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Family Violence Torts and Their Limits in Alberta

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Case Commented On: *Colenutt v Colenutt*, 2023 ABKB 562 (CanLII)

In September 2023, Deanne Sowter and I wrote an ABlawg post on the tort of family violence, which was initially recognized as a new tort by the Ontario Superior Court and then rejected by the Court of Appeal, along with the alternative tort of coercive control (see *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 (CanLII) (*Ahluwalia* ONSC); 2023 ONCA 476 (CanLII) (*Ahluwalia* ONCA)). An Alberta court has now followed the Ontario Court of Appeal in holding that the torts of family violence and coercive control should not be accepted in this province. This post considers Justice Debra Yungwirth's reasons in *Colenutt v Colenutt*, 2023 ABKB 562 (CanLII), including limitations issues that arose in the case and the need for legislative reform.

Claims and History of Proceedings

Colenutt involved parties who had been married for over 20 years. The husband commenced proceedings for a divorce and division of matrimonial property in June 2016, and the wife filed a statement of defence and counterclaim in September 2016. On July 10, 2018, she also filed an action for the torts of assault and battery related to alleged conduct by her husband on July 10, 2016. The husband filed a statement of defence and counterclaim in May 2019, claiming that it was his wife who had assaulted him on July 10, 2016.

In *Ahluwalia* ONSC, decided in February 2022, Justice Renu Mandhane held that the tort of family violence should be recognized, and that it was appropriate to raise this claim in the context of proceedings under the *Divorce Act*, RSC 1985, c 3 (2nd Supp). Following that decision, on November 3, 2022, Ms. Colenutt applied to amend her pleadings in the divorce and tort actions to add a claim based on the tort of family violence and to combine the family proceedings with the action for assault and battery (*Colenutt* at para 12). Her application for amendment and consolidation claimed that her husband had engaged in a pattern of behaviour "that included grooming, coercion, manipulation, humiliation, degradation, sexual assault, harm to animals, and assault and battery", resulting in injuries including "complex post-traumatic stress disorder" (at para 17).

When this application was heard in March 2023, *Ahluwalia* was before the Ontario Court of Appeal, so the parties agreed to wait for the outcome of the appeal. In *Ahluwalia* ONCA, the Court decided that it was not necessary to recognize a new tort of family violence or the alternative tort of coercive control because the existing torts of assault, battery, and intentional infliction of emotional distress, properly applied, covered the wrongs sustained by Ms. Ahluwalia. The parties in *Colenutt* were provided the opportunity to file further submissions based on the *Ahluwalia* ONCA decision, which the husband did, but the wife did not (at para 16).

Reasons for Decision

In *Colenutt*, the court decided that it was appropriate to "accept and apply" the reasons in *Ahluwalia* ONCA concerning the new torts of family violence and coercive control (at para 18). To elaborate, Justice Yungwirth noted that the Ontario Court of Appeal had relied on the fact that 2021 amendments to the *Divorce Act*, which added "family violence" as a consideration in parenting matters, did not include any specific remedy for this violence (*Colenutt* at paras 4-5). However, the Court of Appeal recognized that other torts, such as the intentional infliction of mental distress, can apply in the family law context (at para 6). The Court of Appeal also noted that existing torts can encompass patterns of abuse, and found that courts had accepted this approach in previous cases (although Justice Yungwirth noted these cases were mostly from Ontario) (at para 7). It was therefore unnecessary to recognize new torts of family violence or coercive control (at para 10).

In applying her brief summary of the reasons in *Ahluwalia* ONCA, Justice Yungwirth stated her conclusions more definitively than the Ontario Court of Appeal. In *Ahluwalia*, the decision was linked to the facts of the case, and the point that existing torts were sufficient to cover those facts (*Ahluwalia* ONCA at paras 3, 93, 111-112). In *Colenutt,* however, the court stated that:

> it is appropriate to apply the Ontario Court of Appeal decision in *Ahluwalia*, *for family law litigants in Alberta* who wish to advance a claim for damages arising from family violence, including coercive control. They may proceed based on the current tort laws related to assault, battery, and intentional infliction of emotional distress. (at para 11, emphasis added)

Later in the judgment, Justice Yungwirth confirmed her definitive-sounding conclusion "that there is no separate tort of family violence" (at para 18).

