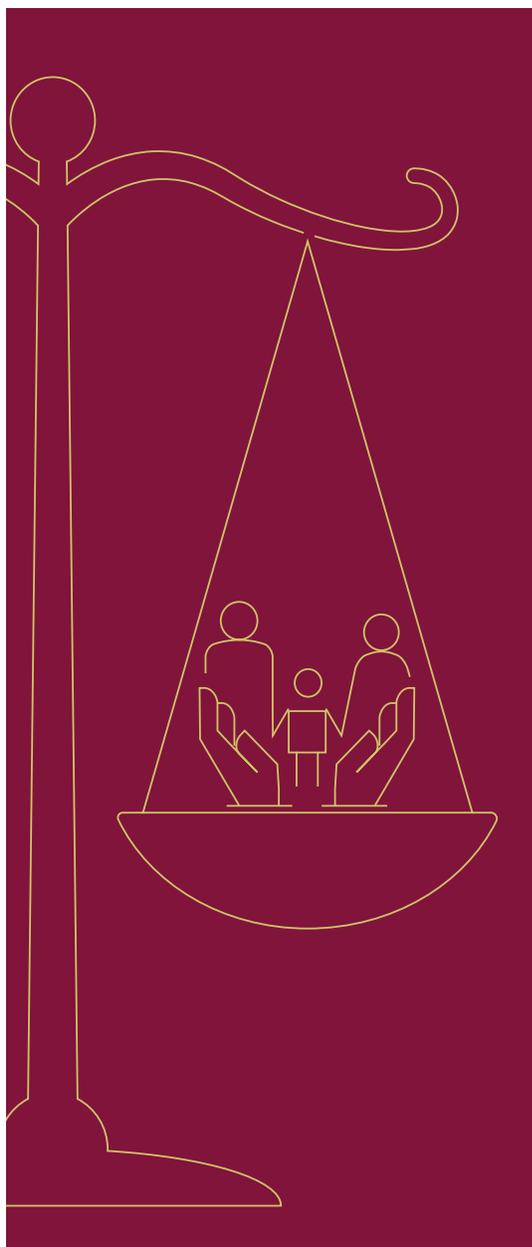

LEGAL BULLETIN

Ontario Court of Appeal Rejects a New Tort of Family Violence: The Case of A v. A 2023 ONCA 476.



Introduction

Tort law allows survivors to seek financial compensation from the person who injured them. In *Ahluwalia v. Ahluwalia*,¹ decided in 2022, Justice Renu J. Mandhane of the Superior Court of Justice created a new tort of family violence, reasoning that traditional torts did not adequately recognize the nature and consequences of family violence.

This decision was appealed by the husband and on July 7, 2023, the Ontario Court of Appeal sided with the husband and overturned Justice Mandhane's decision. The Court of Appeal acknowledged that "intimate partner violence must be recognized, denounced and deterred" but it concluded that there was no need to create a novel tort and reduced the damages from \$150,000 to \$100,000 by eliminating the award for punitive damages; a form of damages ordered by the court with the intention of punishing the defendant for their actions.

What happened in the Superior Court of Ontario?

In 2022, the Superior Court of Ontario recognized a new tort of family violence in the case *Ahluwalia v. Ahluwalia*.² The wife pointed to specific incidents of both physical and mental abuse she suffered at the hand of her husband throughout their 16 year marriage. The Superior Court recognized these incidents of abuse and established there was a pattern

¹ *Ahluwalia v. Ahluwalia*, 2022 ONSC 1303 at para 54 [*A v. A Trial Decision*].

² 2023 ONCA 476 [*A v. A Appeal Decision*].

of coercion and control within the relationship. Due to the husband's behaviour, at trial, Justice Renu J. Mandhane awarded the wife \$150,000 in damages: \$50,000 for each compensatory, aggravated and punitive damages³; collectively, these three forms of damages were awarded with the intent to both compensate the wife financially, while punishing the husband for his abusive behaviour over the course of their marriage.

Justice Mandhane's rationale for recognizing a new tort for family law stems from the unique elements and consequences of family violence as compared to other types of violence. Specifically, while traditional torts, like the tort of assault, battery or intentional infliction of emotional distress, are focused on *distinct incidents* of violence, the tort of family violence focused on *patterns* of violence, coercion and control that lay at the "heart of family violence cases [to create] conditions of fear and helplessness."⁴ Justice Mandhane argued these differences were not properly accounted for by traditional torts,⁵ and a tort of family violence would better recognize the *pattern of abusive behaviour* the survivor experienced and not rely on an individual incident.⁶

Justice Mandhane agreed the new tort of family violence would overlap with the traditional torts. She argued however 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,"⁷ and were not developed to compensate survivors for the "complicated and prolonged psychological and financial abuse."⁸

As a result, the Superior Court's holding in *A v. A* created a new tort specifically for survivors of family violence.

³ *Supra* note 1.

⁴ *Ibid* at para 6.

⁵ *Ibid*.

⁶ *Ibid*.

What Happened in the Appeal?

Writing for the Ontario Court of Appeal, Justice Benotto recognized family violence as a "pervasive social problem" that can take many forms of abuse and intimidation. Justice Benotto provided a number of reasons for the Court's decision; two will be discussed.

