September 15, 2023

Torts and Family Violence: *Ahluwalia v Ahluwalia*

By: Jennifer Koshan and Deanne Sowter

Case Commented On: *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 (Can LII); 2023 ONCA 476 (CanLII)

Intimate partner violence (IPV) takes many forms, all of which cause harm to survivors (who are disproportionately women and children). In August, the Minister of Justice and Attorney General of Canada declared that gender-based violence is an epidemic. However, only certain forms of IPV were subject to legal sanction historically – primarily physical and sexual abuse, although sexual assault against a spouse was only criminalized in 1983 (see *Criminal Code*, RSC 1985, c C-46, s 278). More recently, beginning in the 1970s and 80s, emotional and financial abuse and coercive control have been recognized as insidious forms of IPV. Coercive control focuses on patterns rather than discrete incidents of abuse, and on the impact on the survivor's autonomy rather than physical injuries (see Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York: Oxford University Press, 2007)). Although coercive control is not currently criminalized in Canada (unlike some other common law jurisdictions such as England and Wales), broad definitions of IPV that include coercive control and emotional and financial abuse are now included in many Canadian laws. There are laws declaring IPV to be relevant to parenting decisions (including relocation), protection orders, early termination of leases, employment leave, and other legal remedies (for a comparison of these laws across Canada, see here). Gaps in the law's recognition of IPV remain, however. For example, in Alberta, definitions of family violence in the *Family Law Act*, SA 2003, c F-4.5, and *Protection Against Family Violence Act*, RSA 2000, c P-27, do not yet include emotional and financial abuse or coercive control (for discussion see e.g. here). Moreover, as we discuss in this post, tort law has inconsistently provided avenues of economic redress for the harms caused by IPV.

There are two interrelated and mutually reinforcing economic aspects of IPV, namely, economic abuse and the financial impact of IPV. Economic abuse involves the abuser impeding the survivor's ability to acquire, use, and maintain economic resources, which in turn threatens the survivor's economic security and self-sufficiency. Flowing from economic abuse and IPV more generally, the financial impact on survivors is profound, including undermining their economic security and ability to leave an abusive relationship. Survivors often suffer long term economic consequences, including poor credit, housing issues, and few to no assets. It is also common for women to experience homelessness and poverty after leaving an abusive relationship. To quote the Woman Abuse Council of Toronto, "financial hardship is a near universal experience for women who have left an abusive relationship" (at 4).

Across Canada, compensation to survivors for the harms of IPV is not always provided in victim compensation legislation. Family laws provide for child and spousal support but do not fully account for IPV. There are some financial remedies – e.g. spousal support may include

consideration of a victim's inability to work due to physical injury or psychological trauma, a lump sum may be ordered to sever the contact between parties, or an unequal division of net family property may be awarded where there is financial abuse – but these are limited remedies. The law of torts, based on compensation for intentional wrongs and negligent acts, is another option that might allow survivors to seek monetary damages. Yet tort-based lawsuits against abusers have traditionally been rare and limited to intentional torts such as assault, battery, and the intentional infliction of emotional distress. As noted in this recent post, however, the law of torts is always evolving, and has recently been extended to recognize torts such as harassment and non-consensual distribution of intimate images.

It is within this context that in *Ahluwalia*, Justice Renu Mandhane found that a new tort of family violence should be recognized, and that compensation should be paid by a husband to his wife, who had suffered years of physical, emotional, and financial abuse and coercive control at his hands. However, in July this decision was overturned by the Ontario Court of Appeal. Writing for a unanimous court, Justice Mary Lou Benotto (Justices Gary Totter and Benjamin Zarnett concurring) found that it was not necessary on the facts of the case to affirm a new tort, given that existing torts were available to ground an award of damages for the wife. This post examines the *Ahluwalia* decisions and their implications going forward, including a discussion of myths and stereotypes about IPV that are both repudiated and reinforced in each decision.

