaur Ahluwalia

Respondent
(Respondent)

Darryl A. Willer, Malina A. Roshan, and Geoffrey Carpenter, for the appellant

Julie K. Hannaford, Charu Chande, Angela Pagano, Alexi N. Wood, Lillianne Cadieux-Shaw, Brooke Mackenzie, and Nicky (Yujeong) Kim, for the respondent

Anna Matas, Archana Medhekar and Samantha Eisen, for the intervener The Barbara Schlifer Commemorative Clinic

Kristen Mercer and Frances Wood, for the intervener Luke's Place

Heard: March 23, 2023

On appeal from the judgment of Justice Renu J. Mandhane of the Superior Court of Justice, dated February 28, 2022, with supplementary reasons dated March 10, 2022.

M.L Benotto J.A.:

INTRODUCTION

[1] Intimate partner violence is a pervasive social problem. It takes many forms, including physical violence, psychological abuse, financial abuse and intimidation. In Canada, nearly half of women and a third of men have experienced intimate partner violence and rates are on the rise.[1] What was once thought to be a private matter is now properly recognized for its widespread and intergenerational effects.

[2] The issue before the court is not whether intimate partner violence exists. It does. It is not about whether societal steps should be taken to ameliorate the problem. They should be. The issue is whether, in the context of family law court proceedings – where numerous and varied remedies already exist – a tort specific to "family violence" should be created.

[3] The trial judge found that the marriage here was characterized by a pattern of emotional and physical abuse and financial control. She created a new tort of "family violence" and awarded $150,000 in damages. As I will explain, it was unnecessary to create a novel tort. The law is clear that new torts should only be introduced where the existing remedies are inadequate. In the circumstances of this case, existing torts, properly applied, address the harm suffered.

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[1] Statistics Canada, Victims of police-reported family and intimate partner violence, 2021

FACTS

[4] The parties were married in 1999 in India. Eighteen months later, their first child was born.[2] The husband immigrated to Canada in September 2001. The wife and the child followed in March 2002.

[5] The husband had trained as a lawyer in India. The wife had been a teacher, private tutor, and local talk show host. When they arrived in Canada, they had little social and financial support, and lacked the time and money to get their foreign credentials accredited in Canada. They both worked at a plastics factory in Etobicoke, alternating day and night shifts so one of them could care for their child. The wife left the factory job, working days at a food court and then a banquet hall, while the husband worked nights.

[6] In 2004, a second child was born. The husband started work as a truck driver. They bought their first home in Brampton in 2005 and became involved in the local diaspora communities. He eventually started his own business. She volunteered as on-air talent for Punjabi community television and radio programs. Finances were tight, and the family moved to Edmonton between 2012 and 2014, where the husband worked for Canadian National Trucking Lines and

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[2] I refer to the appellant as husband and the respondent as wife, except when discussing legal submissions.

the wife worked part-time at a Bank of Montreal branch. The family returned to Brampton in 2015.

[7] The couple separated in July 2016. The children have, apart from a few visits, essentially refused to see their father post-separation.

[8] The trial judge found that the husband was abusive during the marriage. This is not disputed on appeal.

[9] The trial judge accepted the wife's evidence that the parties' relationship was characterized by a pattern of emotional and physical abuse and financial control. The wife testified to three specific incidents of physical violence: in 2000, 2008, and 2013.

[10] In 2000, after the parties returned to India from a trip to Europe, the husband punched and slapped the wife, causing extensive bruising on her arms and body. The catalyst to the assault was that the husband was jealous that their Italian tour guide had complimented the wife's appearance. The wife denied having done anything to attract the guide's attention.

[11] In 2008, the husband accused the wife of flirting with a mutual friend who had helped fix a computer. He slapped her, grabbed her by the neck, pulled her hair and strangled her. He said he would "teach her a lesson" and asked her "will you do it again?" She described the incident as the worst night of her life.

[12] In 2013, when the parties were in Edmonton, the husband became drunk, restrained the wife by her wrists, shook her by the upper arms, and slapped her across the side of the head.

[13] The physical abuse was part of a pattern of conditioning and control. The trial judge found the husband insulted and belittled the wife about her appearance and her difficulties conceiving, and repeatedly threatened to leave her and the children penniless. He subjected her to weeks and sometimes months of "silent treatment", which would only end when she complied with his "demand" for sex.

[14] The husband also controlled the finances. Although they had joint bank accounts, the trial judge found the husband "closely monitored" the wife's spending. He admitted that she was totally financially dependent on him at the time of separation. Still, he closed the joint accounts and credit cards in contemplation of separation.

[15] In September 2021, the husband was charged criminally with assault and uttering death threats against the wife. The charges remain outstanding.

DECISION BELOW

[16] The wife brought an action for statutory relief—divorce, child support, spousal support, and property equalization—and also claimed damages for the husband's conduct during the marriage.

[17] The trial judge held that the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), did not create a complete statutory scheme for addressing all the legal issues arising in a situation of alleged family violence. Spousal support awards remained narrowly focused on compensation and economic fallout of the marriage rather than fault and misconduct. Accordingly, she held that an award in tort was proper. “The no-fault nature of family law must give way,” she wrote, “where there are serious allegations of family violence that create independent, and actionable harms that cannot be compensated through an award of spousal support.”

[18] While she considered it “unrealistic” to expect survivors of family violence to file two separate claims to receive different forms of financial relief, she stressed the important role of case management judges to ensure that tort claims were genuine at the pleadings stage. Moreover, case management judges should presumptively order, as Price J. did in this matter, that the tort and statutory claims be tried together.

[19] The trial judge then recognized a new tort of “family violence”. She concluded that there were interests worthy of protection and that development in the law was necessary to stay abreast of social change. She considered case law from the United States which recognized a tort of “battered women’s syndrome”. While that tort overlapped significantly with existing American torts, it was “fundamentally different in terms of the assessment of liability, causation, and damages”.

[20] The trial judge was concerned that focusing on narrow methods of liability did not adequately address the day-to-day reality of family violence. For example, “one hard beating at the beginning of a marriage” could create a constant imminent threat of violence and focusing liability on the one incident risked obscuring that fact. She considered the paucity of damage awards for inter-spousal violence as evidence of the problems associated with addressing family violence through existing torts and noted that earlier cases were “out-of-step with the evolving social understanding about the true harms associated with family violence”. She approvingly cited to the case of *Schuetze v. Pyper*, 2021 BCSC 2209, where a trial judge awarded damages of $795,029 for an incident of physical violence in an intimate relationship.

[21] The trial judge viewed recognition of the new tort as in line with the compensatory goals of tort law. She cited Martin J.’s concurring reasons in *Michel v. Graydon*, 2020 SCC 24, 449 D.L.R. (4th) 147, where she emphasized the negative effects of the economic vulnerability of survivors of intimate partner violence on their ability to access justice. A tort remedy would give survivors avenues to pursue accountability as well as financial independence through a single proceeding, potentially making it more realistic for some women to leave violent relationships.

