

Tort of family violence: Who really wins? | Evan Clemence

By **Evan Clemence**

Law360 Canada (October 30, 2024, 10:57 AM EDT) -- Family lawyers see firsthand how intimate partner violence wreaks havoc upon victims. Compassion and empathy often lead us to want to see something more to help them, especially when these victims are our clients. However, creating a new tort of family violence is not the way to do so.

The trial decision in *Ahluwalia* (*Ahluwalia v. Ahluwalia*, 2022 ONSC 1303) created a tort of family violence to address this domestic violence epidemic, and this writer has personally witnessed the increase in tort claims being pleaded as part of family law litigation. The Court of Appeal for Ontario rightly decided it was unnecessary to add a new tort to those already available, and the matter is currently under appeal to the Supreme Court of Canada.



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Does the increase in family law cases where damages are claimed ultimately serve the goal of the family courts? Does it even serve the interests of the victims themselves who may find themselves stymied and unable to settle their cases when the family law litigation does not resolve?

The question in my mind is whether our family law system is intended to resolve disputes fairly, expeditiously and on the merits or fix complex social problems that have many causes and sources in our culture and history.

As family lawyers, we are taught that to settle cases we need only recall the lessons from "Getting to Yes," thinking methodically about interest-based negotiations. The interests in family law are often muddled by the parties themselves, who are dealing with the emotional turmoil of personal upheaval.

There has never been a shortage of issues in family law that lend themselves well to tit-for-tat:

- a compromise on the amount of income to be imputed to an underemployed payor of support;
- a lump-sum spousal support payment in lieu of a review of support;
- transferring the matrimonial home to the recipient when the payor could have otherwise forced the sale.

This says nothing of the infinitely varied permutations possible on parenting issues (think about those extensive, if not excessive, debates on the merits of phasing in overnight visits in two weeks versus four weeks or the virtues of a Christmas Day pickup at 12 p.m. versus 4 p.m.).

When the disgruntled self-represented litigant strides into court seemingly unwilling to bend even when they know they have no leg to stand on, we as family lawyers are reminded to work a little harder, and maybe the case will settle.

After all, we are told that 98 per cent of cases settle without the need for a trial. Do you really want to be one of the unlucky few?

Now let us assume that one of the fundamental interests in the negotiation is to secure a sizeable award of damages and an acknowledgment of wrongdoing on behalf of that same litigant. A new tort of family violence transforms these goals so that the immovable object meets the unstoppable force. The settlement that appeared within reach vanishes as the elephant in the room comes into focus.

It never really made sense to have a trial over whether someone should pay some “transitional spousal support” of \$15,000 or \$20,000 to get the case settled. Or to overlook the fact that the inter-family loan may not have the best evidence to support it, so it is cut in half.

The long-standing assumption in family law is that a trial will cost more. That assumption may no longer stand, and our already overburdened court system will be facing increased pressure through family law cases that have a new tort component.

The award of damages for family violence becomes the undoer of settlements because it introduces an item that is highly contentious and which parties are unlikely to acknowledge and settle on. It also becomes the trump card played at each step when the opposing party advances a settlement position on the contested issues.

Shouldn't you pay occupation rent for the period of exclusive possession? Tort of family violence.

Shouldn't I receive retroactive contributions of \$10,000 towards the carrying costs of the home? Tort of family violence.

How about the child support you owe me as a set-off? Tort of family violence.

The worn-down litigant who may have been prepared to throw in the towel at the Settlement Conference and pay more in spousal support than they felt was right, or who was willing to concede that their income is higher for support purposes, can no longer be coaxed or cajoled into settlement. The admission of the wrongdoing and the payment of damages around family violence is one step too far. The victim in family violence must wait even longer to get resolution and move on with their lives.

Instead, the victim is forced to retraumatize themselves through a tort claim before their family issues are resolved. The dispute over parenting schedules is protracted even further because the possibility of additional compensation is too tantalizing and may help with those next steps in life. The child is left in greater limbo during this even more protracted dispute.

Had the family violence been framed only as a factor in determining the best interests of the child (i.e., not a tort claim), the hardened opposing party would not be faced with both accepting a lesser relationship with the child and an award of damages; a bridge too far. After all, could the victim not advance a tort claim after the family litigation is settled given standard family law waivers don't include tort claims?

The fundamental principle of effective advocacy in family law is to maintain compassion but also sufficient objectivity and avoid overly identifying with a client. While the tort of family violence might seem appealing, it will be harmful to the fundamental objectives of family courts, which are to focus on the best interests of the children and deal with cases justly and efficiently.

Evan Clemence is a barrister and solicitor specializing in family law at Gelman & Associates. His legal career began as a lawyer practising in Durham Region in Ontario, where he practised in a variety of areas of law, including family, civil, estate and employment law, and included time working as a per diem counsel with Legal Aid Ontario and the Durham Crown Attorney's office.

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