FAMILY VIOLENCE, GENDER, AND ACCESS TO JUSTICE: *AHLUWALIA V AHLUWALIA*

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I. Introduction

On 20 July 2023, Toronto City Council joined some 30 other municipal councils across Ontario in declaring gender-based and intimate partner violence (IPV) "an epidemic".[1] Earlier in the month, the Ontario Court of Appeal (ONCA) issued its judgment in *Ahluwalia v Ahluwalia*,[2] declaring in the opening sentence that, "[i]ntimate partner violence is a pervasive social problem. … In Canada, nearly half of women and a third of men have experienced intimate partner violence and rates are on the rise."[3] Nevertheless, the Court proceeded to overturn Mandhane J's judgment in the Superior Court of Justice recognizing a tort of family violence.[4] According to Benotto JA (Trotter and Zarnett JJA agreeing), existing causes of action in tort (specifically, the torts of battery, assault, and intentional infliction of emotional distress (IIED)) are capable of providing survivors of IPV with an appropriate remedy: money. On 16 May

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[1] Toronto City Council, *CC8.2 – Declaring Gender-Based Violence and Intimate Partner Violence an Epidemic in the City of Toronto* (20 July 2023), <https://secure.toronto.ca/council/agenda-item.do?item=2023.CC8.2>. There appears to be a consensus that lockdowns associated with COVID-19 dramatically increased instances of family violence in Canada and elsewhere: see e.g. Jennifer Koshan, Janet Mosher & Wanda Wiegers, "COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence" (2021) 57(3) Osgoode Hall LJ 739; UN Women, "The Shadow Pandemic: Violence against women during COVID-19", <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19>. Figures released by Statistics Canada also show a clear increase in both family violence and IPV between 2016-2021, with women experiencing violence at roughly two to three times the rate of men: Statistics Canada, *Victims of police-reported family and intimate partner violence in Canada, 2021* (Ottawa: Statistics Canada, 19 October 2022), <https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019c-eng.htm>. The most recent figures indicate that "rates of reported family violence and intimate partner violence were unchanged in 2022": Statistics Canada, *Trends in police-reported family violence and intimate partner violence in Canada, 2022* (Ottawa: Statistics Canada, 21 November 2023), <https://www150.statcan.gc.ca/n1/daily-quotidien/231121/dq231121b-eng.htm#>.

[2] 2023 ONCA 476, leave to appeal to SCC granted, 41061 (16 May 2024) [*Ahluwalia*].

[3] *Ibid* at para 1.

[4] *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 [*Ahluwalia (Trial)*].

2024, the Supreme Court of Canada (SCC) granted leave to appeal the ONCA's judgment.[5]

The ONCA's reasoning has a formalist logic, at least from a doctrinal perspective concerned with incremental development of the common law. However, I suggest in this paper that the Court of Appeal's focus on the appropriate boundaries of tort law can be enriched by considering *Ahluwalia* as a crucible of intersecting and potentially conflicting longer-term trends in Canadian family law:[6]

1. "The Gender Trajectory", by which I refer to the gradual erosion (not elimination) of women's subordination through legal and social recognition of married women's rights to bodily integrity and independent personhood; recognition of women's equal rights to divorce, support, and family property; and more recent recognition of the complexity of family violence and the emergence of coercive control as an analytical framework for understanding the deeply gendered nature of IPV.[7]
2. "The No-Fault Trajectory", referring to the almost complete eradication of fault as a basis for judicial orders in family law cases.[8]
3. "The Efficiency Trajectory", meaning efforts to reduce litigation by limiting judicial discretion in family property disputes and emphasizing uniform standards and formulae in quantifying support obligations; and by imposing duties on parties and counsel to attempt to resolve disputes out of court.[9]

The gender and no-fault trajectories are, of course, connected in the sense that no-fault divorce did away with longstanding (formal) inequalities in the grounds upon which men and women could seek divorce;[10] they are also distinct, however, in the

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[5] *Ahluwalia,* 2023 ONCA 476, leave to appeal to SCC granted, 41061 (16 May 2024).

[6] These trends can also be observed in other common law jurisdictions such as the United States, the United Kingdom, and Australia.

[7] *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*], s 2(1) (defining "family violence" as "conduct … that is violent or threatening or that constitutes a pattern of coercive control"); s 16(4)(b) ("whether there is a pattern of coercive and controlling behaviour in relation to a family member" for the purposes of determining a child's best interests). These provisions were passed in 2019 (SC 2019, c 16) and came into force in 2021.

[8] See *infra* notes 10 and 11.

[9] For statutory examples see *Divorce Act*, ss 7.3, 7.7(2)(a); *Family Law Act*, RSO 1990, c F.3, s 33(10), ss 47.2, 47.3(2)(a) [*FLA*]; *Family Law Rules*, O Reg 114/99, r 8.1 (especially r 8.1(3)(a)) [*FLR*].