[22] The trial judge also viewed recognition of the new tort as in line with Canada’s obligations under the *Convention on the Elimination of All Forms of*

Discrimination Against Women ("*CEDAW*"). In *General Recommendation No. 35* (2017), UN Doc. CEDAW/C/GC/35, the UN treaty monitoring body, the Committee on the Elimination of Discrimination against Women, recommended states parties (of which Canada is one) implement legislative measures ensuring survivors of domestic violence "have access to justice and to an effective remedy", including civil remedies. Finally, she noted that recognition of a new tort was consistent with the standard of individual personal responsibility, and she considered that courts needed to condemn violence in domestic relationships.

[23] The trial judge defined the elements of this new tort. She considered the proper starting point to be the statutory definition of "family violence" in s. 2 of the *Divorce Act*. Based on that definition, she held that a plaintiff could establish a defendant's liability through any of three modes: (1) intentional conduct that was violent or threatening; (2) behaviour calculated to be coercive and controlling to the plaintiff; or (3) conduct the defendant would have known with substantial certainty would cause the plaintiff to subjectively fear for their own safety or that of another person. While these modes of liability overlapped with existing torts, she considered that the existing torts "do not fully capture the cumulative harm associated with the pattern of coercion and control that lays at the heart of family violence". While intentional infliction of emotional distress, for instance, requires showing that a specific interaction or behaviour was "flagrant and outrageous" and

resulted in injury, family violence would allow consideration of, and compensation for, the pattern of violence, not just the individual incidents.

[24] In finding liability for family violence, the trial judge stressed that the focus must be on specific, particularized conduct, including reference to specific incidents, rather than bald assertions. There had to be “a pattern of conduct that included more than one incident of physical abuse, forcible confinement, sexual abuse, threats, harassment, stalking, failure to provide the necessaries of life, psychological abuse, financial abuse, or killing or harming an animal or property”. An unhappy or dysfunctional relationship would not suffice. Once liability was proven, the nature of the family violence would be relevant to damages, with aggravated and punitive damage awards available as well.

[25] Having accepted the wife’s evidence that the husband used physical violence at the beginning of the marriage to condition her to his control, that the violence continued when they moved to Canada, and that she did not leave the relationship because of family expectations, the parties’ children, and her social and financial dependence on him, she found the appellant liable on all three potential modes of liability under the new tort of family violence. In the alternative, she also found him liable under the torts of assault, battery, and intentional infliction of emotional distress.

[26] The trial judge assessed damages at $150,000: $50,000 for each of compensatory, aggravated, and punitive damages.

[27] The trial judge then considered the statutory claims. The husband owed $20,788 in retroactive child support, and $802.20 per month going forward to the end of 2022, retroactive spousal support in the amount of $47,188 and ongoing spousal support of $822 per month while child support remained payable, and then $2,224 monthly until the earlier of his retirement and 65th birthday.

[28] After accounting for the retroactive support awards, property equalization, post-separation adjustments, and damages award, the trial judge determined that the wife was entitled to the entire proceeds of sale from the matrimonial home, which was essentially all the couple had.

POSITIONS OF THE PARTIES

The appellant

[29] The husband concedes that he is liable in damages although he disputes the amount awarded. His concession relates to liability for existing torts that the trial judge found in the alternative. He objects to the novel tort, which he says should not be recognized. It is 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. Such a dramatic change, he says, is better left to the legislature.

[30] The trial judge's decision also largely disregards the recent amendments to the *Divorce Act*, which were intended to address family violence. The legislature could have removed the restriction on considering spousal misconduct when making a spousal support award or included family violence as a factor in such an award. It could also have created a statutory cause of action. Its choice not to do so should be respected, the husband argues.

[31] The husband also points to procedural unfairness. The focus during the trial was the tort of assault, not the proposed new tort of family violence. He had no opportunity to test the novel tort during the trial and was seriously prejudiced as a result.

[32] With respect to damages, he submits that the award is excessive in comparison with prior jurisprudence, and the trial judge did not properly address aggravated and punitive damages. Although the wife made a summary reference to "general, exemplary and punitive damages", no relief was sought for aggravated damages, and no basis for punitive damages was set out. The disproportionality of the trial judge's damage award is underlined by the fact that the respondent only sought damages of $100,000. The trial judge awarded 50% more than was requested.

The respondent

[33] The wife submits that creating a novel tort was necessary because existing torts do not address the cumulative pattern of harm caused by family violence.

Although she supports the trial judge's conclusions about the broad reach of the tort, she proposes that this court could define a narrower tort of "coercive control" which would provide a more sophisticated recognition of family violence.

[34] Coercive control would be made out where a person:

(a) In the context of an intimate relationship

(b) inflicted a pattern of coercive and controlling behaviour

(c) that, cumulatively, was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm.

[35] With respect to damages, the wife submits that the trial judge's determination is afforded deference, and that there was a basis to award aggravated and punitive damages. Specifically, the awards of aggravated damages for betrayal of trust, breach of fiduciary duty, and relevant post-incident conduct as well as punitive damages based on the social harm associated with family violence are said to be justified.

The Interveners

[36] The Interveners do not adopt the more narrowly defined tort as proposed by the respondent. They submit that the trial judge's decision was correct. Family violence is complex and does not generally manifest as discrete incidents of abuse. It is a pattern of long-term, repetitive abuse, aiming to exert control and domination over a family member. Family violence cannot be addressed through established torts, which cannot adequately remedy the prolonged and

compounding systemic abuse of trust and confidence within a relationship. An integrated and comprehensive approach is not achieved by simply adding a new tort of coercive control, leaving survivors of family violence with a patchwork of remedies.

ISSUES

1. Did the trial judge err by including a tort claim in a family law action?
2. Did the trial judge err by creating a new tort?
3. Did the trial judge err in fashioning the tort of family violence?
4. Should this court recognize the tort of coercive control?
5. Did the trial judge err in assessing damages?
6. What is the procedure for a court considering a tort claim in a family law action?

ANALYSIS

[37] It is axiomatic that intimate partner violence must be recognized, denounced and deterred. Aspects of the problem are addressed by the criminal law, by legislation governing family relationships and their breakdown, and by existing tort remedies. The issue is whether a new tort is required in this case.

[38] I begin with the principles of law for combining a damage claim with statutory relief. I then consider the law for novel torts. Against that background, I address the proposed torts of family violence and coercive control, consider the trial judge's

assessment of damages and set guidelines for judges faced with tort claims in a family law proceeding.

Did the trial judge err by considering a tort claim in a family law action?

