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# Tort Claims in Family Law — The Frontier

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An uneasy dance continues between equitable remedies and statutory schemes in family law. Gaps remain in the statutory remedies available for litigants whose spouses wilfully harm them emotionally, physically and financially. Tort damages have been awarded in the family law context where one spouse has suffered as a result of assaultive behaviour which has been defined to include assault, battery, sexual assault or confinement. Tort damages for fraudulent misrepresentation and conspiracy have also been awarded in family law, while claims for damages for malicious prosecution, abuse of process, or sexually transmitted diseases have not, for the most part, been successful. The limitations period with respect to these claims is two years from the date the claim was discovered. As well, the Court has been generally reluctant to impose a fiduciary obligation between spouses to compensate a litigant for losses suffered as a result of emotional or financial distress. A cause of action framed as a breach of fiduciary duty will avoid the two year limitation period associated with tort claims.

The 2009 trial decision of *McLean v. Danicic*<sup>1</sup> (appeal quashed by the Ontario Court of Appeal in January, 2010<sup>2</sup>) bridges this gap. In this case, Justice Harvison Young awarded damages for the intentional infliction of mental suffering and emotional distress in the absence of assaultive behavior. The infliction of distress arose from bullying tactics and harassment meant to intimidate the wife into relinquishing her meritorious case. *McLean* exposes a small, but real and dangerous element of criminal or quasi-criminal behaviour in family law. The case broadcasts the message that consequences will follow strong-arm tactics, and rogue litigants will face sanctions for thumbing their nose at the justice system and their spouse's rightful claims. The case provides a much needed remedy in extreme cases.

## 1. TORT REMEDIES & STATUTORY RIGHTS — FILLING IN THE GAPS

### (a) Damages for Assaultive Behaviour

Damages for “assaultive behaviour” have been awarded by the Court as an extraordinary remedy and as an additional award to claims made under the *Family*

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1 2009 CarswellOnt 3289 (Ont. S.C.J.) [*McLean*].

2 2010 CarswellOnt 648, [2010] O.J. No. 284 (Ont. C.A.). The appeal was quashed as an abuse of process. The Court of Appeal noted that the Appellant's appeal appeared to be vexatious and a continuation of a previous pattern. He had made no effort to bring the appeal forward and sought to again obstruct and increase costs.

*Law Act* upon relationship breakdown.<sup>3</sup> Awards of this nature are relatively new but they appear to be increasing in number. In these cases, a damages award typically follows a criminal conviction for the (physical) assaults alleged, and findings by the trier of fact regarding the circumstances of the assault and its effects on the victim.

In *Dhaliwal v. Dhaliwal*,<sup>4</sup> the wife was physically assaulted by the husband and subjected to emotional abuse by way of verbal attacks and name calling perpetuated by the husband. He was criminally charged and convicted of assaulting the wife. The wife suffered emotional trauma and believed that her reputation in the Sikh community had been sullied. She attempted suicide and suffered from depression, sleep disturbances, a lessened ability to concentrate and fulfill her employment duties, anxiety and a lack or loss of self-esteem. The Court ordered the husband to pay the wife damages in tort as follows: general damages in the amount of \$5,000 and a further \$5,000 for aggravated and punitive damages. The Court relied on the decision of *Surgeoner v. Surgeoner*<sup>5</sup> in finding that the husband's conviction and punishment in the criminal court system for assaulting the wife did not deter the making of an award for damages in the family court system. In making the damages award, Justice Métivier stated that the award was meant to "*indicate society's outrage at this conduct and to compensate the wife for the loss she has suffered*".

In *Harris v. Cohen*,<sup>6</sup> the wife claimed damages for alleged assaults or trespasses upon her person. The wife's evidence was that the husband behaved in an unruly and overbearing way after the parties were married. He repeatedly barged into the wife's son's bedroom, past his closed door, and when he knew the child did not want him to come in. As well, he once barged into the wife's bathroom where she was naked and pulled her into her son's view and made derogatory comments about her in his presence. The Court found that the husband's actions constituted an assault for which the redress of aggravated damages was appropriate. The husband's actions were an "unjustifiable and willful affront to the wife's feelings and dignity". The Court assessed aggravated, compensatory damages in the amount of \$10,000. The wife did not seek punitive damages. Had punitive damages been claimed, the Court would have awarded them because of the "arrogance, high-handedness and cruelty of the defendant [husband]'s actions".

### (i) Aggravated Damages — General Principles

Aggravated damages, like general or special damages, are compensatory in nature. They are those additional damages which will compensate the plaintiff for the additional personal suffering, humiliation and continuing trauma suffered because of the manner in which the injuries were inflicted. In *Hill v. Church of*

<sup>3</sup> See *Huismans v. Black*, 2000 CarswellOnt 3137, ¶17 (Ont. S.C.J.).

<sup>4</sup> 1997 CarswellOnt 5774 (Ont. Gen. Div.) at para. 58–64 [*Dhaliwal*].

<sup>5</sup> 1993 CarswellOnt 4419 (Ont. Gen. Div.) [*Surgeoner*] In this case, the Court awarded a total of \$8,000 for the husband's assault on his wife. He kneed her in the groin and she suffered headaches and a sore back for approximately three weeks. No medical treatment was sought.

<sup>6</sup> *Harris v. Cohen*, 1994 CarswellOnt 2001 (Ont. Gen. Div.) at para. 143–149 [*Harris*].

*Scientology of Toronto*,<sup>7</sup> the Supreme Court of Canada held that aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety. An award of aggravated damages recognizes a real injury suffered by the plaintiff and requires the person who caused the injury to pay compensation for it. An assessment of aggravated damages requires consideration of the entire conduct of the defendant, including his or her conduct in the court action, and the damages will give expression to the natural indignation of right-thinking people.

(ii) *Awarding Punitive Damages for Domestic Abuse — Exception to General Rule*

Punitive or exemplary damages, on the other hand, go beyond compensation to the plaintiff for the damages actually sustained. An award of punitive damages is a penalty imposed on the defendant for outrageous conduct, and may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high handed that it offends the court's sense of decency. Unlike aggravated damages, punitive damages bear no relation to what the plaintiff should receive by way of compensation. In *Hill v. Church of Scientology of Toronto*, *supra*, the Supreme Court of Canada held that punitive damages are not to compensate the plaintiff but rather to punish and deter the defendant and others from acting in a malicious and oppressive manner. Punitive damages will only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

The Court in *C. (M.) v. M. (F.)*<sup>8</sup> held that, as a general rule, punitive or exemplary damages are not awarded when the defendant has already been prosecuted in the criminal courts and punished for the same conduct. However, a line of cases has developed holding that domestic violence cases are an exception to the general rule mentioned above. In *P. (S.) v. K. (F.)*<sup>9</sup> Justice Barclay referred to the Ontario Law Reform Commission Report on Exemplary Damages (1991) which recommended that awards for punitive damages should not be limited because the defendant had been convicted of the same acts which founded the civil claim. In *Surgeoner*, *supra*, the Court stated the following:

I find it difficult to conclude that, simply because R.S. has been convicted of this assault, I cannot award punitive damages in this action, which is an action between husband and wife, where a special relationship exists. What does D.S. gain by that conviction? The answer is nothing. I am of the opinion that cases such as this, commonly referred to as domestic violence cases arising because of the special relationship that is created by marriage, and based upon trust, should be an exception to the general principle surrounding the award of punitive damages notwithstanding that such may result in "double jeopardy". I see no reason to attempt to punish under this heading by making reference to such terms as "aggravated damages" or delineating between the wrongs and identifying those that were punished in the criminal

<sup>7</sup> 1995 CarswellOnt 396, 1995 CarswellOnt 534, [1995] 2 S.C.R. 1130 (S.C.C.).

<sup>8</sup> 1990 CarswellOnt 427, 46 C.P.C. (2d) 254 (Ont. Gen. Div.).

<sup>9</sup> (1996), 1996 CarswellSask 756, [1997] 3 W.W.R. 161 (Sask. Q.B.).

justice system and those that were not. I think it is necessary in this age of enlightenment in dealing with claims of this nature which are, in essence, abuse claims that an exception should be made allowing for an award of punitive damages just as it could be made if R.S. had not been convicted because the effect of such will be to deter this anti-social behaviour. Accordingly, I award general damages in the amount of \$4,000 and punitive damages in the amount of \$4,000.

The question in these cases is whether in light of the full compensatory award, a need remains for the court to mark its disapproval of the defendant's conduct by an exemplary imposition.<sup>10</sup> Compensatory damages should themselves operate as punishment and deterrence. If they adequately satisfy the goal sought to be achieved by exemplary damages, then there may be no reason for additional exemplary damages. To do so may "over compensate" the plaintiff and provide him or her with duplicate monetary recovery. The kind of conduct that attracts exemplary damages has been described as "malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal . . . evil, outrageous, callous, disgraceful, wilful, [and] wanton . . ."<sup>11</sup>

### (iii) *Quantum of Damages*

When an analysis of the damages has been completed by the Court, the Court must fix the amount of the award. The difficulty is that the Court must attempt to quantify the exquisitely subjective effects of often intangible and future consequences. Damages must be measured in light of the harm that has been inflicted and with regard for the ranges of damages awarded in similar cases<sup>12</sup>. The Court must ensure that the amount fairly represents a sum which is appropriate compensation for the injury, and that it meets that purpose without being extravagant, as further explained below. On the other hand, damages must not be so frugally measured as to trivialize the victim's injury. The assessment involves an examination of the victim's complaints and a separation of the problems which may be quickly resolved from the long-term or permanent emotional damage.<sup>13</sup>

### (iv) *Cases Where Punitive Damages Awarded*

In *Farkas v. Kovacs*<sup>14</sup>, the wife sought damages arising from alleged assaults and the husband's mental cruelty. The husband had assaulted the wife on three occasions. He took advantage of her small stature and the fact that she was recuperating from surgery. The husband engaged in conduct aimed at harassing her including calling her names and wishing that she would die of cancer. The Court stated that the wife appeared to have suffered no serious physical harm, but the emotional and mental aspects of the assaults ought not to be diminished. In the circumstances,

<sup>10</sup> *Flachs v. Flachs*, 2002 CarswellOnt 1285 (Ont. S.C.J.); affirmed 2003 CarswellOnt 755 (Ont. C.A.).

<sup>11</sup> Professor Waddams in *The Law of Damages* at p. 998.

<sup>12</sup> *Wandich v. Viele*, 2002 CarswellOnt 6, ¶88 (Ont. S.C.J.).

<sup>13</sup> *C. (M.) v. M. (F.)*, above, at 36.

<sup>14</sup> *Farkas v. Kovacs*, 1989 CarswellOnt 1275, ¶12-14 (Ont. Dist. Ct.).

the Court awarded general damages of \$10,000. Of the total award, \$2,500 was characterized as punitive damages as the husband was aware of the wife's particular vulnerabilities.

In making the damages award, the Court noted that a pecuniary award of damages can be symbolic only inasmuch as there is no formula for arriving at any precise award which adequately compensates. The circumstances are somewhat complicated by the fact that the dynamics of a marital relationship are such that the equities are seldom all on one side. The Court stated that while it is important that any assessment of damages be mindful of that fact, it is also important that individuals such as the husband in that case must be disabused of any perception that domestic relationships provide a license for assaultive behaviour.