Having rejected the tort of family violence, Justice Yungwirth went on to note that if the torts of assault, battery, and intentional infliction of emotional distress were being claimed, this must be done in a separate action from any family matters, but that the proceedings could be consolidated or tried together (at para 11, citing *Ahluwalia* ONCA at para 136). In *Colenutt*, the new allegations made by the wife could therefore not be added to the family proceedings, but it was still possible to amend her tort claim for assault and battery and to consolidate the actions. This was the main focus of the decision.

Justice Yungwirth considered the case law on the amendment of pleadings, which recognizes a "strong presumption in favor of allowing amendments" even after pleadings close, "unless the non-moving party demonstrates an exception or compelling reason not to" (at para 23; see also rule 3.65(1) of the *Alberta Rules of Court*, Alta Reg 124/2010, under which such amendments are within the discretion of the court). In *Colenutt,* the husband made several arguments against the proposed amendments. First, he asserted that they would cause him serious prejudice that could not be compensated through a costs award due to delays in raising the matter. The court rejected this argument, noting that the family and tort actions were still in the discovery phase and that there was "no evidence of anything other than fading memories to … conclude that the passage of time alone should create an inference of prejudice" (at para 32). Mr. Colenutt also argued that the proposed amendments were hopeless in that the allegations did not disclose a cause of action, were

improper and frivolous, and fell “far below the pattern of coercion and abuse found in *Ahluwalia*” (at para 36). The court again disagreed, finding that the amendments raised causes of action in sexual assault and intentional infliction of emotional distress (at para 41), and that the allegations met the requisite evidentiary threshold for amendments to pleadings (at para 50).

The final issue was whether the proposed amendments sought to add a new cause of action after the expiry of a limitation period. The court reviewed the *Limitations Act*, RSA 2000, cL-12, which provides a general limitation period of two years after the plaintiff had (or ought to have had) knowledge of an injury that was attributable to the defendant and that warranted bringing a proceeding (at s 3(1)). According to the court, Ms. Colenutt’s allegations indicated that she knew she had sustained personal injuries (including physical and emotional injuries) due to the conduct of her husband (at para 55). The court did not, however, note when she had discovered those injuries and that they were attributable to her husband. This may have been clear for the alleged assault (which occurred exactly two years before the initial tort claim was filed), but it appears the court assumed that the injuries related to the new allegations of sexual violence and the intentional infliction of emotional distress, and their attribution to Mr. Colenutt, had been (or ought to have been) discovered outside the two-year limit period.

This left the question of whether Ms. Colenutt knew or ought to have known that the injuries warranted bringing a proceeding within the two-year limitation period. Here, the court noted that “discoverability relates to facts, not the applicable law or assurance of success” (at para 58; see also para 53). The timing of the decision in *Ahluwalia* ONSC and its recognition of a new tort thus did not relieve Ms. Colenutt from the relevant limitation period. In any event, *Ahluwalia* ONCA affirmed that patterns of physical and emotional abuse had long been recognized in tort claims (at para 62). Justice Yungwirth concluded that “Ms. Colenutt did not need to rely on a tort of family violence or a tort of coercive control to include her claims related to a pattern of conduct in her pleadings” (at para 65).

While the general limitation period barred the amendments (at para 66), the *Limitations Act* was revised in 2017 to add s 3.1(1), which provides that:

> There is no limitation period in respect of
>
> (a) a claim that relates to a sexual assault or battery,
> (b) a claim that relates to any misconduct of a sexual nature … if, at the time of the misconduct, … the person with the claim was in an intimate relationship with the person who committed the misconduct, …
> or
> (c) a claim that relates to an assault or battery … if, at the time of the assault or battery, … the person with the claim was in an intimate relationship with the person who committed the assault or battery.

The court found that the effect of this provision was such that Ms. Colenutt’s proposed amendments related to the alleged sexual assaults were not foreclosed by the general two-year limitation period (at para 69). As for the wife’s other allegations, which engaged the tort of intentional infliction of emotional distress, Justice Yungwirth referenced case law establishing that this is a distinct tort from assault and battery, and noted that it is not mentioned in s 3.1 (at para

76). While she acknowledged the argument that s 3.1(1)(c) "should be read broadly so that it also applies to claims for intentional infliction of emotional injury in intimate relationships", she held that "the legislation does not go that far" (at para 77).