1. Existing/Traditional Torts:

Justice Benotto held that a survivor of family violence could rely on three existing torts when seeking restitution: battery, assault, or intentional infliction of emotional distress. These traditional torts are what are known as "intentional torts," which means that the harm caused to the survivor was intentional. The standard of proof for intentional torts is a balance of probabilities (meaning the survivor must prove that it is more likely than it is unlikely the harm occurred). Further, with each tort, the survivor would need to prove the actions against them were intentional and harmful or offensive.

The three traditional torts are broken down as follows:

1. The *tort of battery*, which includes the tort of sexual battery;
2. The *tort of assault*, which requires proof of immediate bodily harm--the survivor needs to prove they felt they were in immediate danger; and
3. The *tort of intentional infliction of emotional distress*. This tort can also be referred to as the intentional infliction of mental distress, harm or suffering.⁹ To prove this, the survivor needs to show the defendant acted recklessly; their conduct was extreme and outrageous; their conduct was calculated to produce harm to the

⁷ *Supra* note 2 at 54.

⁸ *Ibid*.

⁹ *Ibid*.

survivor; and resulted in the survivor’s visible injury of emotional distress.¹⁰ The defendant’s conduct must be more than hateful, which does not include mere insults, indignities, threats or annoyances,¹¹ making it a more difficult tort to prove.

Justice Benotto disagreed with Justice Mandhane that the traditional torts could not properly address and compensate for the patterns of abusive behaviours found in family violence cases. Justice Benotto held these three traditional torts are “flexible enough to address the fact that abuse has many forms. Recurring and ongoing abuse, intimidation, domination and financial abuse exist [and] can be patterned into daily life.”¹² For example, in the case of a tort of assault - which requires the survivor to prove they felt they were in immediate harm - a survivor could argue the pattern of abuse caused them to live in a “near/constant fear of imminent harm.”¹³

Remedies

Although Justice Benotto disagreed with Justice Mandhane’s reasons for creating a tort of family violence, she did accept the importance of recognizing the harm caused by family violence, and providing larger monetary awards as a form of punishment to an abuser. These are known as “punitive” or “aggravated” damages (the money owed to a survivor).

A judge has the discretion to order punitive and/or aggravated damages in addition to “general damages” if a survivor successfully proves the elements required to meet the tort. General damages award a survivor for the non-monetary loss they suffered, like their pain and suffering. Aggravated damages compensate for harm suffered by the cruel intentional act of an abuser.

With these different forms of monetary awards, a survivor could argue the patterns of abuse they suffered were harmful enough to warrant additional, punishment-based, monetary awards in addition to their basic monetary entitlement.

Summary

The *A v. A* Court of Appeal decision has been met with disappointment by advocates for intimate partner survivors who view it as a missed opportunity for the highest court in Ontario to ensure there is an easier way for survivors to be financially awarded for the harms they suffered.¹⁴ This tort was viewed as a legal tool developed for family violence survivors that accounted for the unique context of their experience. Further, this decision was seen as the court not fully understanding the complexity of coercive control.¹⁵ Specifically the repeated acts of humiliation, intimidation, exploitation, isolation and depriving the victim of their independence, which may be reinforced by physical and sexual violence, or the threat of violence experienced by survivors and compromises their autonomy.¹⁶

The recognition of a new tort for family violence survivors was an opportunity to save family violence litigants from having to use more of a “patchwork”¹⁷ approach to access their legal rights. What this means is survivors and family lawyers are still left with the challenge of finding what traditional tort or torts would best fit the circumstances of the harm the survivors experienced instead of having access to one succinct tort meant for their unique situations. Not recognizing the tort of family violence was seen by some as a step backward in the essential development of a law and remedy meant for family violence survivors in family law proceedings.¹⁸

¹⁰ *Ibid.*

¹¹ CED 4th, *Torts*, “Intentional Infliction of Mental Suffering: Elements of Cause of Action” at § 70 (June 2023).

¹² *Supra* note 1 at 92.

¹³ *Ibid* at 92.

¹⁴ Luke’s Place, “Ontario Court of Appeal Rejects Tort of Family Violence in Decision of Ahluwalia v. Ahluwalia” (12 July 2023) online:

Luke’s Place < <https://lukesplace.ca/> > .

¹⁵ Mary-Jo Maur, “The Ontario Court of Appeal’s Decision in Ahluwalia v Ahluwalia – Prudence? Or Opportunity Missed?” (2023), 41:3, CFLQ.

¹⁶ *Supra* note 8..

¹⁷ *Supra* note 14..

¹⁸ *Supra* note 20.

The Court of Appeal decision may be headed to the Supreme Court. In the words of Law Professor May-Jo Maur from Queens University “overall, this is a conservative judgment from the Ontario Court of Appeal. At some point, either in this case or another, the Supreme Court of Canada may have to guide us on whether coercive control is a tort. It is possible, of course, for another litigant to raise these facts and call the tort something else, such as “intentional restriction of autonomy in a domestic setting”. Victims of coercive control deserve compensation. Getting there may require more education about the nature of this behaviour for judges, lawyers, and the public”.¹⁹

¹⁹ *Supra* note 19.

This bulletin was prepared by:
Jessica DiLeo, JD Candidate 2024, Western Law