In *Valenti v. Valenti*,<sup>15</sup> the wife sought civil damages arising from an assault. The court awarded the sum of \$10,000 for pain, suffering and loss of enjoyment of life, \$2,500 as aggravated damages and a further \$2,500 as punitive damages. Justice Métivier described the circumstances in *Valenti* as follows:

On 2<sup>nd</sup> December, 1991, the husband became very abusive towards the wife. As a result, he became violent, punching his wife in the face and head area, and forcing her head into the walls of the hallway. It is also noted that she was kicked and forced to sit on the couch with instructions not to move.

The husband then forced his wife to the vehicle and as they drove, the accused struck his wife in the face as well as hitting her with the car phone. At one point she became terrified and attempted to leave the vehicle. At this point the accused assumed control of the truck and after driving around for a short period of time returned to the residence.

Justice Métivier described the injuries to the wife as a bruised and swollen face. She also had a sore nose and a large bruise on the left lower back near her hip with swelling over a number of days. The wife suffered from symptoms of post traumatic stress disorder. Her honour awarded aggravated damages "for inflicting injury in a climate that can only have been one of terror." In awarding punitive damages, Justice Métivier stated that, "the deterrence of this kind of conduct can only occur when such abuse is treated with the outrage it deserves."

In *S. (L.N.) v. K. (W.M.)*,<sup>16</sup> the wife sought general damages of \$50,000 and punitive damages of \$25,000 for physical, psychological and emotional injuries as a result of the husband's assaults on her. Justice Perras awarded general damages of \$15,000 stating the following:

Given the length of time over which the verbal and physical assaults transpired in this case and given the injuries, bruises, bumps, bangs, etc. and the mental anguish that Ms. W.M.K. suffered from 1978 to 1996, I am satisfied that the pain, suffering, distress and humiliation were of an aggravated nature and hence I award \$15,000 for general damages.

The Court further awarded punitive damages of \$4,000 after finding that the husband's conduct towards the wife was "reprehensible and malicious and severely

<sup>15</sup> 1996 CarswellOnt 514, [1996] O.J. No. 522, ¶70 (Ont. Gen. Div.); affirmed 1998 CarswellOnt 2275 (Ont. C.A.)

<sup>16</sup> 1999 CarswellAlta 582, ¶40 (Alta. Q.B.); additional reasons at 1999 CarswellAlta 945 (Alta. Q.B.).

offends a reasonable view of common decency". The damages amounts were offset against the husband's unjust enrichment property claim.

In *Flachs v. Flachs*<sup>17</sup>, the wife and daughter sought tort damages for assault, battery, sexual assault and the intentional infliction of mental suffering. The evidence painted a picture of constant physical and emotional abuse of the wife by the husband over a period of 38 years during their marriage and of a life of fear and physical abuse inflicted upon his daughter from early in her childhood until she left home at age 19. In assessing compensatory damages, the Court's task was to attempt to quantify 38 years of abuse and physical and mental suffering endured by the wife and a lost childhood and the long term effects of abuse endured by the daughter.

The Court was satisfied that the wife endured years of mental suffering consisting of humiliation, embarrassment and degradation as the result of being physically abused by the husband in front of others. The wife suffered from "Post-traumatic Stress Disorder, anxiety and depression. The parties' daughter's psychiatrist diagnosed her with suffering from psychiatric difficulties as a consequence of witnessing the husband's assaults on her mother and being assaulted herself by her father. The Court awarded general damages to the daughter in the amount of \$75,000, and general damages to the wife of \$125,000. In addition to general damages, the Court awarded aggravated damages of \$25,000 each to compensate the parties for the additional personal suffering, humiliation and continuing trauma suffered because of the manner in which the injuries were inflicted. The Court concluded that an award of punitive damages was appropriate in the amount of \$25,000 each in light of the husband's outrageous conduct. These damages were awarded separately and above criminal sanctions for assaults on the wife and daughter.

#### *(v) Cases Where No Punitive Damages Awarded*

In *C. (N.) v. B. (W.R.)*,<sup>18</sup> the plaintiff brought an action for damages for sexual assault and battery and assault and battery. The Court concluded that the plaintiff did in fact suffer physical and verbal abuse on a daily basis and sexual assaults as frequently as five times a week during her six and a half year relationship with the defendant. As a result of the abuse, the plaintiff suffered from symptoms of post traumatic stress disorder such as depression, anxiety and anger as well as nightmares and disrupted sleeping patterns. In awarding aggravated damages, the Court recognized the immeasurable impact of the injuries suffered by the victim which were exacerbated by the way in which the injuries were inflicted. Given the intimate domestic relationship between the parties, the frequency of the physical and sexual assaults, the nature of the brutal assaults and their impact on the plaintiff, the Court awarded \$65,000 in general damages and \$25,000 in aggravated damages. Notwithstanding the brutality, damages were not specifically earmarked as exemplary or punitive. However, the general and aggravated awards were relatively high in comparison with other cases. This case, like all damage awards in family law cases, emphasizes the highly discretionary nature of this inherently equitable

<sup>17</sup> 2002 CarswellOnt 1285 (Ont. S.C.J.); affirmed 2003 CarswellOnt 755 (Ont. C.A.).

<sup>18</sup> 1999 CarswellOnt 3036 (Ont. S.C.J.).

remedy.

In *C. (M.) v. M. (F.)*, *supra*, the plaintiff sought damages for sexual assault against her former common law partner. The parties had lived together for more than two years. The events in question took place after the parties stopped cohabiting. The defendant broke into the plaintiff's house, forcibly confined her and subjected her to an all-night series of brutal physical and sexual assaults. The defendant was acquitted of sexual assault at the criminal trial, but convicted of assault. The Court assessed the plaintiff's damages solely on non-pecuniary damages for pain and suffering and the loss of enjoyment of life caused by the emotional scarring of the incidents. Included in those damages was an award of aggravated damages. The court fixed those damages at \$40,000. In making its award, the Court considered the plaintiff's shock and physical hurt as a result of the rape, the humiliation and degradation endured, and the plaintiff's ongoing emotional problems which required treatment. Justice Keenan acknowledged that the defendant's criminal acquittal on the sexual assault charges did not preclude the court from finding him liable for the commission of those acts based on the civil standard of proof. Nonetheless, punitive damages were not awarded because compensatory damages could be fixed at a level that would include exemplary considerations.

In *Wandich v. Viele*<sup>19</sup>, the wife sought damages in tort for personal injury. Justice Paisley concluded that the husband had assaulted the wife during the course of their relationship. He had earlier pleaded guilty to criminal assault. His Honour described the wife's allegations as follows:

Ms. Viele testified that there had been from seven to nine incidents during their relationship in which she had been assaulted . . . she described incidents in which Mr. Wandich had threatened her with a knife, choked her, caused her nose to bleed, punched her and poked her in the eye. She testified that during the incident which resulted in the criminal charge, Mr. Wandich had pushed, kicked and punched her, pulled her hair, threatened to poke her in the eye, broke a framed picture on her head and pushed her against the wall. He then picked up a bathroom plunger and said that he was going to hit and bloody her. She ran into the kitchen to call 911. He took the phone out of her hand, put his fingers towards her eye and said, "don't you call anybody", then he dialled 911 and complained he had been assaulted. When the police arrived, Mr. Wandich was charged and taken away in handcuffs.

Justice Paisley awarded the wife \$5,000 in compensatory damages. In assessing the appropriate award for compensatory damages, the Court took into account the nature of the assault and the bruising suffered, but considered that her pain and suffering did not establish that the assault was near the high end of the range in similar cases. The Court did not find that an award of punitive or exemplary damages was appropriate. Justice Paisley stated that the stigma imposed on him by the finding of guilt in criminal court, and the fact that the wife was compensated by an award of compensatory damages served as an adequate penalty or deterrent in that case.

<sup>19</sup> 2002 CarswellOnt 6, ¶81-82 (Ont. S.C.J.).



In *White v. White*,<sup>20</sup> a decision of the British Columbia Supreme Court, the wife sought damages as a result of her husband's savage assaults. The husband's attempt to raise the defence of provocation in final argument was rejected. The most serious assault consisted of the husband pulling the wife to a standing position by her hair, dragging her across a coffee table, pushing her in a bedroom, causing bruises to her legs and abdomen and tearing loose at least two pieces of her hair. This left her with a bloody, exposed scalp in at least two places. The Court concluded that the second assault aggravated her pre-existing personality disorder. The Court awarded the wife the sum of \$10,000 for non-pecuniary general damages for the assaults committed on her by the husband in the circumstances.

In *Megeval v. Megeval*<sup>21</sup>, Justice Kirkpatrick dealt with an assault causing serious permanent injury to the wife's right wrist. The injury caused Ms. Megeval prolonged serious disability. Her Honour awarded a global figure for non-pecuniary and aggravated damages of \$45,000. The fact that the assault took place in the context of a marriage, and from a husband of substantially greater stature and strength than his wife, supported a claim for aggravated damages.

In *Rezel v. Rezel*<sup>22</sup>, the wife claimed damages for an assault she suffered during an altercation at the end of the marriage. The husband admitted to two occasions of assault, although he testified that he could not recall the details. The wife testified that during one of these incidents her husband had "socked" her in the mouth and left her with a black eye. She was forced to take a few days off work as a result. Justice Harvison Young of the Ontario Superior Court set the quantum of general damages payable to the wife by the husband for the assaults at \$7,500. While the marriage was a turbulent one, the Court did not find that there was a lengthy history of physical violence. While unacceptable, and constituting clear instances of assault, these incidents did not result in lasting injury to the wife and the husband was contrite.

In *Van Dusen v. Van Dusen*<sup>23</sup>, the wife sought leave to claim tort damages for assault. She sought general damages in the amount of \$10,000, aggravated damages in the amount of \$5,000 and punitive damages in the amount of \$5,000 against the husband for the physical assault he committed upon her on the date of separation. The husband tormented and physically assaulted the wife throughout the marriage even in the presence of the children. The last assault was witnessed by the children, which caused the wife physical and emotional harm and pain. The husband was charged and later convicted of assault. After considering the level of violence and pain inflicted upon the wife and the demeaning nature of the assault, the Court awarded \$15,000 in general and aggravated damages. The Court declined to make an Order of punitive damages.

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20 2003 CarswellBC 750 (B.C. S.C.).

21 1997 CarswellBC 2344, ¶59 (B.C. S.C.).

22 2007 CarswellOnt 2313 (Ont. S.C.J.).

23 2010 CarswellOnt 398 (Ont. S.C.J.).

**(b) Damages for Intentional Infliction of Mental Suffering and Emotional Distress — expanding tort remedies to address emotional or financial abuse**

*(i) Mental Suffering & Emotional Distress*

A party may be injured not only by some physical assault upon his or her person but also by conduct which produces nervous shock, mental anguish, or some other emotional injury. The cause of action is not for the physical consequence but for the causing of emotional or mental harm by some direct act on the part of the opposing party.<sup>24</sup> The Ontario Court of Appeal has held that the tort of intentional infliction of mental suffering involves the following three elements (i) flagrant or outrageous conduct; (ii) calculated to produce harm; and (iii) resulting in a visible and provable illness.<sup>25</sup>

In *Frame v. Smith*,<sup>26</sup> the Supreme Court of Canada refused to extend the tort of intentional infliction of mental suffering into the realm of family law as the Court believed that such cause of action would have the potential for petty and spiteful litigation, and could be used as a weapon for spouses undergoing a great deal of emotional trauma which they believed was maliciously caused by the other spouse. The Court stated that, “it is not for this court to fashion an ideal weapon for spouses whose initial, although hopefully short-lived objective, is to injure one another, especially when this will almost inevitably have a detrimental effect on the children.”<sup>27</sup>

Notwithstanding the Supreme Court of Canada’s concerns set out in the *Frame* decision, recent case law suggests that in appropriate extreme circumstances, the Court will award damages in family law under the tort of intentional infliction of mental suffering and emotional distress.