[39] The appellant cautions against the expansion of tort claims in family law proceedings. He relies on *Frame v. Smith*, [1987] 2 S.C.R. 99, to support his position that it is up to the legislature, not the courts, to expand the categories of claims in family law. That case involved a father who sought to bring a claim for various torts against his former spouse, who had willfully denied him his court-ordered parenting time. La Forest J., for the majority, gave numerous reasons for rejecting the claim. He said, at paras. 11-12, that the legislature, in the *Children's Law Reform Act*, R.S.O. 1980, c. 68, had created a complete code for issues of custody and access (as they were then known). Most importantly, the legislature had created sanctions and remedies for one party's failure to comply with parenting orders. He thus held that "the statute shows a clear disposition not to permit recourse to the courts for civil actions of this nature."

[40] La Forest J. also made *obiter* comments in *Frame v. Smith* about the "undesirability of provoking suits within the family circle". "The disruption of the familial and social environment so important to a child's welfare," he wrote, "may well have been considered reason enough for the law's inaction, though there are others."

[41] There are three reasons why I conclude that *Frame v. Smith* does not provide a complete answer to the question before this court. First, in that case, the statutory scheme specifically addressed the harm the father had suffered: failure to comply with parenting orders. The legislature could have created a cause of action but did not, instead making provisions for fines and contempt orders. I do not agree that a general legislative intention to preclude tort actions in family law actions can necessarily be so readily inferred in this case. The *Divorce Act* includes no remedies for the harm suffered by the respondent.

[42] Second, courts have already recognized the addition of a tort claim in a family law proceeding. In *Leitch v. Novac*, 2020 ONCA 257, 150 O.R. (3d) 587, this court allowed a tort claim for conspiracy to proceed in a family law case. The claim was against family members who allegedly helped a party hide finances. Hourigan J.A. said, at para 44-46:

> As the Supreme Court suggested in *Leskun v. Leskun*, [2006] 1 S.C.R. 920, 2006 SCC 25, at para. 34, nondisclosure is the cancer of family law….
>
> There is a related malady that often works hand-in-hand with nondisclosure to deny justice in family law proceedings. The problem is what I will call "invisible litigants". These are family members or friends of a family law litigant who insert themselves into the litigation process. They go beyond providing emotional support during a difficult time to become active participants in the litigation. Usually, their intentions are good, and their interference makes no difference in the ultimate result. However, sometimes they introduce or reinforce a win-at-all-costs litigation mentality. These invisible litigants

> are willing to break both the spirit and letter of the family law legislation to achieve their desired result, including by facilitating the deliberate hiding of assets or income.
>
> If we were to accept the analysis of the motion judge, co-conspirators who engage in such behaviour could do so with impunity.

[43] Third, if non-disclosure is the "cancer" of family law proceedings, intimate partner violence is the cancer of domestic relationships. Those who are victimized do not lose their remedies when they marry or begin a domestic partnership.

[44] When La Forest J. spoke in *obiter* about not provoking lawsuits within the family, he was speaking of an issue for which there was a direct statutory remedy. More importantly, in the 36 years since *Frame* was decided, society, the legislature, and the courts have come to recognize the reality of intimate partner violence and the need to condemn it.

[45] As a final note, some cases have relied on *Frame v. Smith* for the proposition that claims for intentional infliction of emotional distress are not permitted within the family law context at all: see *Lo v. Lo* (2009), 70 R.F.L. (6th) 309, at paras. 15-18 (Ont. S.C.); *Murray v. Toth*, 2012 ONSC 5815, at paras. 40-41. I would not endorse this broad statement. While *Frame* does rule out the availability of the tort on the facts of that case—i.e., where one party is wilfully denying another parenting time following a marriage breakdown—it does not bar relief for intentional infliction of emotional distress during a marriage.

[46] For these reasons, the trial judge did not err by including a tort claim in a family law proceeding.

Did the trial judge err by creating a new tort?

[47] It is not suggested that tort law, however it may be developed or expanded, is capable on its own of solving the problem of family violence. The existence of family violence does not, by itself, justify the creation of a new tort. The creation of a new tort is only appropriate when there is a harm that “cries out” for a legal remedy that does not exist.

[48] The respondent relies on *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, where this court acknowledged that the common law must evolve when faced with evidence that it fails to address a social ill. That case involved the defendant repeatedly, and without any valid reason, accessing the banking records of her ex-husband’s new partner, the plaintiff. Sharpe J.A. concluded in that case that a right of action for intrusion upon seclusion should be recognized as a new tort in Ontario. His conclusion followed an extensive review of Canadian and Ontario jurisprudence, the academic literature and American and British tort law. He recognized that technological developments threatened privacy and the facts of the case “cry out for a remedy": at para. 69.

[49] Privacy is recognized as a right worthy of protection. The routine collection of personal information accessible in electronic format increased the threat to a

right that has been protected for centuries. Sharpe J.A. confirmed, at para. 66, that:

> The caselaw, while certainly far from conclusive supports the existence of such a cause of action.

[50] The principles for the creation of a new tort were discussed by this court in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494. There, the trial judge had recognized the new tort of harassment. This court cautioned that common law change is evolutionary. It happens slowly and significant change is best left to the legislature. At paras. 20-21:

> Common law change is evolutionary in nature: it proceeds slowly and incrementally rather than quickly and dramatically, as McLachlin J. explained in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, [1989] S.C.J. No. 94, at p. 760 S.C.R.:
>
> > Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

[51] When remedies already exist, a new tort is not required. As stated in *Merrifield,* "legal remedies [are] available to redress conduct that is alleged to

constitute [the new tort.]. The tort of [intentional infliction of emotional distress] is one of these remedies…" (at para. 42).

[52] A new tort is not required when the only difference from established torts is the quantum of damages. In *Non-Marine Underwriters*, *Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, the court explained, at para. 27, that the tort of sexual battery was not necessary because the harms suffered by the plaintiff were addressed by the established tort of battery and the sexual component only went to damages.

[53] *Merrifield* left open the possibility that there could be a situation arising where existing torts do not address the impugned conduct. This is what occurred in *Caplan v. Atas*, 2021 ONSC 670, where the tort of internet harassment was recognized. Corbett J. concluded that existing torts did not adequately respond to the extraordinary behaviour before him. The conduct spanned over 20 years and went beyond the bounds of decency and tolerance. Yet, the plaintiff had not established injury, so intentional infliction of emotional distress was not available. At paras. 168-170, he explained:

> In my view, the tort of internet harassment should be recognized in these cases because Atas' online conduct and publications seek not so much to defame the victims but to harass them.
>
> …

> The tort of intentional infliction of mental suffering is simply inadequate in these circumstances: it is designed to address different situations. …
>
> I do not have evidence that the plaintiffs have suffered visible and provable illnesses as a result of Atas' conduct. One would hope that a defendant's harassment could be brought to an end before it brought about such consequences. To coin a phrase from Sharpe J.A., quoted by the Court of Appeal in *Merrifield*, "[T]he law of this province would be sadly deficient if we were required to send [the plaintiff] away without a legal remedy." The law would be similarly deficient if it did not provide an efficient remedy until the consequences of this wrongful conduct caused visible and provable illness.