Trial Decision

Facts

The parties were married in India in 1999. Following the birth of their first child, the husband immigrated to Canada in 2001, followed by the wife and child 6 months later. Their second child was born in 2004. Although the parties had trained as professionals in India, they lacked social and financial support in Canada, and did not have the resources to accredit their foreign credentials. They worked in a plastics factory and in food services in Etobicoke, Ontario and when their second child was born, the husband began work as a truck driver while the wife volunteered for Punjabi community television and radio programs in their new home in Brampton, Ontario. After a two-year stint in Edmonton, Alberta they resettled in Brampton, where they lived until their separation in July 2016. The parties' finances were described by Justice Mandhane as "tight" (ONSC at para 14).

The trial judge accepted the wife's evidence of the husband's emotional and financial abuse and coercive control. The husband "insulted and belittled the wife about her appearance and her difficulties conceiving, and repeatedly threatened to leave her and the children penniless" (ONCA at para 13). He also subjected her to "silent treatment" that only ended "when she complied with his 'demand' for sex" (at para 13). The husband also controlled the family's finances, closely monitoring the wife's spending and depriving her of access to joint accounts and credit cards while contemplating separation (at para 14). He was physically violent on three specific occasions, which included punching and slapping his wife to the point of causing extensive bruising, and strangling her (at paras 9-12). This abuse was not disputed on appeal.

The husband was criminally charged with assault and uttering death threats in 2021, charges which were still outstanding at the time of the appeal. The wife applied for a divorce, child and spousal

support, property equalization, and damages for the husband's conduct, which she argued had caused her to experience mental and physical harm. She was self-represented at trial, while her husband – who had trained as a lawyer in India – was represented by counsel.

Analysis

On the issue of liability for damages, the trial judge addressed four issues: (1) Whether the wife's tort claim was properly considered as part of the family law proceedings; (2) Whether a tort of family violence should be recognized; (3) Whether the husband was liable in damages for his conduct during the marriage; and (4) If so, what damages should he pay? We will focus on the last three issues, the first having been decided in the wife's favour.

Justice Mandhane began her discussion by noting the general principle that a tort entails breach of a recognized legal duty where the appropriate remedy is a claim for damages (ONSC at para 49). Moreover, although courts should exercise caution in accepting new torts, it is legitimate to do so "where the interests are worthy of protection and the development is necessary to stay abreast of social change" (at para 50, citing *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 (CanLII)). She acknowledged that the proposed tort of family violence overlaps with existing torts such as assault, battery, and intentional infliction of emotional distress, yet "it is fundamentally different in terms of the assessment of both liability, causation, and damages" (at para 51).

From here, Justice Mandhane found that the proper starting point for the new tort of family violence was the definition of "family violence" in the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2, which she used to articulate the following modes of liability (at para 52):

> Conduct by a family member towards the plaintiff, within the context of a family relationship, that:
>
> 1. is violent or threatening, *or*
>
> 2. constitutes a pattern of coercive and controlling behaviour, *or*
>
> 3. causes the plaintiff to fear for their own safety or that of another person.

The first mode requires intentional conduct on the part of the defendant/family member, which is "consistent with the well-recognized intentional torts of assault and battery" (at para 53). Similarly, the third mode requires that the defendant/family member "engaged in conduct that they would know with substantial certainty would cause the plaintiff's subjective fear", which is consistent with the existing torts of battery and intentional infliction of emotional distress (at para 53). It is the second mode of liability that is unique compared to the incident-based nature of existing torts, by capturing "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" (at para 54, emphasis in original). To establish this mode, the defendant family member must have "engaged in behaviour that was calculated to be coercive and controlling" (at para 53). Overall, to make out the tort of family violence, the plaintiff must prove:

> that a family member engaged in 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 (at para 55).