In *MacKay v. Buelow*<sup>28</sup>, the wife brought an action for damages resulting from continued harassment and intimidation by the husband. The husband had called the wife continuously during the day and night for a four month period; he threatened the physical wellbeing and safety of the wife and child; he stalked the wife on several occasions; he threatened to kill her and he harassed the wife’s friends and professional advisers. The Court awarded non-pecuniary general damages of \$25,000 and \$15,000 for aggravated damages for the invasion of privacy, trespass to the person, mental suffering and emotional distress suffered by the wife. The wife was entitled to a further \$15,000 in punitive damages because of the “calculated, devilishly creative and entirely reprehensible conduct of the husband”. \$44,000 was awarded to compensate her for necessary future medical and psychiatric care. She was also entitled to recover her pre-trial expenses incurred as a result of the Husband’s conduct.

<sup>24</sup> The Law of Torts in Canada, vol. 1 at pp. 47 and 48.

<sup>25</sup> *Prinzo v. Baycrest Centre for Geriatric Care*, 2002 CarswellOnt 2263, 60 O.R. (3d) 474 (Ont. C.A.).

<sup>26</sup> *Frame v. Smith*, 1987 CarswellOnt 969, 1987 CarswellOnt 347, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 (S.C.C.), followed in *Lo v. Lo*, 2009 CarswellOnt 2979 (Ont. S.C.J.).

<sup>27</sup> *Frame v. Smith*, above at 128.

<sup>28</sup> *MacKay v. Buelow*, 1995 CarswellOnt 89, ¶12, 16-17 (Ont. Gen. Div.).

In the *McLean* case, *supra*, Justice Harvison Young found that the Respondent, Darko Danicic ("Danicic"), had intentionally inflicted emotional harm on the Applicant, Traci McLean ("McLean"), by forwarding "frightening" and "hostile" letters "clearly designed to threaten and intimidate" his former spouse into abandoning her claims. His harassment of McLean escalated to the point that he has been charged with criminal harassment, extortion and obstruction of justice. Danicic sent a threatening package to McLean attempting to blackmail her. The package including humiliating photographs of McLean, including intimate photographs taken during the parties' relationship, and threats to forward them to various people, including her colleagues and her grandmother.

The Court concluded, on a balance on probabilities, that Danicic sent or caused to be sent a letter reporting his threat to "personally put a bullet in [Ms. McLean's] head." The Court further found that he sent or caused to be sent the two packages containing the intimidating photographs and extortionate messages. The Court found that "Danicic caused McLean to suffer acute anxiety, fearfulness and great distress. She continues to be fearful for herself and others, including her legal counsel, and her family. She is particularly fearful of his taunt that one day it will start again and be much worse, contained in the second package she received."

Her Honour held that the three elements of the tort of intentional infliction of mental suffering were made out: Danicic engaged in (1) "flagrant and outrageous conduct" that (2) was "calculated to harm" McLean and (3) resulted in "a visible and provable illness," as evidenced by McLean's need for medical assistance and anti-anxiety medication. In the circumstances, Justice Harvison Young ordered Danicic to pay McLean \$15,000 for intentionally causing her mental distress, \$228,500 for the legal costs he forced her to incur during their matrimonial dispute, plus prejudgment interest from the time the two packages containing the photographs were sent. The Court emphasized that the \$15,000 award of "compensatory and aggravated damages" for intentional infliction of mental suffering and emotional distress was intended to "indicate society's outrage at this conduct and to compensate the wife for the loss she has suffered," to use the words of Justice Métivier in *Dhaliwal*.

The *McLean* decision makes clear that the tort of intentional infliction of mental suffering is available in cases involving outrageous conduct meant to intimidate a spouse and prevent him or her from pursuing his or her claims. The conduct must result in provable loss. It is unlikely that the case will open the floodgates for litigation between spouses who suffer emotional stress as a result of relationship breakdown given the extreme nature of Danicic's conduct.

### **(c) Expanding the Tort to Cases of Parental Alienation**

The tort of intentional infliction of mental suffering may be useful in the context of parental alienation. A child reaching the age of majority could seek damages for the intentional emotional distress suffered at the hands of the alienating parent as a result of being deprived of a relationship with their other parent. An award of damages in this respect would act as a deterrent to discourage parents from engaging in parental alienation which invariably results in long lasting emotional damage to children.

In *Attia v. Garanna*<sup>29</sup>, the father sought damages against the mother for abducting the children to Egypt from Ontario. The Court expressly stated that damages can be awarded for the tort of intentional infliction of mental suffering in this context. However, in the *Attia* case, the essential ingredients of the tort were missing. No medical evidence was marshalled to evidence that the father had suffered a provable illness. If counsel intend to pursue damages for mental and emotional suffering, it is imperative that pleadings are properly framed and medical evidence presented to the Court to prove the damages. In *Attia*, while the Court noted that the mother's conduct may have had a severe emotional impact on the father, damages were not recoverable as a separate tort.

*(i) Extortionate conduct — Tort of Intimidation*

In addition to the tort of intentional infliction of mental suffering, the tort of extortion or intimidation is available to a litigant in matrimonial litigation where the opposing party has made threats in an effort to prevent the litigant from proceeding.

The tort of extortion requires the threat to do an illegal act. In *Roman Corp. v. Hudson's Bay Oil & Gas Co.*,<sup>30</sup> the Supreme Court of Canada stated that, "in order to succeed under this head (tort of intimidation), the facts relied upon by the appellants would have to disclose that they had sustained damage by reason of a threat, made by the Respondents, of an unlawful act." In *R. v. Blake*<sup>31</sup>, Justice Doherty of the Ontario Court of Appeal held that, "... Some threats, while not *per se* unlawful (e.g., the threat to disclose some despicable act from one's distant past), will have a much more coercive effect than a threat to do something which is in and of itself unlawful".

In *R. v. Royz*<sup>32</sup>, the Ontario Court of Appeal found that the appellant's comments to the complainant that he would make sure that important people in her life found out about the past she wished to keep hidden unless she purchased his distribution rights, and that he would "ruin her", clearly fell within the broad definition of a "threat" adopted by the Court in *H.(A.)*. Accordingly, the essence of extortion is that an advantage is sought to be obtained by illegitimate pressure, or, as stated by the Court in *R. v. Jansen*, "not by violence, but by inspiring fear".<sup>33</sup>

Based on the above authorities, Justice Veit of the Alberta's Queen Bench concluded in *Scherf v. Nesbitt*<sup>34</sup> that in order to establish either the crime of extortion or a civil claim based on extortion in the family law context, the claimant must

<sup>29</sup> 2010 CarswellOnt 1168 (Ont. S.C.J.); additional reasons at 2010 CarswellOnt 1953 (Ont. S.C.J.).

<sup>30</sup> 1973 CarswellOnt 228, 1973 CarswellOnt 228F, 36 D.L.R. (3d) 413 (S.C.C.) at p.420 [D.L.R.].

<sup>31</sup> 2005 CarswellOnt 4269, (sub nom. *R. v. H.A.*) [2005] O.J. No. 3777, 202 O.A.C. 54 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 1192, 2006 CarswellOnt 1193 (S.C.C.).

<sup>32</sup> 2008 ONCA 584, 2008 CarswellOnt 5423, [2008] O.J. No. 3129 (Ont. C.A.); affirmed 2009 CarswellOnt 1608, 2009 CarswellOnt 1609, 2009 SCC 13 (S.C.C.).

<sup>33</sup> 1959 (1) SA 779 (C).

<sup>34</sup> 2009 CarswellAlta 2162 (Alta. Q.B.).

only establish improper pressure without reasonable justification or excuse. In that case, the wife successfully applied for distribution of the sale proceeds of a jointly owned property after the breakdown of the parties' common law relationship. She then sought full recovery costs based on the husband's bullying and abusive e-mails to her after she requested the sale proceeds. The husband threatened to publicize private information about the wife which he knew the wife would not wish to have publicly disclosed. He also expressed contempt for her lawyer's professional ability and integrity.

Justice Veit stated that before imposing punitive costs for conduct which is not directly part of the court process, the court must be satisfied about not only the external circumstances of the conduct but also that there was no reasonable justification or excuse for the conduct. In all litigation, especially in matrimonial litigation, a court must be sensitive to the fact that emotions may run high and that litigants may say or write inappropriate things in the heat of the moment.

The wife established a claim for punitive costs in *Scherf*. Justice Veit concluded that the husband's post-litigation threats to the wife were extortionate and constituted an abuse of process. He knowingly applied illegitimate pressure on the wife by threatening to publicly disclose materials which he knew she wished to keep private. While the e-mails did not threaten to do something illegal, the husband's threats were intended to intimidate and upset the wife and constituted substantive wrongdoing. The judge awarded double the costs under the normal tariff rather than full indemnity costs as the appropriate sanction for the husband's extortionate conduct. The Court noted that the husband's extortionate conduct did not rise to the level of misconduct in the *McLean* case justifying an award of full recovery costs.

#### (d) The New *Limitations Act*

The new *Limitations Act*<sup>35</sup> imposes a two year limitation period for tort claims from the date the claim was discovered. A litigant's tort claim does not accrue until he or she was reasonably capable of discovering the wrongful nature of the opposing party's acts and the nexus between those acts and the corresponding injury. In *M.(K.) v. M.(H.)*<sup>36</sup>, the Supreme Court of Canada established a prerequisite that the party have a "substantial awareness of the harm and its likely cause before the limitations period begins to toll".<sup>37</sup>

Under the new *Act*, both the tort of assault and the tort of battery are governed by the provision regarding "assault" under section 1 of the new *Act*. The limitation period for assault and battery under the new *Act* is the basic limitation period of two years from the date the claim was discovered. This basic limitation period is set out in section 4 of the new *Limitations Act*, and discoverability is outlined in sec-

<sup>35</sup> *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B, [the new *Limitations Act*] or [the new *Act*].

<sup>36</sup> 1992 CarswellOnt 841 (S.C.C.).

<sup>37</sup> The equitable doctrine of laches could apply to these cases where there is evidence of either implicit acquiescence by a plaintiff, or of circumstances making the prosecution of the lawsuit unreasonable or oppressive. Acquiescence suggests knowledge by the plaintiff of his or her rights.

tion 5 of the Act. Section 5 of the new Act provides as follows:

5. (1) A claim is discovered on the earlier of,
  - (a) the day on which the person with the claim first knew,
    - (i) that the injury, loss or damage had occurred,
    - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
    - (iii) that the act or omission was that of the person against whom the claim is made, and
    - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
  - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
- (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Section 10 contains a specific provision relating to assault which provides as follows:

10. (1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.
- (2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

#### *(i) Transitional Provisions*

The limitation period for assault under the former *Limitations Act* was four years pursuant to section 45(1)(j). In order to determine what limit applies in a case involving damages for assaultive behaviour, one must consider whether the alleged incidents occurred before or after January 1, 2004. The transitional provisions in section 24 of the new Act may or may not apply, depending upon that determination.

Section 24 only applies to claims based on acts or omissions that occurred before January 1, 2004. When such a claim arises, the transitional provisions provide, among other things, that if the limitation period did not expire before January 1, 2004, and a limitation period under the new Act would apply were the claim to

be based on an act or omission that occurred after January 1, 2004, then the claim will fall under the former Act if discovered before January 1, 2004, and under the new Act if discovered after January 1, 2004. Section 24(2) states that the section applies to claims based on acts or omissions that took place before January 1, 2004 and in respect of which no proceedings had been commenced prior to that date.