[54] Corbett J. defined the test for internet harassment as "communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm" (para. 171). At para. 174, he distinguished *Merrifield*:

> However, the facts of the case before me are very different from the facts in *Merrifield*. … the law's response to Atas' conduct has not been sufficient, and traditional remedies available in defamation law are not sufficient to address all aspects of Atas' conduct.

[55] Similarly, in *Alberta Health Services v. Johnston*, 2023 ABKB 209, Feasby J. found that existing torts left a gap in the law with respect to the misinformation, conspiracy theories and hate that had been promulgated by the defendant. He therefore recognized a tort of harassment, though defined slightly differently from the tort recognized in *Caplan*.

[56] In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, Abella J. said, at para. 118, that the common law develops to "keep law aligned with the evolution of society". At paras. 237 *et seq.*, Brown and Rowe JJ. summarized Canadian jurisprudence and set out a test for the recognition of new torts. While their reasons were dissenting, they deal with an issue not addressed by the majority and so do not conflict with the binding holding in any way. The direction is helpful:

> Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies; (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another; and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial. Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration. [Citations omitted.]

[57] There is no doubt that a tort of family violence or coercive control would "reflect and address a wrong visited by one person on another". The issue here is whether there are adequate alternative remedies and whether the change wrought upon the legal system would be indeterminate or substantial.

[58] The trial judge determined that a new tort was necessary because in her view the assessment of liability and causation as well as of damages under existing torts were insufficient.

[59] With respect to liability and causation, the trial judge emphasized the focus in the existing torts of assault and intentional infliction of emotional distress on individual instances rather than on a *pattern* of behaviour. The essence of her reasoning on this point is set out in para. 54 of the reasons:

> While the tort of family violence will overlap with existing torts, there are unique elements that justify recognition of a unique cause of action. I agree with the [respondent] that the existing torts do not fully capture the cumulative harm associated with the *pattern* of coercion and control that lays at the heart of family violence cases and which creates the conditions of fear and helplessness. These patterns can be cyclical and subtle, and often go beyond assault and battery to include complicated and prolonged psychological and financial abuse. These uniquely harmful aspects of family violence are not adequately captured in the existing torts. In general, the existing torts are focused on specific, harmful *incidents*, while the proposed tort of family violence is focused on long-term, harmful *patterns* of conduct that are designed to control or terrorize. For example, the tort of intentional infliction of emotional distress requires showing that a specific interaction or behaviour was "flagrant and outrageous" and resulted in injury. In the context of damage assessment for family violence, it is the pattern of violence that must be compensated, not the individual incidents. [Emphasis in original.]

[60] With respect, this statement reflects a misunderstanding of the law of existing torts. Existing torts already address patterns of behaviour, for both liability and damages.

[61] In *Barker v. Barker*, 2022 ONCA 567, 162 O.R. (3d) 337, this court recently provided a summary of the torts of battery and assault. Although the terms are often used interchangeably, there is a distinction. At para. 138:

> … battery and assault are distinct concepts in tort law, both being examples of trespass to the person … a battery involves actual physical contact by the tortfeasor or bringing about harmful or offensive contact with another person, whereas a tortious assault involves intentionally causing another to fear imminent contact of a harmful or offensive nature. [Citations omitted.]

[62] The tort of battery requires direct interference with one's person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant. The interference must be "harmful or offensive" or contact that is "non-trivial": *Scalera*, at para. 16.

[63] The trial judge's findings here that the appellant physically assaulted the respondent on three separate occasions satisfy the requirements for the tort of battery.

[64] Assault is conceptually different. It involves creating the apprehension of imminent harmful or offensive contact. In *Barker,* at para. 170, this court approved the following statement of law from the Hon. Allen M. Linden, et al., *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis, 2015), at §2.42:

> Assault is the intentional creation of the <u>apprehension of imminent harmful - or offensive contact</u>. The tort of assault furnishes protection for the interest in freedom from fear of being physically interfered with. Damages

> are recoverable by someone who is made apprehensive of immediate physical contact, even though that contact never actually occurs. [Emphasis added.]

[65] *Barker* involved a claim brought by 28 persons admitted to a mental health facility. They sought (among other things) damages against physicians who worked at that facility for assault, battery and intentional infliction of emotional distress. The claim for assault related to a program in the facility where patients could be sent to an extremely harsh form of solitary confinement known as MAPP. The trial judge wrote that the patients "lived under the shadow of the MAPP threat": *Barker v. Barker*, 2020 ONSC 3746, at para. 1202.

[66] This court concluded that the trial judge had failed to apply the imminence requirement for assault, instead relying on a fear of future harm, which itself was "conduct-dependent". A fear of future harm is not an apprehension of imminent harm: see *Barker* ONCA at para. 182.

[67] Here, however, the imminence requirement is met. The wife suffered constant threats of imminent harm, solidified by actual harm – both physical and emotional. The pattern of abuse caused her to live in a near-constant fear of imminent harm. The three violent incidents described above show that this fear, unlike that of the plaintiffs in *Barker*, was not conduct-dependent: simple acts such as asking a friend for help fixing a computer or receiving a compliment from a tour guide would be enough to provoke the husband's wrath.

[68] The trial judge's findings of fact satisfy the requirements for assault.

[69] There is also the tort of intentional infliction of emotional distress. It has three elements: (i) the defendant's conduct was flagrant and outrageous; (ii) the conduct was calculated to harm; and (iii) the conduct caused the plaintiff to suffer a visible and provable illness. See *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.).

[70] The requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow: Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, Ont.: Butterworths, 2001) at p. 34, Prof. G.H.L. Fridman, *The Law of Torts in Canada* (Toronto: Carswell, 1989) at p. 53. The "visible and provable illness" does not require expert medical evidence. It is satisfied when depression or physical illness result from the conduct: see *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543.

[71] The trial judge's findings satisfy these requirements. However, she concluded that these torts do not capture the pattern of conduct that is inherent in intimate partner violence. I disagree and turn to that issue now.

[72] The trial judge was concerned that in the context of existing torts, courts would concentrate on the individual incidents of abuse and lose sight of the patterns of conduct. At para. 59, she said:

> Focusing too narrowly on specific incidents risks minimizing the tortious conduct, which is the overall

> pattern of violent and coercive behavior combined with a breach of trust. It follows then that a surgical focus on the mechanical elements of the physical assaults, for example, will not be adequate to understand and appreciate the true nature of the harmful conduct.

[73] No jurisprudence was relied on by either the trial judge or by the respondent to support the proposition that a *pattern* of tortious conduct is not captured by the existing torts of battery, assault, and intentional infliction of emotional distress. Similarly, no jurisprudence is cited to support the trial judge's concern that existing torts are too narrowly focused to capture these dynamics in a relationship. To the contrary, the two cases specifically referred to by the trial judge at para. 113 in support of the high quantum of damages she awarded, clearly involved analogous patterns of decades-long abuse: *N.C. v. W.R.B.*, [1999] O.J. No. 3633, *C.S.F. v. J.F.*, [2002] O.J. No. 1350.