As to the rationale for accepting this new tort, Justice Mandhane relied on several arguments. First, claims based on the tort of battery in the spousal context appear to be rare and "out-of-step with the evolving social understanding about the true harms associated with family violence", making the assessment of damages problematic (at para 61; see also paras 60-63). Justice Mandhane also found that existing intentional torts present "a real risk that triers of fact will miss the relevant social context and engage in stereotypical reasoning about the proper comportment and behaviour of survivors when assessing credibility" (at para 63). In the case at hand, she noted that the husband relied on several such problematic stereotypes: that the wife's claims of violence should not be believed because "she was an educated person" and because she immigrated to Canada to join her husband after the first incident of violence – insinuating that if she was abused, she would have left the relationship; and that the wife "was more likely to have fabricated the family violence because she was cast in a movie about intimate partner violence post-separation" – suggesting that IPV is the subject of fantasy (at para 65).

Second, although "family violence" is recognized in the *Divorce Act* for the purpose of parenting arrangements, awards for spousal support under the *Act* do not generally consider family violence and are "insufficient to compensate for the true harms and financial barriers associated with family violence" (at para 66; see also paras 5 and 68). These harms include "acute and chronic health issues …; mental, psychological, and social problems …, underemployment and absenteeism, low career advancement, substance abuse, self-harm, suicidal ideation, death by suicide, and femicide" (at para 66), which are the types of harm regularly compensated in tort actions. Justice Mandhane recognized that "the negative financial and social impact of family violence is almost exclusively borne by the survivor" (at para 67). Moreover, she found that the tort of family violence is consistent with recognition of "the economic barriers facing survivors" in case law (see e.g. *Michel v Graydon*, 2020 SCC 24 (Can LII) at paras 95-96, cited at para 67) as well as in provincial legislation (e.g. for early termination of residential tenancies and leaves of absence from employment – at para 68).

Third, comparative jurisprudence and Canada's international legal obligations also support the recognition of the tort of family violence. In particular, Justice Mandhane pointed to the *Convention on the Elimination of all Forms of Discrimination Against Women* and its *General Recommendation No. 35*, para 29, which calls on state parties to implement legislative measures to enhance survivors' access to justice and to effective remedies, including civil remedies for "all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity…" (at para 69).

Lastly, Justice Mandhane found that although family violence has societal dimensions, a new tort would be "consistent with the normative standard of personal responsibility in our society" (at para 70). This principle of responsibility is also recognized in the *Criminal Code*, s 718.2, which stipulates that an intimate partner context is an aggravating factor at the stage of sentencing (at para 40).

Having accepted the tort of family violence, Justice Mandhane found that the husband was liable for his psychological abuse, verbal abuse, financial abuse, and sexual abuse of the wife, which

were part of a pattern of coercive control (at paras 105-110). In the alternative, she held that the husband was liable for the three specific incidents of physical violence under the tort of assault (at para 103), as well as for the intentional infliction of emotional distress because his pattern of coercive control was "flagrant and outrageous," calculated to produce harm, and caused the wife's depression and anxiety (at para 111).

Justice Mandhane awarded $50,000 for compensatory damages related to the mental health impacts on the wife because of her husband's abuse, including past and future care costs and lost earning potential (at paras 114-116). She made it clear that this compensatory award was distinct from the spousal support order, which was both insufficient to cover, and not inclusive of, the wife's mental health needs (at paras 117-118). She also awarded $50,000 in aggravated damages for coercive control and breach of trust, noting that the husband "preyed on" his wife's "vulnerability as a racialized, newcomer woman" (at para 119). Here, she cited the impact of his actions on the children's mental health, which in turn "made their care more challenging and aggravated the Mother's damages" (at para 119). Lastly, she awarded $50,000 in punitive damages to condemn the father's conduct, noting that this award could have been higher, but he was still facing criminal charges and the possibility of further punishment (at para 120). Overall, the $150,000 damage award for the tort of family violence was "high", but it was justified on the facts and was not out of line with other case law (at para 113).