(ii) *Effect of transitional provisions*

Section 24(5) of the new Act states:

24. (5) If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:

1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
2. If the claim was discovered before January 1, 2004, the former limitation period applies.

Section 24(5) accordingly applies if two requirements are met: 1) that the former limitation period did not expire before January 1, 2004; and 2) that a limitation period under the new *Limitations Act* would be applicable to the claim if it were a claim based on an act or omission that took place after January 1, 2004.

In *Lo v. Lo*<sup>38</sup>, the Wife commenced her civil action for damages for assaultive behaviour after the parties settled their family court action in 2006. She subsequently brought a motion in family court in 2009 seeking to amend her pleadings to seek damages for assault. The alleged incidents of assault did not commence until January 2002. It was therefore impossible for the 4 year limitation period under the former Act to have expired before January 1, 2004. The first requirement of section 24(5) was therefore met. The second requirement of section 24(5) was also met because a claim for assault is covered by sections 4 and 10 of the new *Limitations Act*. Section 10 outlines the presumption relating to the discoverability of assault claims, as further explained below.

If both requirements of section 24(5) are met, the following two rules also apply to the claim: 1) if the claim was discovered before January 1, 2004 the former limitation period applies; and 2) if the claim was discovered after January 1, 2004 the new limitation period applies. Accordingly, and as explained by Justice Nelson in *Lo v. Lo*, the determination of which Act applies depends upon whether the claims were discovered before or after January 1, 2004. However, irrespective of which Act applies, section 10 of the new *Limitations Act* applies to the claims because of section 24(7) of the new *Limitations Act*. That section states:

24. (7) In the case of a claim based on an assault or sexual assault that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit, the following rules apply, even if the former limitation period expired before January 1, 2004:

1. If section 10 would apply were the claim based on an assault or sexual assault that took place on or after the January 1, 2004,

section 10 applies to the claim, with necessary modifications.

2. If no limitation period under this Act would apply were the claim based on a sexual assault that took place on or after January 1, 2004, there is no limitation period.

### (e) Rebuttable Presumption Under Section 10

In *Lo v. Lo*, Justice Nelson stated that section 10 of the new Act provided a rebuttable presumption in favour of the wife seeking damages for assault. As mentioned above, section 10 provides that the limitation period will not run while she is incapable of commencing the claim. His Honour found that as a result of the intimate relationship between the parties and the wife's dependence on the husband at the time of the alleged assault, the wife was presumed to have been incapable of starting the proceeding until the time that she did, unless the contrary is proven.

However, the wife's own evidence in *Lo v. Lo* rebutted that presumption as she acknowledged that she always intended to sue her husband for additional torts. The wife did not bring her claim for damages until after the parties settled their family court action. She incorrectly believed that she needed to bring a separate civil action for damages, and waited until she felt she could afford to do so. After she was informed that that was not the case, she brought a motion in family court in 2009 seeking to amend her pleadings to add additional tort claims. That did not, in Justice Nelson's view, stop the running of the limitation period.

In *Coutanche v. Napoleon Delicatessen*<sup>39</sup>, the Ontario Court of Appeal held that a party's lack of awareness regarding a limitation period does not delay its running. The Court cited with approval the following statement made in *Hill v. South Alberta Land Registration District*<sup>40</sup>: "Discoverability relates to facts, not law. Error or ignorance of the law, or uncertainty of the law, does not postpone any limitation period."

### (f) Discoverability

If the presumption under section 10 of the new Act is rebutted, the Court must then determine whether the litigant's claims were discovered before or after January 1, 2004, which will lead to a determination of which Act applies pursuant to the transitional section 24(5) of the new Act. In *Placzek v. Green*<sup>41</sup>, the Ontario Court of Appeal found that "discovered" refers to discovering the material facts on which a cause of action or claim is based for the purpose of triggering the limitation period. In *Central & Eastern Trust Co. v. Rafuse*<sup>42</sup>, the Supreme Court of Canada stated that its earlier decision in *Nielsen v. Kamloops (City)*<sup>43</sup> laid down a "general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence...".

<sup>39</sup> (2004), 72 O.R. (3d) 122 (Ont.C.A.).

<sup>40</sup> (1993), 135 A.R. 266, 33 W.A.C. 266, 8 Alta. L.R. (3d) 379.

<sup>41</sup> [2009] O.J. No. 326 (Ont.C.A.).

<sup>42</sup> [1986] 2 S.C.R. 147 (S.C.C.).

<sup>43</sup> [1984] 2 S.C.R. 2 (S.C.C.).



The Court accordingly found in *Lo v. Lo* that the wife's claims were discovered on the date the alleged incidents occurred. Since the alleged assaults occurred before January 1, 2004, the former Limitations Act applied and the limitation period was four years. That limitation period had therefore expired before the wife brought her motion on February 25, 2009 seeking an Order to amend her application.

### (g) Doctrine of "Special Circumstances"

The doctrine of "special circumstances" applies only to expired limitations periods under the former Limitations Act. If the Court determines that that Act applies, the Court must consider whether "special circumstances" exist that would allow a litigant to proceed with his or her tort claims notwithstanding an expired limitation period.

The Supreme Court of Canada in *M.(K.) v. M.(H.)* made clear that limitations periods should not be lightly interfered with by the Court. The Supreme Court stated that plaintiffs are expected to act diligently and "not sleep on their rights. . ." In *Deaville v. Boegeman*<sup>44</sup>, the Ontario Court of Appeal stated that it is in the public interest that there should be an end to litigation.

In *Frohlick v. Pinkerton Canada Ltd*<sup>45</sup>, the Ontario Court of Appeal held that where a limitation period has passed, there will be a presumption of prejudice that cannot be compensated for by costs or an adjournment. The moving party must demonstrate why, on the facts of the case, the court should not apply the normal rule that the presumption of prejudice flowing from the loss of the limitation period is determinative. This involves a consideration of special circumstances that would lead the court to conclude that the presumption of prejudice should not apply.

The concept of "special circumstances" will not be lightly applied. In *Ioannou v. Evans*<sup>46</sup>, the Ontario Superior Court described special circumstances as "the facts of the particular case that make it in the interests of justice to, in effect, displace the defendant's entitlement to rely upon a limitation period defence." The court in *Deaville* noted that the meaning of "special circumstances" is a matter of discretion, which is dependent upon the facts of each individual case. The Court in *Ioannou* stated that it "may consider the totality of the factual background to the proceedings. The conduct and circumstances of the parties are relevant considerations...."

In *Lo v. Lo*, Justice Nelson concluded that the wife was not permitted to amend her application to include the torts of assault and battery as the claims were barred due to the passage of the limitation period. The wife had unnecessarily delayed proceeding with her claims for two years. Her claims that special circumstances existed due to an error by the court were not accepted by the Court. Further, her argument that the absence of prejudice to the husband amounted to a special

<sup>44</sup> [1984] O.J. No.3403 (Ont.C.A.) [Deaville].

<sup>45</sup> (2008), 88 O.R. (3d) 401 (Ont.C.A.) [Frohlick].

<sup>46</sup> [2008] O.J. No.21 (Ont.S.C.J.) [Ioannou].

circumstance was not accepted.<sup>47</sup> The Court found that it would not be in the interests of justice to exercise its power to allow the proposed amendments. The Court stated that allowing amendments that are statute-barred is a power that should be used sparingly, and only in the most deserving of circumstances. Justice Nelson stated: "Allowing these amendments in this type of case might well encourage litigants to further draw out protracted family law proceedings by adding additional claims that could have been brought within the limitation period — but were not." Counsel must accordingly be cognizant of the limitation periods with respect to tort claims when framing their pleadings, and proceed expeditiously with the tort claims in family court.

## **(h) Additional Tort Claims in Family Law — Varying Degrees of Success**

### **(i) Damages for Fraudulent Misrepresentation**

In *Raju v. Kumar*<sup>48</sup>, the wife sued the husband for damages on the basis that she was induced to marry him by the fraudulent misrepresentation "that it was his intention to stay married to the plaintiff and that he was not using her as a means to come to Canada". The wife was a self-supporting, childless, 41 year old divorcee when she met the defendant, who was a Fijian citizen, 29 years old, and previously divorced with one daughter. The parties were introduced through family connections in April 1999. They spoke a few times by telephone before the wife flew to Fiji in June 1999 to meet the husband personally. According to the wife, the parties discussed their mutual desire to have children and the husband expressed to her a desire to live in Canada. The wife accordingly purchased engagement and wedding saris in Canada, which she took with her to Fiji anticipating her marriage. She also took Canadian immigration forms for the husband to obtain landed immigrant status so he could live with her in Canada.

When the wife arrived in Fiji, she met with the husband two or three times for a few hours. With the assurance of her father, the wife agreed to the marriage at a family meeting, as did the husband. Before the marriage, the husband told the wife about his divorce, that he had a daughter and that he had split up with his girlfriend a few months before. The parties were wed soon after they agreed to marry at the family meeting. The wife purchased the husband a wedding ring for \$300 and paid \$1,000 for the wedding reception including an album of photos.

The husband remained in Fiji while he waited for his immigration forms to be processed. His application for a visa was initially refused after his failed immigration interview. After the parties were married in January 2001, the wife received an anonymous telephone call from a woman in Fiji who told her that her husband was having an affair with 'Vijay'. The husband denied the affair, but later admitted at trial that he had lied to the wife and resumed his affair shortly after the wife returned to Canada from Fiji in January 2001. The husband's immigration appeal was

<sup>47</sup> The Ontario Court of Appeal in *Frohlick* at paragraph 26 held that facts indicating an absence of prejudice may constitute special circumstances justifying leave to amend pleadings.

<sup>48</sup> 2006 CarswellBC 666 (B.C. S.C.)

granted in July 2001 and he arrived in Canada on December 21, 2001. The wife paid his \$975 landing fee. She took him to her home and they resumed intimate relations. Those relations ceased after a few nights, and the husband hardly spoke to the wife. He refused to look for work and stayed home while the wife worked. The wife found a photo of Vijay in the husband's wallet. By January 2, 2002, the husband had left the parties' home, and failed to advise the wife of his whereabouts. The husband had flown to Edmonton where he resided with relatives and found a job. Within a few days of arriving in Edmonton, the husband contacted Vijay in Fiji and began to write love letters to her.

The wife spent over \$8,000 on long distance calls in an attempt to locate the husband. She was bilked of her jewellery by a psychic she engaged to help her find the husband. Eventually, the wife learned that the husband was in Edmonton. When she was finally able to reach him by telephone in September 2002, the husband told her that he did not want to speak to her and that she should not call again. The wife was devastated and was diagnosed with acute grief, anxiety, psoriasis of skin under stress, loss of ability to work due to anxiety and grief response. Vijay eventually rejected the Husband and sent the wife copies of the love letters he had sent to her. The love letters disclosed that his relationship with Vijay continued into 2002 and included a proposal of marriage. Vijay wrote a letter stating that she was in a relationship with the husband both before and after his marriage to the wife, and that he had married the wife for the sole purpose of entering Canada.

The four elements of the tort of deceit are: a false representation, knowledge of its falsity, an intent to deceive and reliance by the plaintiff with resulting damage. In *Raju*, the husband either knew that his representations that he had split up with Vijay prior to the marriage and that he would move to Canada to raise a family with the wife were false or he was reckless as to their truth or falsity. The Court found that there was no doubt that the husband intended that the wife would believe those representations so she would marry him. The wife relied on those representations when she agreed to marry the husband.