[74] Courts have long recognized that patterns of physical and emotional abuse constitute tortious behaviour. Contrary to the trial judge's conclusion, courts have considered the patterns of behaviour that constitute intimate partner violence without limiting their focus to individual incidents. In *O.O.E. v. A.O.E.*, 2019 SKQB 48, Tholl J.A. accepted the plaintiff wife's evidence of numerous incidents of violent abuse at the hands of the defendant husband. He found at para. 207, that the husband "committed the torts of assault and battery on numerous occasions" over a period spanning almost four years. His conduct was described as "induc[ing] a state of terror" in the wife and causing her to be "'terrified' of his temper for the

entire relationship". The court awarded combined general damages and aggravated damages in the amount of $40,000. Taking into account the defendant's "very limited financial resources", punitive damages of $5,000 were also awarded.

[75] In *C.S.F. v. J.F.*, [2002] O.J. No. 1350, also mentioned by the trial judge in support of a high damages award, the action was framed in assault, battery, sexual assault, and intentional infliction of emotional distress. The evidence was described, at para. 5, as "a picture of constant abuse of his wife by the defendant over a period of 38 years during their marriage and of a life of fear and physical abuse." Lofchik J. found liability for intentional infliction of emotional distress. At para. 26, he said the court was "attempting to put a dollar value on 38 years of abuse and physical and mental suffering". The mother in that case was awarded $125,000 in general damages and the daughter was awarded $75,000 in general damages. They were also each awarded $25,000 in aggravated damages and $25,000 in punitive damages. An appeal to this court was dismissed: 2003 CarswellOnt 755.

[76] In *MacKay v. Buelow* (1995), 11 R.F.L. (4th) 403 (Ont. Gen. Div.), the defendant "harassed and intimidated the plaintiff on numerous occasions", including threats of violence, throwing a cupboard door at her, stalking, videotaping her through her bathroom window from a tree, and threatening to kidnap her daughter. The plaintiff was diagnosed with post-traumatic stress disorder. Binks J.,

without limiting his analysis to any particular incident, found liability for trespass to the person (i.e., assault), intentional infliction of emotional distress, and invasion of privacy. For general, aggravated and punitive damages altogether, the plaintiff was awarded $55,000.

[77] While the plaintiff in *Valenti v. Valenti* (1996), 21 R.F.L. (4th) 246 (Ont. Gen. Div.), aff'd (1998) 41 R.F.L. (4th) 289 (C.A.), only sought damages for assault for one violent incident, at paras. 72-74, Métivier J. recounted some elements of the overall pattern of abuse and made the specific finding that "the husband's past behaviour would have intensified the wife's concern for her life and safety". For general, aggravated and punitive damages, $15,000 was awarded to the wife.

[78] Much like in the present case, in *Dhaliwal v. Dhaliwa*l, [1997] O.J. No. 5964 (Gen. Div.), the wife provided evidence of three discrete violent incidents that formed part of a pattern of physical and emotional abuse. This abuse caused her to suffer depression, sleep disturbances, and other forms of emotional distress. Métivier J. noted (at para. 10) that verbal abuse "leaves scars as real and as deep as physical abuse." She accepted the wife's evidence as to the pattern of abusive conduct and awarded damages of $10,000.

[79] In *N.C. v W.R.B.*, [1999] OJ No 3633 (S.C.), mentioned by the trial judge as an example of a higher damages award in the context of spousal violence, the plaintiff suffered "physical and verbal abuse on a daily basis and sexual assaults

as frequent as four or five times a week during her six and a half year relationship with the defendant". These assaults left her "powerless to leave the relationship due to her systematic erosion of self-esteem" (at para. 4). She also experienced symptoms of post-traumatic stress disorder. In choosing an appropriate quantum of damages, Beaulieu J. emphasized the frequency and nature of the abuse. The plaintiff was awarded $65,000 in general damages, $25,000 in aggravated damages and $1,017 in special damages for a total of $91,017.

[80] In the context of existing torts, courts have also specifically considered the *pattern* of abuse as a reason to award higher damages.

[81] For example, in *Calin v. Calin*, 2019 ONSC 3564, two daughters asserted a litany of claims of abuse by their father. While Gomery J. assessed each claim individually, she concluded in her assessment of damages, at para. 339, that "abuse of a child by a parent over many years should attract more than modest damages, even in the absence of any serious physical injury." She awarded one daughter $50,000 in general damages, the other $25,000, and each of them an additional $10,000 in punitive damages.

[82] In *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607, the physical and emotional abuse was described as extending over the entire period of 6 months during which the parties lived together. Gomery J. found liability in assault and battery for several incidents of violent abuse and threats by the defendant toward his

then-girlfriend. She held that the damages award should reflect the “entire history” of abuse, and concluded, at para. 120, that despite the lack of lingering physical injury, a damages award on the high end of the scale was “appropriate due to the repeated, ongoing nature of Nicholas' physical and verbal abuse and Jane's vivid evidence on the terrifying nature of the incidents in September 2013 and March 2014.” The plaintiff was awarded a total of $100,000 in damages: $20,000 for assault and battery as well as general damages of $50,000, aggravated damages of $25,000 and punitive damages of $25,000. The damages award also reflected the defendant’s commission of the tort of public disclosure of private information: he posted a sexually explicit video of the plaintiff on a pornographic website without her knowledge to punish her for reporting to the police his assaults and threats.

[83] The court in *Farkas v. Kovac*s, [1989] O.J. No. 2387 (Dist. Ct.) considered three separate incidents of physical violence between the intimate partners when establishing liability. However, while the incidents themselves were relatively minor, the overall pattern of abuse was held to be relevant to the damages assessment. Hoilett D.C.J. considered, at para. 10, that while the plaintiff “appears to have suffered no serious physical harm … the emotional and mental aspect of the assaults, in the circumstances outlined, ought not to be diminished”. $10,000 in damages was awarded, $2,500 of which was categorized as punitive.

[84] In *S. (L.N.) v. K. (W.M.)*, 1999 ABQB 478, the defendant husband admitted liability for several discrete violent incidents. The court considered “the length of

time over which the verbal and physical assaults transpired in this case and given the injuries, bruises, bumps, bangs, etc. and the mental anguish that Ms. W.M.K. suffered from 1978 to 1996" as relevant to the assessment of damages. $4,000 was awarded in damages.

[85] In *Van Dusen v. Van Dusen*, 2010 ONSC 220, MacLeod-Beliveau J. awarded general and aggravated damages for one individual assault, which took place in front of the parties' children. She noted the "undisputed facts … that Mr. Van Dusen tormented and physically assaulted the Applicant throughout their marriage", in the context of her damages award. The wife was awarded $15,000 in general and aggravated damages.

