

Family

Ontario case suggests that abuse of opposing counsel may amount to family violence

By Barb Cotton



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(April 19, 2022, 11:37 AM EDT) -- In a recent article I explored the potential scope of the new tort of family violence established in the Ontario Superior Court of Justice case of *Ahluwalia v. Ahluwalia*, 2022 ONSC 1303, (supplementary reasons at *Ahluwalia v. Ahluwalia*, 2022 ONSC 1549), within the context of the potential broad definition of a "family member" ("Potential scope of new tort of family violence"). A preceding Ontario Superior Court of Justice case, *Armstrong v. Coupland*, 2021 ONSC 8186, may further expand the potential scope of the new tort by finding that a party's abuse of opposing counsel amounted to "family violence".

In *Armstrong v. Coupland*, 2021 ONSC 8186, a decision of Justice Deborah L. Chappel, an unmarried couple had a young child, 2 years old at the time of the motion. The parties began their relationship in 2016, separated in May 2019, and briefly reunited before a final separation in

September 2020.

The mother alleged that the relationship ended because of the abusive behaviour of the father, including physical abuse, his alcohol and marijuana addiction problems and his anger management difficulties. The father had been convicted of impaired driving and lost his drivers licence on two previous occasions, in 2013 and 2019.

For a period of time following their separation the father had access to the child supervised by the mother, but the mother found this to be too difficult because of his conflictual behaviour. He also refused to commit to not being under the influence of drugs or alcohol so the unsupervised visits could occur. A court order then granted the father supervised access by a community agency. This fell through as the community agency found the actions of the father, including scheduling of visits and last-minute cancellations, too difficult to deal with. The police and the Children's Aid Society became involved with the family.

The father then brought an application for unsupervised access before the court in September 2021. Although Justice MacLeod found there were valid concerns as to the father's history of excessive alcohol consumption and that the father was "difficult and cantankerous," he granted specified unsupervised access to the father.

Following this, the father demonstrated an unwillingness to follow the parenting terms of the order, and "embarked upon a persistent, systematic campaign" with the mother and her counsel to change the terms to allow him more and more access (para. 34). He made constant last-minute demands for changes to the schedule and imposed unreasonable time limits for responses, and threatened to keep the child from the mother.

In his communications the father made frequent derogatory comments about the mother and her counsel, was unresponsive to reasonable requests, was sarcastic and threatening and presented as "rambling and non-sensical" (para. 15). In the father's view, he "only gets that way" because the mother and her counsel were so challenging and unfair to him (para. 16).

The governing legislation was the Ontario *Children's Law Reform Act*, which defines "family violence"

to include "any conduct by a family member towards another family member that is violent or threatening, that constitutes a pattern of coercive and controlling behaviour, or that causes the other family member to fear for their own safety or for that of another person ..." (s.18(1)). Further, in considering the impact of family violence, the court should take into account "whether the family violence causes the child or other family member to fear for their own safety or for that of another person" (s. 24(4)(f)).

Justice Chappel stated:

21 The definition of family violence specifically recognizes that conduct that may not constitute a criminal offence can constitute family violence for Family Law purposes. The examples of conduct that constitute family violence is expansive, but it is non-exhaustive. The broad definition recognizes the many insidious forms that domestic violence can take other than physical violence and accords each equal weight in the best interests assessment. The specific inclusion of this factor as a mandatory consideration in determining the best interests of children recognizes the profound effects that all forms of family violence can have on children. These consequences can be both direct, if a child is exposed to the family violence, or indirect, if the victimized parent's physical, emotional and psychological well-being are compromised, since these consequences in turn often negatively impact that parent's ability to meet the child's physical and emotional needs.

In terms of the father's specific "disrespectful and malicious" conduct towards the mother's lawyer, he:

- caused the mother to frantically seek out her counsel, often over the weekend;
- launched insults at the mother's counsel, accusing her of being an accessory to the alienation of the child, among other things;
- threatened to report the lawyer to the Law Society of Ontario for alleged professional misconduct;
- would send several messages to the lawyer in succession, late at night;
- set specific deadlines as to when he expected to receive responses;
- accused the lawyer of supporting family conflict, and taking advantage of the mother's anxieties, in order to "pad [her] bank account;"
- further insulted and belittled the lawyer, as a "blight on Family Law," and accused her of attempting to bankrupt him; and
- threatened: "I promise that you'll get all of that hurt that you're creating in [the child's] life from your support of this animosity back on you somehow by karma." and "Just so you know, I'm now devoted to making sure that you, personally, cannot hurt any more kids like you're hurting [the child]. You're my next project ..."

The mother's lawyer was found to have responded calmly and respectfully, asking him to stop sending threatening correspondence.

In the result the father's conduct towards the mother and her lawyer was found to constitute family violence within the meaning of s. 18(1) of the *Children's Law Reform Act*.

39 The Applicant's conduct since September 10, 2021 in relation to his parenting time and his communications to Ms. Swan and the Respondent constitute family violence within the meaning of section 18(1) of the *Children's Law Reform Act*. The communications have often been inappropriately aggressive, demanding and threatening. While many of the comments have been directed towards Ms. Swan, they have been sent to the Respondent as well and have been clearly designed to destroy a solicitor client relationship that the Respondent considers to be critical to ensure the safety and wellbeing of herself and her two children. In this sense, the communications amount to a pattern of threatening, coercive and controlling behaviour towards the Respondent.

In fashioning the remedy, as well as reimposing the need for limited, supervised access, the judge tailored her order to ensure that the father's communications with the mother's lawyer were "civil" ("brief, informative, and courteous"), on pain of an application by the mother for costs.

It is to be noted that the recent amendments to the *Divorce Act* have introduced provisions regarding family violence very similar to those of the Ontario *Children's Law Reform Act*, and thus the logic of this case would arguably extend to the situation of divorcing spouses.

As family violence is a concept introduced in many statutes across Canada, abuse of opposing counsel may amount to family violence in other contexts as well.

Thus, with this more expansive understanding of "family violence," there may be an even greater potential scope of the tort of family violence.

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