The last option for avoiding the general two-year limitation period was s 6(2) of the *Limitations Act*, which saves claims added to a proceeding after the expiration of the relevant limitation period where they are "related to the conduct, transaction or events described in the original pleading." The court noted that Ms. Colenutt's original tort claim raised only one incident from 2016, and that the proposed amendments "significantly expand the scope of the litigation, not just in terms of the time frame of the alleged events, but also the nature of the claims" (at para 85). In turn, "the amendments would require significantly more facts to be proven at trial", and "the evidence needed to prove the new allegations would differ significantly, in nature and quantity, from the evidence required to prove the one incident complained of in the original pleadings" (at para 85). Therefore, the exception in s 6(2) was not engaged, and the proposed amendments related to the tort of intentional infliction of emotional distress were barred by the two-year limitation period (at para 86).

In the end, the court granted the application to amend the pleadings to add the new allegations of sexual assault, and consolidated the tort and family actions given that both related to the relationship between the parties and because consolidation would address "the scarcity of judicial resources" (at para 91).

Commentary

It is unfortunate that the issue of whether the torts of family violence and coercive control should be recognized in Alberta arose in the context of an application to amend pleadings. If the matter had come up in a trial where all of the evidence was before the court, the facts may have supported the recognition of new torts if existing torts were not sufficient to cover the conduct and injuries revealed by the evidence. For example, Ms. Colenutt alleged harm to animals, which is included within modern understandings of family violence (e.g. in the *Divorce Act*), but – depending on the evidence – may not meet the requirements of the tort of intentional infliction of emotional distress. Although Justice Yungwirth appeared to state definitively that the torts of family violence and coercive control should not be accepted in Alberta, her reasons should be confined to the circumstances of the proceedings before her, consistent with *Ahluwalia* ONCA.

It is also unfortunate that the court did not provide its own reasons in considering whether to accept the new torts in *Colenutt*, beyond simply adopting the *Ahluwalia* ONCA reasons. As we argued in our [earlier post](), some of the reasons for rejecting the tort in *Ahluwalia* ONCA, including the point that the *Divorce Act* does not include a specific remedy for survivors of family violence, are not persuasive. On one hand, the rationale that family violence is only relevant to parenting disputes under the *Divorce Act* is problematic – family violence is also relevant to matters such as spousal support if the resulting injuries affect the survivor's ability to become self-sufficient (see *Leskun v Leskun*, [2006 SCC 25 (CanLII)]() at para 21). At the same time, the fact that the *Divorce Act* does not include a compensatory remedy for injuries related to family violence is one of the reasons that the tort of family violence is necessary.

In addition, Alberta could be seen as a different context than Ontario, in that the new tort of harassment was recently recognized in this province in spite of Ontario Court of Appeal jurisprudence to the contrary (see *Alberta Health Services v Johnston*, 2023 ABKB 209 (CanLII) and my ABlawg post on that decision here; see also *Ford v Jivraj*, 2023 ABKB 92 (CanLII); *Achor v Ihekweme*, 2023 ABKB 606 (CanLII)). Moreover, although the Ontario Court of Appeal decision in *Ahluwalia* was based in part on the fact that prior case law had recognized patterns of family violence under existing torts, the only Alberta decision cited in support of this approach dealt with damages, not liability (see *LNS v WMK*, 1999 ABQB 478 (CanLII), cited in *Ahluwalia* ONCA at para 84). In *Colenutt*, the court did not reference any Alberta cases that support the recognition of liability for a pattern of abuse in the context of family violence, and indeed explicitly noted that the relevant cases were largely from Ontario (at para 7).