Appeal Decision

Issues on Appeal

The husband appealed, arguing that a new tort of family violence should not have been created by the trial judge. Importantly, he did concede liability pursuant to the torts of assault and intentional infliction of emotional distress, while arguing that the amount of damages awarded by Justice Mandhane was too high (ONCA at para 29). The husband's position was that the tort of family violence was "poorly constructed" and "too easy to prove", applying to a "vast number of cases" which would create a "floodgate of litigation that would fundamentally change family law", a change "better left to the legislature" (at para 29). In essence, he argued that the IPV epidemic is so extreme that recognizing it by creating a tort of family violence would overwhelm the family justice system.

In contrast, the wife wanted the tort of family violence and damage award upheld, arguing that a novel tort was necessary "because existing torts do not address the cumulative pattern of harm caused by family violence" (at para 33). Alternatively, she proposed a new tort of coercive control, which would be made out where, in the context of an intimate relationship, a partner "inflicted a pattern of coercive and controlling behaviour" that "cumulatively was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm" (at para 34).

The Barbra Schlifer Commemorative Clinic and Luke's Place filed a joint intervenor factum in the appeal, advocating for the tort of family violence to be upheld (at para 36). They disagreed with the wife's proposal of a tort of coercive control, arguing that a narrow tort would leave survivors with a patchwork of torts to navigate, which would be unhelpful. Moreover, they argued that a novel tort of family violence was necessary because existing torts do not "adequately remedy the

prolonged and compounding systemic abuse of trust and confidence within a relationship" (at para 36).

Thus, the issues on appeal were: (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 the Court of Appeal recognize a tort of coercive control; (5) Did the trial judge err in assessing damages; and (6) What is the procedure for a court considering a tort claim in a family law action? In this post, we focus on questions two to four, the creation of a new tort. In short, the Court of Appeal declined to recognize a novel tort, whether of family violence or coercive control, finding that existing torts covered the harms of IPV in this case, and they reduced the damage award to $100,000.

Analysis

In her reasons for the Court of Appeal, Justice Benotto focused on the existing torts and did not dispute the three rationales used by Justice Mandhane to justify the creation of a new tort, stating that the question was not "whether [IPV] exists" or "whether societal steps should be taken to ameliorate the problem" but whether a tort of family violence should be created (at para 2). The Court held that existing torts were sufficient in this case, including in relation to the pattern of behaviour that Justice Mandhane had recognized as unique. They found the tort of battery can encompass multiple instances of physical violence, as occurred in this case (at paras 61-63). The tort of assault (i.e. threats) involves the "apprehension of imminent harmful or offensive contact" which includes the fear a survivor may live under, as in this case (at paras 64-68). The requirements for the tort of intentional infliction of emotional distress were also met in this case, where the conduct was "flagrant and outrageous", "calculated to harm", and "caused the plaintiff to suffer a visible and provable illness" (at para 69). The Court of Appeal disagreed with Justice Mandhane's finding that these torts were insufficient to capture IPV fully because their focus is too narrow, highlighting instead the lack of caselaw to support such a finding (at para 73).

Justice Benotto found that the trial judge had also failed to cite support for her concern that existing torts do not capture intimate relationships (at para 73). To be sure, the intervenors were also concerned that existing torts cannot adequately address the prolonged and compounding systemic abuse within a relationship of trust and confidence (at para 36). Justice Benotto responded to these concerns by finding that the existing torts do allow for consideration of domestic relationships (at para 73). However, this discussion was not lengthy and did not deeply consider the contextual relevance of the violence occurring within an intimate relationship of trust, nor the intersectional considerations that may further complicate the dynamics involved (e.g. the fact that the parties had immigrated to Canada).