The Court found that the husband misrepresented his true feelings towards the wife and that the true motive behind marrying her was to emigrate to Canada. The Court found that the wife married the husband relying on his misrepresentations of true affection and a desire to build a family with her in Canada. Those misrepresentations entitled the wife to damages.

The husband's main misrepresentations were that he was not continuing an adulterous relationship with Vijay and that he still wanted to come to Canada to live with the wife. While one spouse owes the other no duty to disclose an adulterous relationship<sup>49</sup>, by actively denying his adultery and representing to the wife that he still wanted to be married to her and join her in Canada, after failing his immigration interview, the Court found that the husband must have intended that the wife would continue to support his immigration by paying for his appeal.

The Court held that the following expenses were recoverable by the wife — the expenses she incurred for the marriage as a result of the husband's misrepresentations, namely, the cost of the reception, photos and ring, in the amount of \$1,300, and the expenses related to the husband's immigration, his \$500 application,

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<sup>49</sup> *Fleming v. Fleming* (2001), 19 R.F.L. (5th) 274 (Ont. S.C.J.).

\$2,500 appeal and \$975 landing fee. As well, the Court awarded the wife the cost of the long distance calls from 1999 through 2001 when the husband arrived in Canada in the amount of \$6,601, for a total award of special damages of \$11,376.

Further, the Court awarded the wife \$10,000 in general damages for hurt feelings, humiliation, inconvenience and postponement of the opportunity to marry another man while she was still capable of bearing children. The Court discounted the latter aspect of the claim on the basis of the contingencies that she might not have found a suitable husband and might not have had a child for any number of reasons even had she married someone else. Punitive damages were not awarded. While the Court found the husband's conduct to be that of a cad, the Court was reluctant to "censure even the most egregious marital conduct, since to do so may promote vindictive and extortionate litigation, where such disputes are more appropriately resolved under the existing provincial and federal statutory framework."

*(ii) Damages for Sexually Transmitted Diseases — Expanding the Tort of Deceit*

There appear to be no Ontario cases where damages have been awarded on the ground that a party has sexually transmitted diseases to his or her spouse. In *K.(M.) v. M.(P)*<sup>50</sup>, the wife's claim for damages relating to allegations concerning sexually transmitted diseases was dismissed without reasons.<sup>51</sup> However, numerous international authorities recognize a duty of care on one spouse to disclose to the other any matter which will cause physical injury, such as one spouse having a sexually transmitted disease.<sup>52</sup> If that duty of care is breached, the torts of deceit or fraudulent misrepresentation may be available to litigants in Ontario who seek damages on the basis that his or her spouse sexually transmitted diseases. The tort of deceit also applies between spouses when a false representation by one induces the other spouse to take some commercial or contractual step resulting in damage.

*(iii) Tort of Conspiracy*

The courts have described the requirements for the tort of conspiracy as follows:

- (1) all of the parties to the conspiracy must be identified and their relationship to each other described;
- (2) agreements between the various defendants must be pleaded with all facts material to such agreements including the parties to each agreement, the date of the agreement and the object and purpose of each agreement.
- (3) The overt acts of each of the alleged conspirators in pursuance or furtherance of the conspiracy must be pleaded with clarity and precision,

<sup>50</sup> 1996 CarswellOnt 3353 (Ont.C.J. - Gen.Div.)

<sup>51</sup> In *Parry v. Parry*, 1997 CarswellOnt 196 (Ont.C.J., Gen.Div.), the Wife brought an action for damages on the grounds that the Husband had sexually transmitted diseases to her. However, the action had not yet been listed at the time of the decision.

<sup>52</sup> *Magill v. Magill*, [2006] HCA 51 (High Court of Australia); *Kathleen K. v. Robert B.*, 198 Cal Reprtr 273 (1984); *Beaulne v. Ricketts* (1979), 96 D.L.R. (3d) 550; *Barbara A. v. John G.*, 193 Cal Reprtr 422 (1983).

including the times and dates and such overt acts;

(4) The pleading must allege the injury and the damage occasioned to the plaintiff and special damage in the sense of a monetary loss which the plaintiff has sustained must be pleaded and particularized.<sup>53</sup>

In *Helmy v. Helmy*<sup>54</sup>, the husband won \$2.5 million dollars in a Lotto 649 draw approximately one month before the parties separated. The wife alleged that she had an interest in the lottery winnings on the basis of a resulting or constructive trust. She further alleged that the husband and his family members had conspired to keep his lottery win a secret from her to deprive her of her share. The wife brought an action for damages for civil conspiracy. Justice Seppi of the Ontario Superior Court found that the husband's brother had claimed the prize to conceal the winnings from the wife. The husband gifted the brother \$375,000 for his cooperation in concealing the matter from the wife. He advanced additional funds to his other siblings. In awarding damages for conspiracy, the Court held that the husband and his siblings had acted according to a common design. They had schemed with the purpose of depriving the wife of her lawful interest in the lottery winnings.

Justice Seppi found that the quantum of damages owed to the wife was the measure of the loss which she suffered directly as a result of her liability, which loss was assessed to be one-half of the total winnings, or \$1.25 million, less the additional amounts determined to be owing to her by the husband. The Court found that there was no evidence of intangible consequent losses sufficient to entitle the wife to aggravated damages. However, the Court awarded the wife punitive damages of \$50,000 in addition to the damages for the tort of conspiracy. In awarding the punitive damages, Justice Seppi stated that the conduct of the defendants was calculated and deliberate. They had conspired to deprive the plaintiff of her just and rightful share of her husband's net family property, and as such, the conduct was malicious in nature and deserving of punishment.

#### *(iv) Damages for Malicious Prosecution*

Litigants have attempted to seek damages for malicious prosecution and false imprisonment in family court where one party alleges that the opposing party set in motion the criminal charges made against him or her, resulting in a malicious prosecution. These claims are often unsuccessful as it must be proven that the criminal proceedings were commenced without reasonable cause. The decision whether or not to commence those criminal proceedings is that of the Crown after an investigation undertaken by the police. A plaintiff must therefore prove that his or her spouse used the Crown as agent to effect the prosecution where the Crown would not otherwise have decided to charge the plaintiff. The legal test is a high one in the circumstances.

The four elements required to prove an action for malicious prosecution are as

<sup>53</sup> *K. (H.V.) v. Children's Aid Society of Haldimand-Norfolk*, 2003 CarswellOnt 1487 (S.C.J.)

<sup>54</sup> 2000 CarswellOnt 4480 (Ont. S.C.J.).

follows (all four elements must be met)<sup>55</sup>:

1. The defendant must have initiated the proceedings: the defendant must have set in motion the proceedings; the test is whether “the informant had done all he could do to launch criminal proceedings against the accused.”
2. The proceedings must have terminated in favour of the plaintiff: it is the result, and not why the result was reached, that is critical. Thus, if proceedings terminated in the plaintiff’s favour because of a technical defect or procedural irregularity, rather than on the substantive merits, this element has still been satisfied.
3. The plaintiff must show that the proceedings were instituted without reasonable cause: this includes both a subjective and objective element. The defendant must have had “an honest or actual belief in the accused’s guilt, and reasonable and probable grounds upon which to base his belief”. This element does not require, however, that the defendant believe that the accused would necessarily be found guilty.<sup>56</sup>
4. The defendant was actuated by malice: malice has been defined as “some predominate wish or motive other than vindication of the law; some other motive than a desire to bring to justice a person the defendant honestly believes to be guilty”<sup>57</sup>.

In *Okatan v. Yagiz*,<sup>58</sup> the husband sought damages for malicious prosecution as a result of his wife’s allegations of assault. The wife had given a statement to the police about the husband’s alleged assault, threat, and possession of a firearm, resulting in criminal charges made against him. He was later found not guilty of the charges. While the first two elements of the above test were met, Justice Mesbur was not persuaded that the proceedings were instituted without reasonable cause. Given the testimony of the attending police officer, her Honour was persuaded that the wife had an honest or actual belief in the husband’s guilt, and reasonable and probable grounds upon which to base her belief. The officer herself was of the view that there were reasonable and probable grounds to arrest the husband. Further, the Court was not persuaded that the wife’s primary motive was malice. Justice Mesbur accepted that the wife was of the firm belief that her husband was guilty and should be brought to justice.

Since the husband was not able to prove two of the necessary elements of malicious prosecution, he could not succeed in his claim. While the Court did not doubt that he suffered damages as a result of his ordeal of being arrested, charged and tried (his psychologist’s report attested to that fact), his claim was dismissed in the absence of all four elements mentioned above.

In *Ruel v. Ruel*,<sup>59</sup> the wife sought damages based on her claims against the husband for abuse of process and malicious prosecution, the latter based on com-

<sup>55</sup> *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609 (S.C.C.); *Huisman v. Black*, 2000 CarswellOnt 3137 (Ont.S.C.J.)

<sup>56</sup> 2004 CarswellOnt 9908 (Ont.S.C.J.).

<sup>57</sup> *Carpenter v. MacDonald* (1979), 19 C.R. (3d) 400 (Ont. C.A.).

<sup>58</sup> 2004 CarswellOnt 9908 (Ont. S.C.J.).

<sup>59</sup> 2010 CarswellBC 1982 (B.C. S.C.).

plaints the husband had filed with the RCMP concerning the wife's alleged criminal actions. The wife sought aggravated damages as a result of the mental distress suffered as a result of being forced to defend both criminal and civil prosecutions, together with punitive and exemplary damages, in the amount of \$1,000,000. The wife asserted that the husband's allegations were ill-founded and unsubstantiated. The Court reviewed her allegations of abuse of process and malicious prosecution and concluded that her claims for damages were not supportable in the context of the family litigation, and her claims were dismissed. The Court stated the following:

The anger and undoubted pain felt by the parties in this case is significant as I surmise that both believe they have been wronged by the actions of the other and both have sought ways to gain a measure of revenge as a result. Although this case offers an extreme example of the feelings occasionally raised during a matrimonial breakup, I am not satisfied that the evidence has established Ms. Ruel's claims of abuse of process and malicious prosecution such as would lead to the damages sought by Ms. Ruel. I dismiss the plaintiff's claim in this respect.

In *Cannady v. Desmond*,<sup>60</sup> the husband brought an action against his former common law spouse for damages for malicious prosecution. The wife had late reported assaults to the police during the parties' relationship. Most often the assaults and threats were not reported. The husband alleged that the wife falsely caused him to be charged with assaulting her and uttering death threats. Those charges were dismissed following a criminal trial because the court was not satisfied of the husband's guilt beyond a reasonable doubt as a result of the wife's delay in reporting the incidents to the police. The husband claimed that the criminal trial was embarrassing and humiliating to him, and he incurred legal fees of \$4,000 in defence of the criminal charges. He also claimed to have been slandered when his wife's counsel made in-court statements that she, his client, had been assaulted.

The husband's claim for damages was dismissed as he had failed to prove the necessary four elements of a claim for damages for malicious prosecution. The Court emphasized that it was the police who, on the basis of information from the wife, chose which events would be proceeded with and charged the husband. The wife had made her complaint, the police investigated, and the decision to charge was that of the Crown. The third element was accordingly not met. Further, the Court did not accept that the wife was motivated by malice in making her complaint. The Court accepted that her fear was grounded upon her past knowledge of the husband's propensity to extract revenge. The Court was not referred to any circumstance which would justify a finding that an in-court reference by the wife's counsel alleging an assault or threat by the husband would be considered slanderous. Accordingly, the husband's claim for damages for malicious prosecution, defamation and legal fees incurred in defence of the criminal charges was dismissed.