[86] Courts have also considered patterns of abusive conduct that occur following a marital breakdown as relevant to costs. In *McLean v. Danicic* (2009), 95 O.R. (3d) 570 (S.C.), Harvison Young J. (as she then was) considered a "campaign of threats and intimidation" in a family law litigation. Citing *Prinzo*, she concluded that "Mr. Danicic had intentionally inflicted mental distress on Ms. McLean" by sending photographs and accompanying threats. She awarded damages. When discussing costs, she said that he had pursued a relentless campaign of harassment. At para 92:

> As I have found earlier, he embarked on a campaign of threats and intimidation designed to coerce her into abandoning her claims. He withdrew $25,000 from the line of credit secured on the Brown's Line property the

> day after learning, at a case conference before Goodman J. on March 14, 2005, that Ms. McLean was about to bring a motion for a certificate of pending litigation. He took a number of actions, any of which, standing alone, would not justify a finding of bad faith but which, when considered in their entirety, reveal a pattern of conduct designed to delay and frustrate the proper resolution of this matter.

[87] Other courts have considered theories of liability premised on patterns of conduct, but rejected them only because the pattern could not be established on the facts: *Wandich v. Viele* (2002), 24 R.F.L. (5th) 427 (Ont. S.C.), and *Rezel v. Rezel* (2007), 37 R.F.L. (6th) 445 (Ont. S.C.).

[88] Further, isolated incidents that are not individually tortious may, when viewed in their repetitive and cumulative nature, become tortious. For example, *Warman v. Grosvenor* (2008), 92 O.R. (3d) 663 (Sup. Ct) involved a pattern of anti-Semitic and homophobic online harassment persisting for at least two years. The pattern included the defendant posting the plaintiff's home address online and urging his readers to "pay him a visit", as well as one statement that he owned a firearm and "its bullets have [the plaintiff's] name on them". Ratushny J. found the plaintiff could recover damages for assault. She wrote, at para. 62:

> The postings and the e-mails have continued for over two years. They have persistently expressed hatred and anger and have called on others to act against the plaintiff, to try to get him evicted and to make him a target of violence. They are not general threats. They are threatening and intimidating and by virtue of their repetitiveness, their detail regarding the plaintiff's whereabouts and their level of malevolence, they are

> more than mere empty threats and insults. They are vicious and serious and are to be taken seriously. They have made the plaintiff apprehensive of imminent physical harm and reasonably so, particularly in the context of the wide publication of the postings on the Internet and the very real possibility that someone will, as they have in the past by contacts with the management of the plaintiff's residence, act on the defendant's repeated invitations to others to find the plaintiff and inflict serious physical harm on him. [Emphasis added.]

[89] In *Warman*, the prolonged and repeated nature of the conduct formed part of the analysis of whether there was an apprehension of imminent physical contact. The trial judge did not focus on the individual instances (which may not on their own be tortious) but rather she considered the two-year pattern of conduct to determine that, taken as a whole, it led the plaintiff to apprehend imminent physical harm. Therefore, the repetitive nature of the conduct helped establish the elements of the tort. Ratushny J. did not consider whether each individual message constituted an assault, but rather she considered the entire two-year pattern of conduct to determine that, taken as a whole, the plaintiff reasonably apprehended physical harm and was thus assaulted. This was not a situation like *Barker* where there was a fear of future harm. This was a situation where a person lives in a constant state of fear.

[90] In *Jones v. Tsige,* the tortious conduct continued for four years, during which time the defendant accessed the plaintiff’s personal information 174 times.

Sharpe J.A. found the conduct deliberate, prolonged and shocking, contributing to his conclusion that the facts of the case required a remedy.

[91] In summary the trial judge's concern that "long-term, harmful *patterns* of conduct that are designed to control or terrorize" are not captured by existing torts is misplaced. She found that the appellant had subjected the respondent to years of physical, psychological, emotional and financial abuse constituting behaviour calculated to be coercive and controlling. These facts fall squarely within the existing jurisprudence on battery, assault and intentional infliction of emotional distress. The jurisprudence cited above demonstrate that *patterns* of recurring behaviour are addressed.

[92] As set out in *Merrifield*, this desirable gradual evolution, with significant change best left to the legislature, means that new torts should not be created where existing torts suffice. The existing torts are flexible enough to address the fact that abuse has many forms. Recurring and ongoing abuse, intimidation, domination and financial abuse exist can be patterned into daily life. Trial judges should be alive to these dynamics. The trial judge here recognized the ability of existing torts to address the harm when she found that liability under the existing torts had in fact been established.

[93] The trial judge erred by creating a new tort which was not required here.

Did the trial judge err in fashioning the tort of family violence?

[94] Even if there were a need to create a new tort, the trial judge's approach was misguided in her reliance on the s. 2 definition of "family violence", which has a very specific application. The trial judge adopted a definition of family violence meant for post-separation parenting plans and used it to fashion the new tort.

[95] At para 43 the trial judge said:

> With 2021 reforms to the *Divorce Act*, Parliament has explicitly recognized the devastating, life-long impact of family violence on children and families…

[96] The definition in s. 2 of the Act is:

> ***family violence*** means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes
>
> (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
>
> (b) sexual abuse;
>
> (c) threats to kill or cause bodily harm to any person;
>
> (d) harassment, including stalking;
>
> (e) the failure to provide the necessaries of life;
>
> (f) psychological abuse;
>
> (g) financial abuse;

> (h) threats to kill or harm an animal or damage property; and
>
> (i) the killing or harming of an animal or the damaging of property; (*violence familiale*)

[97] The *Divorce Act* specifically refers to family violence only in connection with parenting orders in s. 16(3)(j). When the court assesses the best interests of children, the court is to consider:

> (j) any family violence and its impact on, among other things,
>
> > (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
> > (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child;

[98] In s. 16(4) the court is to consider the impact of family violence on children:

> (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:
>
> > (a) the nature, seriousness and frequency of the family violence and when it occurred;
> >
> > (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
> >
> > (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
> >
> > (d) the physical, emotional and psychological harm or risk of harm to the child;

> (e) any compromise to the safety of the child or other family member;
>
> (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
>
> (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
>
> (h) any other relevant factor.

[99] I agree with the trial judge that the relatively recent addition of family violence considerations reflects Parliament's awareness of and concern about the devastating effects of family violence on children.

[100] I do not agree with the trial judge that these sections "formed the starting point" for creating a new tort between the spouses. To the contrary, the legislature must be taken to have intentionally introduced this concept only in the context of parenting.

[101] Sections 16(3) and (4) of the *Divorce Act* reflect Parliament's recognition of the fact family violence is an important consideration in developing a parenting plan. All aspects of the post-separation parenting are affected: the contact between the former spouses, the arrangements for decision making, the dispute resolution process and so on.

[102] By adopting the definition of family violence created for the specific purpose of post-separation parenting plans and using it to create a new cause of action, the

trial judge ignored the clear intention of the legislature. This was an error. It also creates the same indeterminate changes in the conduct of family law proceedings that I address below in connection with the proposed tort of coercive control.

Should this court recognize the tort of coercive control?