Another new tort – the public disclosure of private facts – was recently recognized in Alberta, and also provides support for acceptance of the tort of family violence. In *ES v Shillington*, 2021 ABQB 739 (CanLII), the court considered this new tort in the factual context of non-consensual disclosure of intimate images by an intimate partner. One of the issues was that Alberta had passed legislation recognizing the tort of non-consensual disclosure of intimate images in 2017 (see *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, SA 2017, c P-26.9) (*NCDIIA*). However, the plaintiff had commenced her action in June 2018 in relation to conduct that occurred as early as 2006. Justice Avril Inglis found that the new legislation did not apply retrospectively, so it could not be relied on by the plaintiff for the defendant's conduct (at para 41). This, as well as the relatively narrow focus of the *NCDIIA*, left a gap in the law in Alberta that the new tort of public disclosure of private facts could fill (see paras 42-50). While Justice Inglis did not discuss limitations issues in *Shillington*, it is likely that the conduct in that case would have qualified as "misconduct of a sexual nature" such that it was subject to no limitation period under s 3.1 of the *Limitations Act* (for a discussion, see here at 48).

This leads to the limitation issues in *Colenutt*. If the court had accepted the new tort of family violence, it would have had to consider whether the exemption in s 3.1 of the *Limitations Act* applied. Section 3.1 only refers to sexual assault and battery, sexual misconduct, and assault and battery. One of the very arguments in favour of recognizing the new tort of family violence is that the existing torts of assault and battery do not sufficiently encompass all of the harms of family violence. The language in s 3.1 therefore suggests that the normal two-year limitation period would apply to the tort of family violence even if it were recognized. This is consistent with Justice Yungwirth's finding that the s 3.1 exemption does not apply to the intentional infliction of emotional distress.

The limitations problem in *Colenutt* reinforces another rationale for accepting the tort of family violence, which is that existing torts provide a piecemeal approach. The facts of *Colenutt* are illustrative. The claims for physical and sexual assault and battery experienced by Ms. Colenutt can move forward, but the claims for intentional infliction of emotional distress cannot, due to the court's interpretation of the applicable limitation periods. It is a problematic state of affairs from access to justice and compensatory justice perspectives where a survivor's experiences of violence are legally parsed in this way. Recognition of a tort of family violence would be better inclusive of the different types and patterns of conduct and the different harms that intimate partner violence encompasses, including coercive control. But as *Colenutt* shows, to have full effect, this

recognition would require a related amendment to s 3.1 of the *Limitations Act* in Alberta (and similar provisions in other jurisdictions – for a comparison, see here).

Would such an amendment be consistent with the objectives underlying s 3.1 of the *Limitations Act*? One of the rationales for exempting assault and battery claims from the usual limitation periods when the parties were intimate partners relates to the challenges posed by the discoverability of injuries by survivors. Survivors of intimate partner violence often engage in self-blame, sometimes as a result of the abuser's tactics of coercive control. Discoverability is also influenced by dominant social norms, including the myth that only physical violence and related injuries are serious or "count" as family violence (for a discussion see here). These realities affect the extent to which survivors can reasonably be expected to understand that the harms they have sustained – particularly emotional/psychological harms – are attributable to the abuser and warrant legal proceedings (see e.g. *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 (CanLII) at para 46, discussing discoverability in a different context). This is why *Colenutt* should have addressed the issue of when the wife discovered (or ought to have discovered) her injuries and their implications under s 3 of the *Limitations Act* (although perhaps evidence was lacking here too). More broadly, the discoverability rationale for exempting intimate partner assault and battery from the normal limitation periods applies equally to the proposed tort of family violence and, pending the recognition of that tort, to the intentional infliction of emotional distress in intimate partner relationships. There is a strong argument that legislatures should amend their limitations legislation to ensure that such claims are not statute-barred.

Legislatures could also consider statutory recognition of the tort of family violence, which could be accomplished in conjunction with the amendment of limitations legislation. A full canvassing of this possibility goes beyond the scope of this post, but the tort of non-disclosure of intimate images provides a precedent – it has been legislatively recognized in several Canadian jurisdictions (see here at 73-74). Legislating a new tort of family violence would remove the need for the existence of the tort to be litigated, resulting in access to justice advantages and conservation of judicial resources. And the new tort (and related remedies) could be shaped through consultations with anti-violence experts.

Lastly, it must be recognized that while torts can provide assistance to some survivors of family violence, they remain a limited approach due to both the financial resources required to litigate such claims and because the abuser may not have the means to pay damage awards in any event. Access to adequate shelters and housing, income support, childcare, legal aid, IPV support services, and other state-funded resources are also critically necessary in addressing the causes and consequences of family violence (see this 2021 report from Women's Shelters Canada for further discussion).

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