In *Coscarella v. Coscarella*,<sup>61</sup> the wife sought damages from the husband for malicious prosecution because he laid a private information charging her with assault. He subsequently withdrew the charge after the Crown declined to prosecute

<sup>60</sup> 1999 CarswellBC 886 (B.C. S.C.).

<sup>61</sup> 1999 CarswellOnt 4606 (Ont.S.C.J.).

the charge. No evidence was called as to why the Crown did not wish to prosecute the charge. Justice Lack of the Ontario Superior Court found that it was unlikely that a conviction of the wife would have resulted. However, the Court was unable to conclude that the husband did not have reasonable and probable grounds for laying the information and consequently, the claim for malicious prosecution was dismissed.

In *Ebrahim v. Ebrahim*,<sup>62</sup> the husband was found in contempt of an access Order. On appeal, that finding was set aside. The husband subsequently brought an action against the wife claiming that the contempt proceedings constituted an abuse of process and malicious prosecution. The damages claimed included punitive damages. In a claim for abuse of process, the plaintiff must prove that 1) the original process was initiated for an improper and collateral purpose; and 2) that there existed some overt act or threat, separate and distinct from the proceedings themselves but related to the improper purpose.<sup>63</sup> The husband's action was dismissed as he could not demonstrate a lack of reasonable and probable cause for the contempt application in view of the findings of the lower court. His claim of an abuse of process could not succeed in the absence of a collateral or improper purpose on the part of the wife.

In *Lee v. Lee*,<sup>64</sup> the husband attempted to bring a tort action against the wife shortly before the matrimonial litigation formally ended. The wife had signed a Form 1 under the Mental Health Act authorizing the police to apprehend the husband for the purpose of subjecting him to an involuntary psychiatric assessment. The husband was publicly apprehended at his work site, handcuffed, placed in a police vehicle and taken to the hospital for assessment. The husband sought, among other things, damages for intentional infliction of mental suffering, interference with economic interests, injury to business reputation, false imprisonment, injurious falsehood, defamation, malicious prosecution, abuse of process, and intentional or negligent infliction of harm.

The parties' Divorce Order became final on October 22, 2009. The husband commenced the tort action on October 29, 2009. The wife brought a motion for summary judgment asserting that the husband's tort actions ought to have been dealt with as part of the matrimonial litigation that was now over. Justice Perell agreed. His Honour stated that the wife may or may not have perpetuated the alleged torts, but that the husband knew that he had been wronged, and he ought to have raised any tort claims against his then wife contemporaneously with the matrimonial litigation. His Honour referred to the decision of *Huisman v Black*, supra, where Justice Sheppard dismissed the claims for defamation and injurious falsehood because the husband knew about the causes of action before he signed the minutes of settlement and ought to have advanced those claims as part of the matrimonial proceedings.

In contrast, the Court in *Wong v. Wong*<sup>65</sup> dismissed the husband's motion to dismiss the wife's tort action (brought after the family court action settled) as an

<sup>62</sup> 2002 CarswellBC 694 (B.C. S.C.).

<sup>63</sup> *Dooley v. C.N. Weber Ltd*, 1994 CarswellOnt 999 (Ont. Gen. Div.).

<sup>64</sup> 2010 CarswellOnt 6080 (Ont. S.C.J.)

<sup>65</sup> 2006 CarswellOnt 8823 (Ont.S.C.J.)



abuse of process notwithstanding the conclusion reached by Justice Sheppard in *Huismans v. Black*. The wife's tort action claimed general, special, aggravated and punitive damages against Dr. Wong for assault and battery, conspiracy, defamation, intimidation, deceit, malicious prosecution, and the intentional infliction of mental suffering in the amount of two million dollars. The parties agreed that the settlement reached in family court did not include the resolution of the outstanding tort actions. The Court found that it would be unfair to the wife to have her tort actions dismissed as an abuse of process at the insistence of the husband in the circumstances.

Damages for malicious prosecution have been awarded in two situations where the defendant did not defend the civil action, and where false allegations of sexual assault resulted in the plaintiff suffering financial and emotional loss. In *Karpati v. Sherman*<sup>66</sup>, the plaintiff brought an action for damages for malicious prosecution in the amount of \$40,000 against his 50 year old neighbour and her 18 year old daughter. Their charges of sexual assault against him were dismissed when they failed to appear at the criminal trial. The defendant neighbours also failed to defend the civil action and were noted in default. The plaintiff gave evidence of the devastating effect the entire experience had on him, having lost interest in his personal and social life as well as having lost interest in sex. His sleep patterns were severely disturbed and his efficiency at work was significantly affected. The Court placed high significance on the fact that the neighbours did not attend at the criminal trial, and failed to defend the civil action.

The Court in *Karpati v. Sherman* accordingly awarded the plaintiff special damages in the amount of \$7,938.18 and general damages of \$15,000. In awarding general damages, the Court stated that 'no amount of general damages would adequately compensate for the horrific experience endured by the plaintiff.' The Court awarded a further \$10,000 in punitive damages for total damages of \$32,739.01, plus costs of \$8,310.90. In awarding punitive damages, the Court found the 'egregious conduct of the defendants to be outrageous' and found that the conduct offended 'the court's sense of decency, calling for a punitive response from the court in a very meaningful way. A message must be sent to the defendants and to the public at large that the courts will not tolerate this kind of abuse of process.'

In *Starr v. Starr*,<sup>67</sup> the husband obtained an Ontario judgment against the wife for malicious prosecution. He had alleged that the wife's false accusations that he had sexually assaulted his daughters had led to unfounded prosecutions and an unnecessary criminal injuries compensation claim. The wife did not attend the trial. Her defence and counter-claim were struck. The judgment followed two days of evidence. Justice Whalen found that the husband had not made out his claim in relation to the wife's role in the prosecution of the charges that were laid, but he had made out his claim in relation to the wife's later claim for criminal injuries compensation. He made findings against her that she had demonstrated malice, disregarded court orders for access and deliberately alienated the children from their father. He awarded the Husband damages of \$50,000, costs of \$37,415 and pre and post judgment interest.

<sup>66</sup> 1997 Carswell 3649 (Ont.C.J. - Gen.Div.).

<sup>67</sup> 2008 CarswellBC 2349 (B.C. S.C.).

### (i) Tort of Abuse of Process/misfeasance in a Public Office

Several cases involve civil actions brought by parents against the Children's Aid Society seeking damages for, among other things, abuse of process/misfeasance of a public office, malicious prosecution, defamation and conspiracy.<sup>68</sup> Those actions are often met with motions to strike the statement of claim for disclosing no cause of action. In an action for defamation, the pleading must set out with particularity: (a) the alleged defamation, and (b) when, where, how, by whom and to whom it was made.<sup>69</sup>

In *Odhavij Estate v. Woodhouse*<sup>70</sup>, the Supreme Court determined that the tort of misfeasance in a public office consists of two necessary elements: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. This latter element requires "a conscious disregard for the interests of those who will be affected by the misconduct in question". Accordingly, the awareness of harm must be subjective and can be met by, at least, subjective recklessness or wilful blindness as to the possibility of harm. However, the Supreme Court held that it was sufficient for the plaintiffs to allege as a fact that the defendants knew that the alleged conduct would cause the plaintiffs to suffer harm. The simple allegation of knowledge as a fact, without more, should be enough to meet this element of the offence.

In *K. (H.V.) v. Children's Aid Society of Haldimand-Norfolk*<sup>71</sup>, the Children's Aid Society apprehended children from their birth parents' home and placed them with 'V family' who were approved foster parents. The Society removed the children 17 months later on grounds of physical abuse and neglect and placed them with 'C family'. Both families applied for custody. The trial judge ordered that the children be placed with V family and awarded the family costs. The V family subsequently brought an action against the Society alleging 15 different causes of action against the Society, including an abuse of process, conspiracy, defamation and malicious prosecution. The Society countered with a motion to strike the statement of claim for disclosing no reasonable cause of action.

Justice Himel of the Ontario Superior Court first found that the claim for damages against the Society was founded on the causes of action alleged and was not a re-litigation of issues determined in the prior proceeding as alleged by the Society. The Court found that it was open to the Court to find that decisions of the Directors of the Society were motivated by bad faith such that they would not be protected by statutory protection against liability. The Society attempted to rely on a body of law which protects a director from personal liability for acts conducted on behalf of the corporation provided that the director acts within the scope of duty. However, sec-

<sup>68</sup> See *C.(D.) v. Children's Aid Society of Cape Breton Victoria*, 2008 CarswellNS 388 (N.S. S.C.); *Ashford v. Children's Aid Society of Cape Breton-Victoria*, 2008 CarswellNS 106 (N.S. S.C.).

<sup>69</sup> *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Ont. Gen. Div.), at 349; *Bankten Communication Services Ltd. v. General Motors of Canada Ltd.*, [1996] O.J. No. 2931 (Ont. Gen. Div.) at para 5.

<sup>70</sup> [2003] 3 S.C.R. 263 (S.C.C.).

<sup>71</sup> Above at 60.

tion 15(6) of the *Child and Family Services Act* provides as follows:

No action shall be instituted against an officer or an employee of the Society for an act done in good faith in the execution or intended execution of the person's duty or for an alleged neglect or default in the execution in good faith of the person's duty.

In light of that statutory provision, it was open to a court to find that an officer or employee of the Society, who acted in bad faith in the execution of the person's duty, is responsible for those actions and will not be protected by the corporate veil of the Society. The Court held that the claim for damages for malicious prosecution and defamation were to stand on the basis that the pleadings provided the minimum level of material fact required. However, the claims for abuse of process and conspiracy were struck as the family failed to plead the necessary ingredients for the cause of action. With respect to conspiracy, the statement of claim was deficient as it did not plead the agreement alleged between the defendants, when it was made and the objects and purposes of the agreement. With respect to abuse of process, the Court found that the earlier proceedings were a legitimate process for the protection of the children.

In *B. (D.) v. Children's Aid Society of Durham (Region)*<sup>72</sup>, the father brought an action against the Society social worker and the Society alleging negligence. He claimed damages for all expenses he had incurred as a result of the investigation and the child-protection proceedings. The Society had obtained an interim protection order limiting his access to his two adopted daughters to one-hour supervised visits at the Society's offices as a result of allegations of sexual assault. At the full hearing, Justice Dunn dismissed the child protection application and cleared the father of all allegations of sexual abuse. The father's claim included \$142,520.91 for his prior legal fees less \$60,000 previously recovered. The trial judge reviewed the manner in which the social worker carried out her investigation and determined that her conduct fell well below the standard of care expected of a professional social worker. He found bias and lack of good faith and described the Society's conduct as utterly unconscionable and indefensible.

The trial judge awarded the father general damages in the amount of \$35,000, punitive damages in the amount of \$10,000, and out of pocket expenses in the amount of \$72,219.60. The out of pocket expenses included \$50,000 on account of the father's prior legal fees. On appeal, the Court of Appeal held that the trial judge's findings were supported by the evidence and there was no basis for disturbing the finding of liability. However, it was not established that the settlement of the father's costs should be revisited or that the Society should be held liable for the portion of the legal costs that were not attributable to the child protection proceeding. The award of \$50,000 for legal fees was accordingly struck, thereby reducing the total out of pocket expenses awarded to the father to \$25,219.60.

## 2. DAMAGES FOR BREACH OF FIDUCIARY DUTY — FAMILY LAW'S RELUCTANT EMBRACE

The relationship between husband and wife can, in certain circumstances, give

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<sup>72</sup> 1996 CarswellOnt 2351 (Ont.C.A.).

rise to damages for breach of a fiduciary duty in the family law context. To succeed in a claim for breach of fiduciary duty, the applicant must establish a fiduciary relationship with the respondent and a resulting duty which he or she breached. The applicant must therefore first establish the existence of a fiduciary relationship.