That said, the Court comprehensively listed examples of tort cases involving IPV that recognized a pattern of abuse, including both physical violence as well as psychological harm (at paras 74-79), and including cases that specifically considered the pattern as a reason to award higher damages (at paras 80-85). They observed that courts have also "considered patterns of abusive conduct that occur following a marital breakdown", recognizing 'systems abuse' – the idea that abusers often manipulate the legal system against survivors (at para 86). Similarly, Justice Benotto highlighted examples of cases that occurred over prolonged periods where the individual tactics may not have been tortious in themselves but cumulatively warranted damages (at paras 88-90).

Thus, they held, a tort of family violence was unnecessary because existing torts can recognize a pattern of behaviour within an intimate relationship and therefore address the harms caused by IPV in this case (at para 92).

The Court also held that even if a new tort were needed, the *Divorce Act's* new definition of "family violence" was the incorrect starting place (at paras 94-102). The definition was crafted for a "very specific application", namely, "post-separation parenting plans" (at para 94). Justice Benotto found the intention of the legislature was to introduce the concept of family violence "only in the context of parenting" (at para 100). By adopting it for the creation of a new tort, "the trial judge ignored the clear intention of the legislature", which was an error (at para 102).

Justice Benotto also rejected the proposed alternative of creating a tort of coercive control. The new tort would have eliminated the need to prove harm, only requiring that conduct was "calculated to cause harm" (at para 105). In contrast, the tort of intentional infliction of emotional distress requires proof of harm. An altered framework was rejected by the Court of Appeal because the existing tort was thought to provide an "adequate remedy"; "the elimination of the requirement to establish visible and provable injuries" was not relevant in this case; and "the elimination of the requirement to prove harm would cause a significant impact on family law litigation best left to the legislature" (at para 106). Justice Benotto held that there is nothing impeding courts from considering "the context and pattern of behaviour when assessing the elements of a tort" in a "domestic situation", and the tort of intentional infliction of emotional distress involves considering the "context of the relationship and the patterns of controlling behaviour causing harm" (at para 107). The wife had argued that the elimination of the requirement to prove harm filled a gap in the law when a victim does not have proof of emotional injuries. The Court was clear, however, that no gap existed in this case; therefore, no novel tort ought to be created.

The Court of Appeal reduced the wife's damage award to $100,000 (at para 133). They deferred to Justice Mandhane's decision in relation to both compensatory and aggravated damages. The amounts for those heads of damages were found to reflect an "emerging understanding of the evils of intimate partner violence and its harms" which was consistent with the common law evolving in a way that is aligned with society (at para 128). However, Justice Benotto held that Justice Mandhane had erred in awarding punitive damages. Although the husband's conduct required condemnation, Justice Mandhane failed to consider whether the compensatory and aggravated damages were "insufficient to achieve the goals of denunciation and deterrence" (at para 132).

The family law and gender-based violence communities have been watching *Ahluwalia* closely. At the time of writing, we do not know whether leave to appeal to the Supreme Court of Canada has been sought.

Commentary

Returning our discussion to the trial decision, Justice Mandhane's acceptance of the tort of family violence was a groundbreaking legal development. Her decision is consistent with the growing acknowledgement of the harms of IPV. Particularly noteworthy is her recognition of coercive control and the need to name, and compensate for, *patterns* and not just incidents of abuse. This recognition in itself dispels one of the traditional misconceptions about IPV, that the most significant harms to survivors are accomplished via physical violence (for a discussion of myths

and stereotypes about IPV, see here). In addition to the myths and stereotypes that she explicitly called out, Justice Mandhane's decision implicitly dispelled several others:

- that family violence is not harmful to children unless they experience it directly (ONSC at paras 43, 119);
- that IPV survivors do not stay with their abusers, and should not be believed if they do (at paras 63-64, 74);
- that survivors should not be believed about IPV if they do not report it to the police or other authorities (e.g. medical professionals) until after separation (at paras 74-75, 94);
- that women are likely to fabricate IPV out of anger or hope of financial gain (at para 74).