[103] Recognizing the concerns inherent in the trial judge's proposed approach, on appeal the respondent proposed a "more sophisticated recognition of family violence" as embodied in the term "coercive control" which she submits concerns subordination and control. It includes emotional and psychological harm, financial abuse, social isolation, intentional damage to property, deprivation of necessities of life, or micro-regulation of daily activities. The key is that the controlling tactics are patterned, repeated, and often integrated into everyday life, magnifying and accumulating harms.

[104] The respondent submits that the tort of coercive control would not require *proof* of harm and would be made out where a person:

(a) in the context of an intimate relationship

(b) inflicted a pattern of coercive and controlling behaviour

(c) that, cumulatively, was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm.

[105] Note the distinction. Proof of harm is not an element of the tort. Rather the requirement is that the conduct is calculated to cause harm.

[106] I would not recognize the tort of coercive control at this time because: (i) the existing tort of intentional infliction of emotional distress provides an adequate remedy; (ii) the elimination of the requirement to establish visible and provable injuries does not arise in the case before us; and (iii) the elimination of the requirement to prove harm would cause a significant impact on family law litigation best left to the legislature.

[107] The respondent submits that the existing tort of intentional infliction of emotional distress focuses on specific acts and behaviours, not the context, underlying dynamics, and pattern or web of coercion and control. I disagree. A proper analysis of the tort of intentional infliction of emotional distress would involve the context of the relationship and the patterns of controlling behaviour causing harm. As I have already explained, there is no impediment to a consideration of the context and pattern of behaviour when assessing the elements of a tort, particularly in a domestic situation.

[108] The respondent further submits that the existing tort "risks missing tactics of domination" that may on their own seem minor or trivial, but which function as part of an overarching pattern of coercion and control. Again, I disagree. This is the pattern of behaviour that fits squarely within the existing torts. (*See McLean*, at para. 92).

[109] I turn to the proposed elimination of the requirement to show injury.

[110] The proposed tort of coercive control substantially overlaps with the tort of intentional infliction of emotional distress. The major change in the proposed new tort would be to eliminate the requirement that there be visible and provable injuries. This is, in effect, the gap in the law that the appellant says cries out for a remedy. The submission is similar to that made in Merrifield, which dealt with the proposed tort of harassment. While this court rejected the proposed elimination of the element of visible and provable injuries, it left open the possibility of "the development of a properly conceived tort of harassment that might apply in appropriate contexts" (at para. 53).

[111] The facts of this case do not fall into any gap in the law. The trial judge accepted that injuries had been proven and found the appellant here liable for intentional infliction of emotional distress.

[112] Since the issue does not arise in this case, it would be inappropriate to make a significant change to the law based on a hypothetical. As Sharpe J.A. cautioned in *Jones* at para 21:

> …as a court of law, we should restrict ourselves to the particular issues posed by the facts of the case before us and not attempt to decide more than is strictly necessary to decide that case. A cause of action of any wider breadth would not only over-reach what is necessary to resolve this case but could also amount to an unmanageable legal proposition that would, as [Professor Prosser] warned, breed confusion and uncertainty.

[113] In addition, the elimination of the requirement to prove harm would be a significant change to the law. The degree of proof necessary to demonstrate mental injury is not as onerous as it once was. Initially, “visible and provable injury” was interpreted to only include “recognized” psychiatric injuries—essentially requiring a medical diagnosis. In *Frame*, Wilson J. wrote, at para. 46, that if the tort were available, the plaintiff could only recover damages stemming from his treatment for mental depression. This position was affirmed by the B.C. Court of Appeal in *Young v. Borzoni*, 2007 BCCA 16, which referred to the *Diagnostic and Statistical Manual of Mental Disorders* as a primary source of “recognized psychiatric injury.”

[114] However, this court’s decision in *Prinzo* held that the absence of medical expert evidence was not fatal. Likewise, in *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, a unanimous court rejected the historical practice of requiring “claimants alleging mental injury to show that such injury has manifested itself to an expert in psychiatry in the form of a clinically diagnosed, recognizable psychiatric illness” (at para. 29). Instead, the court adopted the standard set in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9: compensable psychiatric injury “must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept”. Therefore, the testimony of lay witnesses in *Saadati* sufficed to demonstrate the requisite mental injury.

[115] While *Saadati* and *Mustapha* were cases of negligence, not intentional tort, the reasoning in *Saadati* about the proof required to establish injury rebuts the *Young v. Borzoni* approach. At para. 31:

> Confining compensable mental injury to conditions that are identifiable with reference to these diagnostic tools is, however, inherently suspect as a matter of legal methodology. While, for treatment purposes, an accurate diagnosis is obviously important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects. … [T]he trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not to whether a label could be attached to them. Downloading the task of assessing legally recoverable mental injury to the DSM and ICD therefore imports an arbitrary control mechanism upon recovery for mental injury, conditioning recovery not upon any legally principled basis directed to the alleged *injury*, but upon conformity with a legally irrelevant classification scheme designed to facilitate identification of *particular conditions*. [Emphasis in original.]

[116] Thus, the relevant question for the trier of fact is not the diagnosis but rather the symptoms and their effects. At para. 38:

> To the extent that claimants do not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short. … To be clear, however: while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And … the lack of a diagnosis cannot on its own be dispositive, it is

> something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.

[117] This court recently clarified the threshold for psychological injury in *Bothwell v. London Health Sciences Centre*, 2023 ONCA 323, at para. 32:

> In my view, paras. 37 and 38 [of *Saadati*] together are a clear direction that, in distinguishing mental injury from psychological upset, the trier of fact must consider not only the claimant's psychological upset but also how seriously the claimant's cognitive functions and participation in daily activities were impaired, the length of such impairment, and the nature and effect of any treatment sought and taken in relation to the psychological upset.

[118] Thus, while the methods by which psychological injury can be proved have been relaxed, and courts' understanding of what constitutes such an injury have evolved, it remains the case that mere upset, or a vague assertion of psychological harm, will not suffice.

[119] The respondent would have this court eliminate the requirement to offer proof of injury. This would result in a significant change in the jurisprudence with unknown, potentially far-reaching and unintended effects – particularly for families involved in litigation. I will explain.

[120] 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 made 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. It took time, but the move away from an adversarial approach towards a resolution-based approach has been adopted. Law schools offer courses in negotiation for family law. Collaborative law associations have been established. The *Family Law Rules*, O. Reg. 114/99, require three conferences with a judge prior to proceeding to trial. This has significantly reduced the number of cases that actually proceed to trial. The aim is to reduce conflict so as to assist families to better function cooperatively after separation.

[121] These changes were necessary because the classic adversarial model of dispute resolution was not achieving this goal. The devastating exchange of incriminating affidavits remained accessible to the children. And every allegation required a response, resulting in the classic “affidavit war”. The evolution towards case management, early resolution, alternate forms of dispute resolution, negotiation strategies, cooperative lawyering has been gradual but beneficial.