### (a) The Fiduciary Relationship

The Supreme Court of Canada dealt with the nature of fiduciary relationships in *Norberg v. Wynrib*<sup>73</sup>. In *Norberg*, Justice McLachlin (as she then was) relied on the indicia of a fiduciary relationship set out by Justice Wilson in her dissenting judgment in *Frame v. Smith*<sup>74</sup> which was approved in *International Corona Resources Ltd. v. LAC Minerals Ltd.*<sup>75</sup>. In *Frame*, Justice Wilson articulated the indicia required to establish a fiduciary relationship as follows:

Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:

- 1) The fiduciary has scope for the exercise of some discretion or power.
- 2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- 3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>76</sup>

In *Norberg*, Justice McLachlin stated that the fiduciary must "look after" the interest of the beneficiary. In *M. (K.) v. M. (H.)*<sup>77</sup>, Justice La Forest stated that he would "go further and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary". The Supreme Court adopted Dickson J.'s words (as he then was) in *Guerin v. R.*<sup>78</sup> that it is the nature of the relationship, not the specific category of actor involved that gives rise to the duty.

In *Hodgkinson v. Simms*<sup>79</sup>, the Supreme Court of Canada held that there are two types of truly fiduciary relationships. The first type embraces relationships having as their essence discretion, influence over interests, and an inherent vulnerability. For this type, there is a rebuttable presumption that one party has a duty to act in the best interests of the other. The second type occurs when fiduciary obligations arise as a matter of fact from the circumstances. For those, there must be

<sup>73</sup> 1992 CarswellBC 907, 1992 CarswellBC 155, 92 D.L.R. (4th) 449 (S.C.C.); additional reasons at 1992 CarswellBC 338, 1992 CarswellBC 908 (S.C.C.) [*Norberg*].

<sup>74</sup> *Frame*, above.

<sup>75</sup> 1989 CarswellOnt 126, 1989 CarswellOnt 965, 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97 (S.C.C.) at 243 [C.P.R.] [*Lac Minerals*].

<sup>76</sup> *Frame v. Smith* above at 99 per Wilson J., approved by La Forest J. in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, 1989 CarswellOnt 126, 1989 CarswellOnt 965, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.).

<sup>77</sup> 1992 CarswellOnt 998, 1992 CarswellOnt 841, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 (S.C.C.) at 324 [D.L.R.].

<sup>78</sup> 1984 CarswellNat 693, 1984 CarswellNat 813, [1984] 6 W.W.R. 481 (S.C.C.).

<sup>79</sup> 1994 CarswellBC 438, 1994 CarswellBC 1245 (S.C.C.).

evidence of a mutual understanding that one party has relinquished his or her own self-interest and agreed to act solely on behalf of the other party. For example, in cases where a plaintiff shows loss arising from the defendant's non-disclosure, the defendant has the onus to prove that the plaintiff would have suffered the same loss regardless of the breach. Mere speculation by a defendant is not enough.

Accordingly, the essence of a fiduciary relationship is that one party exercises power on behalf of another and either expressly or impliedly pledges to act in the other's best interest. The ability to exercise that power in a damaging way is what makes the imposition of a fiduciary duty necessary. However, a situation must first exist where the fiduciary looks after the interests of the beneficiary in order to establish a relationship.<sup>80</sup>

### **(b) Imposing a Fiduciary Duty**

In *Gregoric v. Gregoric*<sup>81</sup>, the court expanded the fiduciary duty as between husband and wife. Justice Granger was satisfied that there was a common understanding that the husband held property in his name by way of resulting trust for himself and his wife. As a result of this trust, the husband became a trustee of the wife's interest. As a trustee, the husband owed a fiduciary duty to his wife. The relationship between the parties indicated that the husband was the dominant party in the relationship and that the wife placed her trust in him to make both business decisions and deal with the financial management of the family unit. Accordingly, as a result of the fiduciary relationship, the husband was required to act in the wife's interest, selflessly with undivided loyalty. The Court was satisfied that this obligation would have required that financial disclosure be made to the wife. While Justice Granger did not go as far as to hold that spouses are always under a fiduciary duty toward each other, he was satisfied that, in one-sided relationships, where one spouse holds knowledge and power, the law should strive to prevent the abuse of that power.

In the twenty years since *Gregoric*, courts have been reluctant to expressly find a fiduciary obligation existing between spouses where there is a family law statutory scheme in place. The courts have been reluctant to step outside statutory schemes and award significant awards to resolve all issues arising from relationship breakdown. In *Frame v. Smith, supra*, Justice La Forest, in specifically rejecting an action for breach of fiduciary duty commenced by a father against his former spouse for damages arising out of her interference with access to his children, stated that the legislature had intended to devise a comprehensive scheme for dealing with access issues. Had civil action been contemplated as an additional remedy, the legislature would have provided for this, and, "Any other course would allow the courts to choose, in no predictable fashion, to grant a civil remedy for a statutory breach whenever they saw fit".

The Supreme Court of Canada accordingly refused to allow a litigant to sue

<sup>80</sup> *Louie v. Lastman*, 2001 CarswellOnt 1736 (Ont. S.C.J.); affirmed 2002 CarswellOnt 2975 (Ont. C.A.); leave to appeal refused 2003 CarswellOnt 3105, 2003 CarswellOnt 3106 (S.C.C.).

<sup>81</sup> *Gregoric v. Gregoric*, 1990 CarswellOnt 296 (Ont. Gen. Div.); additional reasons at 1991 CarswellOnt 3151 (Ont. Gen. Div.) [*Gregoric*].

for damages for breach of a family law statutory obligation as the statutory scheme provided the entire remedy, which is not the case when dealing with damages for pain and suffering. There is a clear gap in the statutory remedy available for litigants seeking damages as a result of emotional and financial abuse under the *Family Law Act*. Litigants have resorted to seeking damages in tort as a result.

The annotation by the late Professor McLeod following the Supreme Court of Canada's decision of *B. (G.) c. G. (L.)*<sup>82</sup> suggests that the court may be implicitly imposing a fiduciary-like relationship between spouses upon marital breakdown. McLeod stated the following:

In the past, courts have held that marriage does not put spouses into a fiduciary relationship or a relationship requiring them to bargain fairly upon marriage breakdown: *Murray v. Murray* (1994), 10 R.F.L. (4th) 60, 157 A.R. 224, 77 W.A.C. 224, 119 D.L.R. (4th) 46 (C.A.), but see *Underwood v. Underwood* (1994), 3 R.F.L. (4th) 457, 113 D.L.R. (4th) 571 (Ont. Gen. Div.); varied (1995), 11 R.F.L. (4th) 361 (Ont. Div. Ct.). However, L'Heureux-Dubé's reasons [in *B. (G.) (G.) v. G. (L.)*] come close to imposing such an obligation without referring to the cases on point. The thrust of her reasons is that a person should not be allowed to take advantage of his or her spouse's dependence or inexperience to exact an unfair bargain.

In *Ignagni v. Ignagni*,<sup>83</sup> Justice Conant held that the Court should scrutinize transactions between husbands and wives in a manner otherwise than in a normal contractual setting. Irrespective of whether or not a fiduciary obligation exists between a husband and a wife in any particular commercial setting, the Court should create situations which suggest strongly that husbands and wives should treat each other in a commercial transaction with fairness, complete financial disclosure and so as not to prejudice the other.

In *Verdina v. Verdina*,<sup>84</sup> the Court dealt with the wife's allegation that the husband owed a fiduciary duty to her in respect of their participation in purchasing a Country Style Donuts franchise then owned by the husband. The Court found that the third aspect of the test in *Lac Minerals*, that of dependency or vulnerability, was indispensable, and it was on this aspect that the Court in *Verdina* found that there was a fiduciary obligation on the part of the husband to the wife in respect of the business transaction. The Court awarded the wife damages of \$45,000 as a result of the manner in which she was treated in the transaction. She was economically vulnerable to her husband in the transaction.

In *Parmigiani v. Parmigiani*,<sup>85</sup> the husband spent approximately \$165,000 in the months leading up to the parties' separation, resulting in the parties' only debt existing on valuation date. He testified that he lost \$145,000 while gambling after the marriage breakdown. He stopped gambling after reaching the limit on joint lines of credit and credit cards. He acknowledged using a female friend to impersonate his wife in an attempt to obtain another credit card for use at the casino.

<sup>82</sup> 1995 CarswellQue 23, 1995 CarswellQue 120 (S.C.C.).

<sup>83</sup> 1990 CarswellOnt 1312 (Ont. Gen. Div.).

<sup>84</sup> 1992 CarswellOnt 1677 (Ont. Gen. Div.).

<sup>85</sup> 2006 CarswellOnt 1894 (Ont. S.C.J.); additional reasons at 2006 CarswellOnt 3209 (Ont. S.C.J.).

Justice Gordon of the Ontario Superior Court found that the husband's actions in handling the large amounts of money mentioned above were deliberate and pre-meditated. The husband's actions were intentional, reckless, and in bad faith. While not expressly finding that the husband owed a fiduciary duty to the wife, Justice Gordon stated in *Parmigiani* that each party was a trustee for the other when handling funds in light of the jointly held assets and debts. By his conduct, the husband violated that trust and an unequal division was accordingly ordered.

In *Klassen v. Klassen*<sup>86</sup> the British Columbia Court of Appeal held that a fiduciary relationship existed between the husband and the wife respecting shares which were trust property. The Court found that the husband had breached that fiduciary relationship by underpaying the wife pursuant to a 1994 agreement and not disclosing the true value of the shares. The husband stood in a fiduciary position to the wife in any dealings in respect of the shares. The husband, as fiduciary, had a duty to make full disclosure to the wife in negotiating the share purchase agreement. The husband had taken advantage of the wife's lack of knowledge to extract a grossly unfair agreement. The agreement was voidable as an unconscionable transaction. As a fiduciary, the husband was in breach of his duty to make full disclosure, which also made the contract voidable for non-disclosure.

### (c) Cases Finding No Fiduciary Duty Imposed Between Spouses

In *Rosen v. Rosen*<sup>87</sup>, the Ontario Court of Appeal failed to follow *Gregoric* and failed to find that the Husband owed a fiduciary duty to the Wife. The Court of Appeal distinguished *Gregoric* as a case involving control of a business in which his wife had an interest. In the Court's view, it was only for that reason that a fiduciary duty was held to arise. In *Luton v. Luton*<sup>88</sup>, the Ontario Superior Court distinguished *Gregoric* and found no specific obligation between married people which results in the same fiduciary relationship as that of a parent and child or a trustee.

In *Van Bork v. Van Bork*,<sup>89</sup> the Court refused to impose a fiduciary obligation on the husband towards the wife for his adverse behaviour during the litigation process. In the period between 1984 and the conclusion of the trial, there had been protracted and vigorous litigation. There were ten orders made by masters, fifteen by judges, various attendances before registrars to settle orders, three orders at the appellate level, and four motions brought by the husband which were adjourned to trial. The husband even brought a contempt motion against the wife's counsel personally, which was dismissed. Notwithstanding the husband's egregious litigation conduct, the Court awarded no damages for breach of fiduciary duty. Justice Mac-

<sup>86</sup> 2001 CarswellBC 1378 (B.C. C.A.).

<sup>87</sup> 1994 CarswellOnt 390 (Ont. C.A.); leave to appeal refused 10 R.F.L. (4th) 121 (note) (S.C.C.).

