

Family

Potential scope of new tort of family violence

By Barb Cotton



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(April 5, 2022, 11:51 AM EDT) -- The other day a client called me wondering what exactly was the potential scope of the new tort of family violence set out in the recent Ontario Superior Court of Justice case of *Ahluwalia v. Ahluwalia*, 2022 ONSC 1303, (supplementary reasons at *Ahluwalia v. Ahluwalia*, 2022 ONSC 1549)? Was it limited to a divorce context, as Justice Renu Mandhane had placed so much emphasis on the recent introduction of the family violence provisions in the March 1, 2021, amendments to the *Divorce Act* as a rationale for the new tort?

Or could the remedy of damages for the new tort of family violence also be available to common law spouses applying for family law relief under provincial legislation, and in other circumstances? For example, could children who suffered within a violent home also sue for damages under the new tort of family violence?

Good questions, and I decided to look into it. In doing so I was guided by the words of Justice Mandhane that, in developing new foundations for liability, "there is scope to do so where the interests are worthy of protection and the development is necessary to stay abreast of social change" (*Ahluwalia v. Ahluwalia*, 2022 ONSC 1303 at para. 50).

Lawyers are often under the belief that the concept of "family" has a fixed definition, and thus the new tort of family violence would have a delineated scope. This is not the case in Canada, however, and the amorphous definition of family both at common law and as defined within statutes across Canada would seem to lead to a very wide potential application of the new tort of family violence.

Black's Law Dictionary states that the meaning of "family" necessarily depends on the field of law in which the word is used, the purpose intended to be accomplished by its use, and the facts and circumstances of the case. One of the early common law definitions of family was patriarchal and defined a family within the context of obeisance to a head of a household (usually male) upon whom the members are dependent economically, socially and emotionally. Another traditional definition of family is in application to a group of persons consisting of parents, children and immediate kindred which constitutes a fundamental social unit in civilized society (*Rolleman v. Blackmon*, 2002 BCSC 766 at para. 6).

A more fluid definition of "family" evolved in Canada primarily within the context of a line of Supreme Court of Canada cases addressing common law spouses' and same-sex partners' claims for equal rights to benefits under legislation. Thus, in one of the early cases, *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, in which a same-sex couple was excluded from the federal government's bereavement benefits, Justice Claire L'Heureux-Dubé, in dissent, stated at para. 114:

[U]nexaminated consensus" leads many to feel that the term "family" in fact has a plain meaning ... [Yet] [c]ould it not be said that "family status" is an attribute of those who live as if they were a family, in a family relationship, caring for each other?

As Justice L'Heureux-Dubé stated in the subsequent case of *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para 102:

[F]amily means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons ... all of them equally worthy

of concern, respect, consideration, and protection under the law.

(The Honourable Claire L'Heureux-Dubé, "What a Difference a Decade Makes: The Canadian Constitution and the Family Since 1991" (2001), 27 Queen's LJ 361-373.)

When one examines the legislation defining family violence one can see the broad definitions of those who fall within the meaning of family, and thus would presumably potentially have status to claim damages under the new tort of family violence. Indeed, the new amendments to the *Divorce Act* define family violence as being committed by a family member, and "family member" is broadly defined to include "a member of the household of a child of the marriage or of a spouse or former spouse as well as a dating partner of a spouse or former spouse who participates in the activities of the household" (*Divorce Act* s. 2(1)).

In Ontario, the *Children's Law Reform Act*, RSO 1990, c C-12 s. 18(1) includes provisions with respect to family violence by a family member towards another family member. Family member is defined to include a member of a household of a child or of a parent, as well as a dating partner of a parent who participates in the activities of the household.

In Alberta, the *Wills and Successions Act*, SA 2010 c W-12.2 s. 72(b) defines a family member in the context of family maintenance and support to include spouses, adult interdependent partners, children and grandchildren of the deceased. The *Child, Youth and Family Enhancement Act*, RSA 2000 c C-12 s. 126.3(1) defines family member in the context of an application for a publicity ban respecting deceased children to include a parent, guardian, grandparent, sibling or one who stands in *loco parentis*.

Presumably across the country there are equally broad prescriptions of what constitutes family in the various statutes.

Bottom line: Because of the expansive definition of family as developed in the common law, and as defined in various statutes across Canada, there is a very wide potential scope for the new tort of family violence. Common law spouses (or "adult interdependent partners" as they are called in Alberta), same-sex partners and likely the children brought up in violent homes can invoke the new tort.

More peripheral parties that nonetheless fall within the definition of family may also potentially invoke the tort, such as siblings, grandparents and grandchildren, and even dating partners. And on the broadest interpretation of the meaning of family, as per Justice L'Heureux-Dubé, in dissent, in *Canada (Attorney General) v. Mossop*, perhaps all those living "as if they were a family, in a family relationship, caring for each other" can invoke the tort.

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