Similarly, the Court of Appeal explicitly rejected the myth that IPV is rare and a private matter (ONCA at para 1). Justice Benotto also built on the now famous reference that non-disclosure of material financial information is the "cancer of family law proceedings" (see also *Leskun v Leskun*, (2006) SCC 25 (CanLII) at para 34; *Michel v Graydon* at para 33), calling IPV the "cancer of domestic relationships" (at para 43). She also implicitly dispelled the myths that violence ends upon separation (at para 86), and that indirect exposure to family violence is not harmful to children (at paras 94-99).

At the same time, both decisions may inadvertently perpetuate other myths and stereotypes about IPV. As one of her bases for recognizing a new tort, Justice Mandhane suggested that IPV is uncommon, stating that "the marriage before me was not typical… It was not just 'unhappy' or 'dysfunctional'; it was violent" (ONSC at para 5). However, IPV is actually quite common – 30% of all the police-reported violence in 2019 were reports of IPV, and 80% of IPV is not reported at all. To suggest that IPV's exceptionality explains why it is not addressed in legal remedies may perpetuate the idea that it is uncommon, which may in turn affect the credibility of survivors' claims. Justice Mandhane also addressed the husband's argument that claims for damages could be "weaponized" in family law disputes by noting that courts "must be careful not to arm family law litigants to overly complicate the litigation through speculative and spurious tort claims" (at para 41). This comment may also perpetuate the misassumption that women use IPV claims strategically in family litigation.

The myth that women falsely claim IPV to gain a strategic advantage in family law disputes was also inadvertently perpetuated by Justice Benotto's reasons. In the context of rejecting the tort of coercive control, she observed that "for every claim that has merit, there are some which involve claims made for strategic reasons", citing this as a rationale for the move away from no-fault divorce (ONCA at para 120). While recognizing the importance of providing compensation for psychological abuse, Justice Benotto feared that lowering "the level of impugned conduct may unintentionally encourage allegations of fault in every case, thereby undermining the movement towards a resolution-based system" (at para 122). Instead of a new tort having a possible deterrent effect on IPV, the Court presumed the opposite – that a new tort would increase the hostility between parties, leading to adversarial approaches to dispute resolution, and even fabrication. This fear was prioritized over potential benefits (e.g. regarding economic restitution, deterrence, access to justice, safe parenting determinations, and so on). According to Linda Neilson, the myth that claims of IPV "are often false or exaggerated" to "obtain the upper hand" is "one of the most common and dangerous fallacies in the legal system" (at 4.5.2). It is not empirically proven that

women commonly make false claims of abuse. On the contrary, the opposite is true, that survivors tend to downplay and understate abuse. Disadvantaging survivors by reducing avenues of recourse based on stereotypical reasoning maintains an oppressive system that routinely fails them.

Justice Mandhane tried to create a tort that was less vulnerable to stereotypical reasoning; however, the Court of Appeal rejected the attempt, finding that aspects of abusive conduct could fit within existing torts. Put another way, while a tort of family violence would require evidence and presumably education of lawyers and judges on what IPV is, so as to appreciate the significance of seemingly unrelated tactics of abuse, existing torts may lead lawyers and courts to compartmentalize conduct, which risks perpetuating reasoning based on myths and stereotypes. The status quo risks an emphasis on physical violence because it can be seen easily; coercive control, psychological, emotional, and financial abuse struggle to be seen. A relationship defined by no physical violence, with threats of harm such as deportation, poverty, and a severed mother-child relationship, could be misinterpreted as typical of post-separation conflict or emotionality, rather than evidence of abuse amounting to assault or the intentional infliction of emotional distress. That said, we would argue that both decisions underscore the risk of stereotypical reasoning in all IPV related claims, which is why we have previously argued for robust judicial guidelines for, and education about, IPV (see here).