[10] In Ontario, divorce was first made available by the *Divorce Act (Ontario)*, SC 1930, c 14, which reproduced the gendered scheme of the English *Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85. The *Divorce Act*, SC 1968, c 24 introduced divorce at the federal level in Canada and equalized the grounds for divorce between husbands and wives; while the law introduced the possibility of no-fault divorce, it also retained fault-based options based on proof of, for instance, adultery. The current *Divorce Act* made marriage breakdown the sole ground for divorce, albeit retaining adultery or "physical or mental cruelty" as potential

sense that fault is largely irrelevant in modern Canadian family law regardless of gender.[11] The no-fault and efficiency trajectories are also related in that the removal of fault-based grounds for relief limits complex evidentiary inquiries into parties' conduct, thus somewhat reducing the scope for contested proceedings.[12]

In different ways, each of these trends can also be viewed as sub-branches of various efforts and initiatives to improve access to justice: by improving (which is not to say equalizing) the legal position of women and survivors/victims (SVs) of IPV;[13] by equalizing the grounds for divorce; by improving (at least in theory) access to the family law system through uniform standards and cheaper, faster modes of dispute resolution;[14] and by recognizing that the remedial armoury available to parties is not confined to 'core' family law.[15]

Ahluwalia engages with each of these trajectories by raising the question of whether a new cause of action (the tort of family violence), drawn from outside the traditional scope of family law, a tort that deals with the unquestionably gendered phenomena of IPV,[16] ought to be recognized. Running against gender-based arguments in favour of recognition are concerns that the tort could undermine the no-fault basis of the family law system and undercut efforts to reduce litigation by incentivizing fault-based claims that one party committed IPV – claims that are likely to be highly fact specific and contentious; and that damages awards in such cases will effectively supplant or at least complicate otherwise formulaic default schemes for property

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bases for marital breakdown, in addition to the now much more common and truly no-fault ground of living separate and apart for at least one year: *Divorce* Act, s 8(1).

[11] Spousal misconduct is specifically excluded from judicial consideration in corollary relief applications under the *Divorce Act*: s 15.2(5) (spousal support); s 16(5) (best interests of the child). Note, though, that the emotional consequences of conduct can, in certain circumstances, be a relevant factor when determining spousal support: *Leskun v Leskun*, 2006 SCC 25. In Ontario, the obligation to provide support exists "without regard to the conduct of either spouse", though courts can consider "a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship": *FLA*, s 33(10) [*FLA*].

[12] Of course, the advent of no-fault divorce resulted in significantly more divorce applications coming before the courts than had previously been the case; my point is that in the current system, applying for a divorce based on the "living separate and apart" provision in the *Divorce Act* (s 8(2)(a)) is much simpler than proving adultery or cruelty.

[13] Donna Coker, "Restorative responses to intimate partner violence" in Maria Federica Moscati et al, eds, *Comparative Dispute Resolution* (Northampton, MA: Edward Elgar Publishing, 2020) 46 at 47-48.

[14] Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (2013).

[15] *Ahluwalia*, *supra* note 2. See also Nicholas Bala, "Tort Remedies and the Family Law Practitioner" (1998) 16 CFLQ 423.

[16] *Supra* note 1; *Michel v Graydon*, 2020 SCC 24 at para 95; Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life*, 2nd ed (Oxford: Oxford University Press, 2023); Jennifer Koshan et al, "Introduction: Domestic Violence and Access to Justice within the Family Law and Intersecting Legal Systems" (2023) 35:1 Can J Fam L 1 at 16-17.

division.[17] Put differently, will efforts to increase access to justice for SVs of IPV (via a tort tailored to the insidiousness of family violence) compromise the broader community's ability to access justice within the civil and family court systems by diverting already stretched judicial resources to cases alleging the tort of family violence?

I begin with the *Ahluwalia* cases and an overview of the trial decision and the judgment of the ONCA. I then consider what the cases tell us about the interactions between tort and family law. Next, I parry with the ONCA's claim that "existing torts, properly applied, address the harm suffered".[18] My claim is that the existing torts, at least in some instances, fail to capture the gendered essence of coercive control, potentially forcing SVs to fit their experiences into ill-fitting causes of action and thus undermining one dimension of access to justice.