<sup>88</sup> 1995 CarswellOnt 1978 (Ont. Gen. Div.); affirmed 1996 CarswellOnt 1563 (Ont. C.A.).

<sup>89</sup> 1993 CarswellOnt 4375 (Ont. Gen. Div.); additional reasons at 1994 CarswellOnt 2532 (Ont. Gen. Div.); additional reasons at 1994 CarswellOnt 559 (Ont. Gen. Div.); varied 1997 CarswellOnt 4479 (Ont. C.A.); additional reasons at 1994 CarswellOnt 3196 (Ont. Gen. Div.).

Donald made clear that her finding was not to be seen as encouraging future litigants to conduct themselves as the husband did. The Court held that the wife could be compensated through costs and prejudgment interest. By holding that no punitive damages should be awarded, the Court did not wish to suggest that the husband's behaviour was in any way tolerable.

In *Murray v. Murray*<sup>90</sup>, the Alberta Court of Appeal refused to impose a fiduciary duty between the spouses. The Court highlighted Professor McLeod's concerns regarding imposing a fiduciary obligation in his annotation to *Gregoric*: "The problem with imposing a fiduciary relationship is that it fundamentally alters interspousal bargaining. By imposing a fiduciary duty, a party must not only bargain in good faith, it must also look out for the other's interests." The Court of Appeal further stated that it was not realistic to expect both spouses to scrupulously ensure the other's interests in all cases — voluntarily and notwithstanding parity of bargaining power and the fairness of their eventual agreement.

In *Leopold v. Leopold*,<sup>91</sup> Justice Wilson of the Ontario Superior Court concluded that expanding the role of fiduciary to include all separating couples would serve to only "muddy the waters". The Court referred to *Frame v. Smith*, in stating that there is no advantage to opening the arsenal of tort law to separating couples. Justice Wilson suggested that the unique and important aspects of a matrimonial relationship may be recognized by imposing the standard of good faith upon separating couples negotiating their financial arrangements to ensure that there is an appropriate judicial supervisory role for domestic contracts.

In *Montreuil v. Montreuil*,<sup>92</sup> the Court refused to impose on the husband a fiduciary duty to the wife. The husband had the power to operate a Marina without any input from the wife. Her entitlement to a division of marital property, spousal support and child support upon marriage breakdown could be affected through his exercise of that discretion or power. However, the wife was not peculiarly vulnerable to the husband or at his mercy. She worked full-time outside the home and was her spouse's equal in most senses within the relationship. The most that could be said is that she expected him to act in good faith in his dealings with her. A fiduciary duty was not imposed.

#### (d) Fiduciary Duty as Between Parent & Child

Justice La Forest considered the fiduciary nature of the parent child relationship in *M. (K.) v. M. (H.)*, which involved an action by a daughter against her father for damages for incest. His Honour stated that it was "*intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship*"<sup>93</sup>. The essence of the fiduciary breach is thus the trust relationship's damage. Cases dealing with the sexual abuse of a child by a "father figure" are accord-

<sup>90</sup> 1994 CarswellAlta 361 (Alta. C.A.).

<sup>91</sup> 2000 CarswellOnt 4707 (Ont. S.C.J.).

<sup>92</sup> 1999 CarswellOnt 3853 (Ont. S.C.J.); additional reasons at 2000 CarswellOnt 3566 (Ont. S.C.J.); affirmed 2001 CarswellOnt 3464 (Ont. C.A.).

<sup>93</sup> *M. (K.) v. M. (H.)*, above at 58.



ingly based on breach of fiduciary duty.<sup>94</sup>

In *Louie v. Lastman*<sup>95</sup>, Justice Benotto of the Ontario Superior Court dismissed the plaintiffs' claims for breach of fiduciary duty against their father for ignoring them emotionally and financially for 30 years as not disclosing a cause of action. The plaintiffs' damages flowed from the alleged breach of a statutory support obligation. The Court found no fiduciary relationship existed as the defendant had never acted in a position of trust or control over the plaintiffs' lives. Further, the Court concluded that the legislative schemes in place for child support and for the resolution of family disputes would be compromised if damages were awarded in the circumstances of this case.

In *Cho v. Cho*<sup>96</sup>, two adult children commenced an action against their mother for breach of fiduciary duty, aggravated damages, and punitive damages as a result of alleged child abuse during their childhood, more than six years after the abuse ended. The Court found that they were victims of horrific emotional and physical abuse at her hands. They sought damages for breach of fiduciary duty, aggravated damages and punitive damages. They proved the abuse in fact and it amounted to a breach of duty in law. The children suffered from, among other things, post-traumatic anxiety, depression, insomnia, nightmares, headaches and difficulties concentrating. The children testified that the beatings at the hands of their mother were a virtual daily occurrence from as early as they could remember. The abuse included choking, eye gouging, slamming heads into walls, holding heads under water, forcing J-cloths down throats until they wretched, scalding, finger twisting, and near drowning. The Court concluded that the mother's treatment of the children was precisely the kind of wanton, random and vicious cruelty that could be expected to produce the psychological damage which the experts diagnosed both children as suffering from.

The Court found that the mother owed a fiduciary duty to her children and that her assaults upon them constituted breaches of that fiduciary duty. The cause of action was framed in equity rather than tort as breach of fiduciary duty to avoid the two year limitation period associated with tort claims. There is no fixed limitation in respect of actions for breach of fiduciary duty, whether explicitly or by analogy.<sup>97</sup> Since the action for breach of fiduciary duty was based in equity, it was subject to the defence of laches. However, that defence was not established as the children's delay in commencing the action was not excessive and did not constitute acquiescence. The Court stated that the result would have been the same if the plaintiffs had sued their mother in tort, rather than for breach of fiduciary duty. The Children were accordingly entitled to damages in tort. The decision may be instructive with respect to extending mental suffering damages to cases involving parental alienation.

In their statement of claim, the plaintiffs claimed compensation for breach of fiduciary duty in the amount of \$500,000 each. However, the Court went further

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<sup>94</sup> *M. (K.) v. M. (H.)*, above at 67.

<sup>95</sup> 2001 CarswellOnt 1736 (Ont. S.C.J.); affirmed 2002 CarswellOnt 2975 (Ont. C.A.); leave to appeal refused 2003 CarswellOnt 3105, 2003 CarswellOnt 3106 (S.C.C.).

<sup>96</sup> 2003 CarswellOnt 708 (Ont. S.C.J.).

<sup>97</sup> *M. (K.) v. M.(H.)*, above at 328–333.

and awarded damages of \$975,000 for each plaintiff for permanent physical injuries and psychiatric disorders as a result of their mother's physical and emotional abuse. The Court referred to the Supreme Court of Canada decision of *M. (K.) v. M. (H.)*<sup>98</sup> for the proposition that equitable compensation is available to redress equitable wrongs such as breach of fiduciary duty on much the same basis as compensatory and punitive damages would be available in a tort case. The Court merged the principles of law and equity to achieve a just result in this case.

The Court found that the appropriate amount of compensation to reflect the equivalent of general and aggravated damages was \$100,000 for each plaintiff. The Court further found that the case was an appropriate situation for punitive damages, as a deterrent and to mark the court's strongest condemnation of the mother. The mother did not face criminal charges or any other punishment for her wrongdoing. Her betrayal of her children was unconscionable. The Court therefore added a further \$25,000 for each plaintiff to reflect the equivalent of punitive damages at common law. In addition to the non-pecuniary compensation the Court awarded the children \$850,000 as compensation to reflect their loss of earnings both past and future as a result of their mother's wrongdoing. The plaintiffs were also entitled to prejudgment interest on the non-pecuniary compensation of \$125,000 each, and costs.

### 3. CONCLUSION

It is increasingly clear that courts will not ignore wilful and unconscionable behaviour or misconduct and obstructionist tactics in family law. Tort remedies have been expanded to address physical, emotional and financial abuse suffered as a result of bullying tactics employed by a spouse. Equitable remedies should continue to be available to family law litigants and evolve in accordance with our increasingly sophisticated knowledge of harm in spousal relationships. While the Court has been slow to follow *Gregoric* and expressly find a fiduciary obligation between spouses to compensate a spouse for losses suffered, the case law provides consequences for spouses who do not act in good faith towards one another and the court system.<sup>99</sup> The interests of the administration of justice in family law are further protected by imposing statutory obligations upon litigants to treat the court system and one another with good faith.

Courts have not hesitated to order costs to punish improper behaviour by litigants. In particular, Rule 24(8) of the *Family Law Rules* provides that, once a finding of bad faith is made, full recovery costs *shall* be paid immediately. The legislators wish to make clear that rogue litigants who pervert the course of justice must be appropriately sanctioned.

An uneasy embrace continues between legislative schemes and equitable remedies in family law. The *Family Law Act* and the *Family Law Rules* impose positive obligations and correspondingly severe sanctions for misconduct. Section

<sup>98</sup> *Ibid.*, at 334–336.

<sup>99</sup> The Court of Appeal in *LeVan v. LeVan*, 2008 CarswellOnt 2738 (Ont. C.A.); additional reasons at 2008 CarswellOnt 3713 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 6207, 2008 CarswellOnt 6208 (S.C.C.) made clear that full disclosure must be exchanged and valuations completed when negotiating a domestic contract.

56(4) of the *Family Law Act* provides that a domestic contract may be set aside if a party fails to disclose significant assets or debts, if a party did not understand the nature of consequences of the contract, or otherwise in accordance with the law of contract. Rule 2(4) of the Rules provides that parties and their lawyers are required to help the Court to promote the primary objective of the *Family Law Rules* to ensure that the proceeding is fair to both parties and dealt with justly. Further, Rule 13 of the Rules obligates the parties to make full and frank disclosure of the party's financial situation to the other, and to immediately correct or update financial information as soon as a party discovers that the information is incorrect or incomplete. Rule 13(17) sets out sanctions for a party who does not obey this Rule or an Order to serve and file a financial statement or net family property statement.

Some may argue that the above obligations impose a duty tantamount to a fiduciary duty. Ostensibly, the definition of fiduciary duty appears particularly suited to the spousal relationship. However, the attempt to impose a "one size fits all" equitable remedy may be increasingly obsolete as family law becomes subject to an increasingly specific and streamlined set of substantive and procedural laws. As the statutory schemes for the resolution of family law matters become progressively more comprehensive, the need for reliance on equitable remedies may recede.

However, equitable remedies should continue to be available to family law litigants and evolve in accordance with our increasingly sophisticated knowledge of harm in spousal relationships. Family law is a living, breathing animal constantly changing and expanding.

Extreme cases do not fall neatly into statutory pigeon holes and can involve misconduct so egregious that society's abhorrence cannot be remedied through costs or other sanctions. Although, the court has turned to equitable remedies in limited cases, judges continue to exercise reluctance to award meaningful sanctions and damages. While some judges fear that comprehensive statutory schemes may be compromised by the importation of equitable remedies, equitable remedies remain available and necessary in a small line of cases. While mandatory disclosure and sanctions for bad faith provide some protection for spouses, exemplary and punitive damages remain necessary tools to remedy the extraordinary pain and suffering caused by malicious scoundrels.

*McLean v. Danicic* is a cautionary tale for those who seek to harm their spouses emotionally and financially. The chilling effect of bullying behaviour by spouses after separation is widespread, and often under-reported, in part because of victims' fear and their consequent desire to walk away. The fact is, in family law, spouses frequently give up their rightful claims in the face of seemingly overwhelming emotional, physical or financial pressures from a spouse. Thankfully, the *McLean* case sends a strong message that victims can be protected by our justice system.