There is also risk of a new myth being created by Justice Benotto's rejection of the *Divorce Act*'s definition of "family violence" as a starting place for the creation of a new tort. She held that this definition only applies to post-separation parenting plans (at para 94). This section of the decision contrasts with the rest because it implies that a child's experience of family violence, or exposure to IPV, is more worthy of legal attention than the impact of IPV on the victim directly. This is an interesting turn, in that another myth is that children's exposure to IPV is not serious or harmful (for a case repudiating that myth, see *Barendregt v Grebliunas*, 2022 SCC 22 (CanLII)). To be clear, both facets of family violence are equally serious and harmful. And it is correct that the 2021 amendments to the *Divorce Act* focused on children's exposure to IPV. However, "family violence" is defined very similarly when it applies to victims directly – this is clear from the definitions of the term in legislation providing for protection orders, early termination of leases, and employment leave, noted above.

Such a narrow approach by Justice Benotto harkens back to family law before the Supreme Court's decision in *Moge v Moge*, 1992 CanLII 25 (SCC), [1992] 3 SCR 813, a time when the emphasis on self-sufficiency in spousal support cases contributed to the feminization of poverty. In *Moge*, Justice Claire L'Heureux-Dubé observed that the spousal support provisions of the *Divorce Act* could not have been intended "to financially penalize women in this country", a reading which would be "perverse in the extreme" (at 857). Yet, despite the new definition of family violence and the legislative background to the *Divorce Act* emphasizing the importance of recognizing family violence (a term which includes both IPV and coercive control), the definition and its use in the Act is indeed in relation to parenting. In other words, the Court of Appeal was not wrong, but relying on such a narrow application of the definition excludes many contexts where IPV should be seen as relevant, ultimately contributing to survivors' economic disadvantage. We worry about how this finding may be misinterpreted by lawyers and lower courts in the future.

Moreover, focusing on the risk of increased adversarial conduct in family law disputes contributes to the exceptionalization of IPV. It suggests that the priority is a system that works for the majority

of litigants, which is assumed to be cases with no IPV, instead of responding to the marginalized victims who are many, and who are often unable to find any sense of justice through the family justice system (see here and here).

Overturning a tort of family violence also raises questions about why the types of harms that are seen as worthy of legal protection exclude a tort specifically crafted to alleviate the economic consequences of IPV – a type of violence shown to impact more women than men, in quantity, seriousness, and lethality. It is unclear why the possible deterrent effect of such a tort did not tip the scales towards its creation when the Court recognized that IPV is a "pervasive social problem" (ONCA at para 1). Presumably being liable for a tort of family violence as opposed to a tort of assault or battery would have had different societal and individual effects in relation to accountability and deterrence. A new tort would have provided an avenue of financial compensation, and it may have given survivors a way to be heard, a factor often seen as important to their perceptions of justice (see e.g. here).

Although we do not discuss the issue of whether it is appropriate to consider a tort claim within family law proceedings, we do wish to comment on the access to justice implications of Justice Mandhane's decision. A tort of family violence would have filled gaps within existing legal remedies, including by alleviating the need to litigate multiple torts. The Court of Appeal's reliance on existing torts results in a more complicated approach that requires survivors to fit their experiences, and their perpetrators' tactics, into multiple legal categories. This complexity will often necessitate representation by legal counsel, although Ms. Ahluwalia was unrepresented at trial – a common situation for survivors in light of the limits of legal aid (for a discussion see e.g. here). *Ahluwalia* highlights the need for increased legal aid for survivors of abuse. But tort remedies and the private law system only go so far. Survivors of abuse also require access to financial supports that address structural inequalities, including housing, social assistance, and subsidized childcare.

Jennifer Koshan's research is supported by a UCalgary Research Excellence Chair and Deanne Sowter's research is supported by a Vanier Canada Graduate Scholarship.

This post may be cited as: Jennifer Koshan and Deanne Sowter, "Torts and Family Violence: *Ahluwalia v Ahluwalia*" (15 September 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/09/Blog_JK_DS_Ahluwalia.pdf