[122] I do not for a moment suggest that it is appropriate to shift cases involving intimate partner violence from the court system. Nor do I diminish the importance of properly addressing it in the context of family law litigation through tort claims. Where abuse, physical or otherwise, leads to psychological injury, compensation is in order, and any approach suggesting otherwise must be rejected. I simply caution that to lower the level of impugned conduct may unintentionally encourage

allegations of fault in every case, thereby undermining the movement towards a resolution-based system.

[123] A fundamental change to tort law eliminating the requirement to show injury has significant potential to impact several aspects of federal and provincial legislation, including the *Divorce Act,* the *Children's Law Reform Act,* the *Family Law Act* and the *Family Law Rules*, to name a few. As McLachlin J. (as she then was) explained in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61, significant change may best be left to the legislature:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

[124] For these reasons, I would not recognize the proposed new tort of coercive control.

Did the trial judge err in assessing damages?

[125] The trial judge assessed damages at $150,000: $50,000 for each of compensatory, aggravated, and punitive damages.

[126] The compensatory damages were based the fact that the respondent suffered from depression and anxiety because of the appellant's abuse. The $50,000 in aggravated damages related to the "overall pattern of coercion and control and the clear breach of trust". The appellant "preyed on the [respondent's] vulnerability" as a new, racialized immigrant to Canada. Moreover, his post-separation conduct was egregious and left the respondent unable to meet the children's daily needs, which itself affected the children's long-term mental health.

[127] The appellant submits that the award is excessive and not in line with prior jurisprudence. While I agree that the damage assessment is higher than in many previous cases, I would not interfere with the trial judge's award for compensatory and aggravated damages.

[128] First, the trial judge's assessment of damages attracts a high level of deference. Second, while the quantum is higher than has been typical in previous jurisprudence, the higher damage award reflects an emerging understanding of the evils of intimate partner violence and its harms. Just as sentencing in a criminal context is not in a "straitjacket", so too damage awards should reflect society's

abhorrence towards the conduct.[3] Indeed, the quantum of damages historically awarded may need to evolve to better reflect the current societal understanding of the extent of these harms. This is entirely consistent with Abella J.'s comment in *Nevsun,* at para. 118, that the common law develops to "keep law aligned with the evolution of society".

[129] I would not interfere with the trial judge's assessment for compensatory and aggravated damages.

[130] The punitive damage award is different.

[131] Although the respondent sought $100,000 in total damages; the trial judge ordered $150,000. The additional $50,000 for punitive damages reflected, in the trial judge's words, the "strong condemnation" required.

[132] I agree with the trial judge that the appellant's conduct called for condemnation. But the trial judge failed to take a required step in the analysis of whether an award of punitive damages was warranted. She did not address, and made no finding that the award of general and aggravated damages was insufficient to achieve the goals of denunciation and deterrence. This was an error. In *Whiten v. Pilot Insurance*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 94, the court set out the following principles for an award of punitive damages:

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[3] *R. v. A.J.K.,* 2022 ONCA 487, 415 C.C.C. 230, at para. 71; *R. v. Cunningham*, 2023 ONCA 36, at para. 52.

> (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. [Emphasis added.]

[133] A proper consideration of the *Whiten* requirements in the context of this case does not justify an award of punitive damages because the compensatory and aggravated damages (in the amount sought by the respondent) are sufficient to accomplish the objectives of condemnation. It was unreasonable and

disproportionate to add punitive damages in the amount of an additional 50% of the total claimed, without any explanation. I would allow the appeal with respect to the punitive damage award, thereby reducing the total damages to $100,000. This is not to say that where a tort is made out in circumstances such as these punitive damages are never justified. They may very well be, where the trial judge is satisfied that the deterrent and denunciatory effect of the other heads of damages is insufficient to accomplish the objective of condemnation.

What is the procedure for a court considering a tort claim in a family law action?

[134] The trial judge began her analysis with the tort claims. She then addressed child support, spousal support, and equalization. She found the appellant owed (i) $20,788 in retroactive child support, and $802.20 per month going forward to the end of 2022; (ii) retroactive spousal support of $47,188 and periodic payments of $822 per month while child support remained payable, and $2,224 monthly until the earlier of the appellant's retirement and 65th birthday. The equalization payment was agreed to on appeal in the amount of $5,296.00 based on the value of $16,950 for the husband's business.

[135] These payments, added to the damage award, resulted in the respondent receiving all the proceeds of the matrimonial home. Although the parties agreed to the equalization on appeal, proper net family property statements were not

addressed by the trial judge. In effect, the damage claim subsumed the trial and the statutory entitlements of the parties.

[136] The starting point for a determination of financial issues arising from the marriage is the application of the statutory provisions which, in this case are the *Divorce Act* and the *Family Law Act*, R.S.O. 1990, c. F.3. Only after those determinations are made should the court consider other claims.

[137] When claims other than those arising directly from the statute are raised in a family law proceeding, the statutory entitlements may inform those determinations. This issue arises in other situations, for example, when a party makes a claim for unjust enrichment. This court has held that the provisions of the *Family Law Act* entitlements should be established first: *McNamee v. McNamee,* 2011 ONCA 533, 106 O.R. (3d) 501. It may be that the operation of the equalization provisions would resolve the claim: *Martin v. Sansome*, 2014 ONCA 14, 118 O.R. (3d) 522, at para 61.

[138] In *Martin,* Hoy A.C.J.O. (as she then was) explained at para. 66: “the aggrieved party's entitlement under the equalization provisions of the [*Family Law Act*] should first be calculated. Where appropriate, s. 5(6) of the [*Family Law Act*], which provides for an unequal division of net family properties where equalization would be unconscionable, should be invoked.”

[139] Likewise, in *Halliwell v. Halliwell,* 2017 ONCA 349, 138 O.R. (3d) 671, Gillese J.A. stressed that the “starting point” for inequities arising out of marriage breakdown is the application of the statutory framework. The trial judge had begun his determination with a consideration of whether the businesses in question amounted to a joint family venture. This court concluded that “the trial judge erred by beginning his analysis with the question of family venture. He should simply have had recourse to the [*Family Law Act*].”

[140] I recognize that a tort claim differs from a claim in equity. A claim in equity may go to asset ownership. But the principle of first determining statutory entitlements, including equalization and corollary relief under the *Divorce Act*, is sound. Child support is a right of the child and cannot be set aside for later. A compensatory support award under the *Divorce Act* may impact the quantum of damages. If the abuse allegation involves financial abuse, there may be an order for unequal division of net family property.

[141] In my view, the court should complete the statutory claims before assessing liability and damages for tort claims.

CONCLUSION

[142] I would allow the appeal in part and reduce the damage award by $50,000. I would not recognize the new torts of domestic violence or coercive control as defined in this case.

[143] In accordance with the parties' agreement, I would not order costs.

Released: July 7, 2023 MLB

M. L. Benotto J.A.

I agree K. Thorburn J.A.

I agree B. Zarnett J.A.