In Part III, I bring a historical lens to the gender dimensions of the proposed tort. Specifically, I examine how the common law of domestic relations historically subordinated wives'/women's interests, personhood, and bodily integrity in favour of men. While these modes of gender-based legal subordination have been abolished (the gender trajectory), I argue that this history of male dominance and female subordination points to the symbolic and practical importance of further advancing the gender trajectory in modern Canadian family law by providing women, as the group disproportionately affected by IPV, with a cause of action specific to the multifarious ways in which some men continue to dominate and control women.[19]

In Part IV, I shift gears and outline the no-fault and efficiency trajectories in modern Canadian family law; and I consider the argument – forcefully made by counsel for Mr. Ahluwalia before the ONCA – that expanding the scope for fault-based tort claims in the family law context could undermine the efficiency trajectory by flooding the courts with contentious, fact-specific claims. I also suggest why this floodgate concern might not be an existential threat to the existing family law system.

I conclude by suggesting that *Ahluwalia* can be understood as exposing the tension between different forms of access to justice, and different groups' interests in such access; and I offer my own view that the symbolic and practical importance of recognizing a tort specific to the experiences of SVs (mostly women) of IPV would be

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[17] *Ahluwalia, supra* note 2 (Factum, Appellant at paras 47-50) [Appellant's Factum].

[18] *Ahluwalia*, *supra* note 2 at para 3.

[19] I do not wish to suggest that IPV is only committed by men against women (including trans women). Women can and do commit violence against male partners, albeit at a much-reduced rate. IPV is also a problem in same-sex relationships: see Statistics Canada, *Intimate partner violence: Experiences of sexual minority women in Canada, 2018*, by Brianna Jaffray, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 April 2021), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00005-eng.htm>. On male dominance see Catharine A MacKinnon, *Toward A Feminist Theory of the State* (Cambridge MA: Harvard University Press, 1989).

a positive extension of the gender trajectory in modern Canadian family law and outweighs efficiency-based concerns about further complicating an already overburdened family law system.

II. The *Ahluwalia* Decisions

Mr. and Mrs. Ahluwalia married in India in November 1999 and separated in Canada in July 2016. There were four issues at trial: property equalization, child support, spousal support, and Mrs. Ahluwalia's claim for damages based on her former husband's alleged abuse during the marriage. I am only concerned with this last claim, which Mandhane J held was substantiated and therefore awarded Mrs. Ahluwalia $150,000 in compensatory, aggravated, and punitive damages.[20]

In essence, Her Honour recognized a common law tort of family violence[21] on a series of interconnected grounds:

- The *Divorce Act* "does not provide a victim/survivor … with a direct avenue to obtain reparations for harms that flow directly from family violence and that go well-beyond the economic fallout of the marriage".[22]
- Reforms to the *Divorce Act* in 2021, which made "family violence" (as defined)[23] relevant to determinations of parenting time and/or contact

[20] Interestingly, this most contentious dimension of the case appears to have been the product of fortuitous advice given to Mrs. Ahluwalia by an unnamed agent during a settlement/trial management conference in March 2021. Litigation concerning the property and support questions commenced in August 2016, at which time Mrs. Ahluwalia was represented by counsel. In September 2019, however, she began representing herself. During the March 2021 conference, though, she was represented by the agent who obtained leave to file an Amended Answer. That same day, an Amended Answer was filed adding a claim for "general, exemplary and punitive damages for the physical and mental abuse suffered by the Respondent at the hands of the Appellant". According to Mandhane J, "[s]he essentially plead the tort of family violence; she did not plead the specific torts of assault, battery, or [inflict]ion of emotional distress." *Ahluwalia (Trial)*, *supra* note 4 at paras 25-27. At the conclusion of the trial, Mandhane J requested written closing submissions asking, amongst other things, "Is there a tort of family violence in Canadian law? If not, should such a tort be recognized by the Court?". Mrs. Ahluwalia argued that "the tortious conduct is the family violence that she experienced throughout the marriage, and that damages should be assessed at $100,000 based on the overall pattern of violent and controlling conduct." Justice Mandhane agreed but increased the damages award to $150,000: *ibid* at paras 34, 39, and 112.

[21] *Ibid* at para 48.

[22] *Ibid* at para 46. Indeed, as Mandhane J noted at para 45, s 15.2(5) of the *Divorce Act* specifically precludes consideration of "misconduct" for the purpose of making spousal support orders.

[23] See the definition of "family violence" in s 2 of the *Divorce Act*.

orders,[24] demonstrate a legislative intention to "recognize[] the devastating, life-long impact of family violence".[25]

- "[T]he existing torts do not fully capture the cumulative harm associated with the *pattern* of coercion and control that lays at the heart of family violence cases".[26]

Accordingly, Mandhane J formulated the tort of family violence by reference to the definition of "family violence" in the *Divorce Act*: conduct that is violent or threatening, or constitutes a pattern of coercive and controlling behaviour, or causes the plaintiff to fear for their own safety or that of another person.[27]

Upon this conceptual footing, Mandhane J had little problem finding in favour of Mrs. Ahluwalia based on three instances of physical violence,[28] a pattern of psychological abuse and extensive financial control exercised by Mr. Ahluwalia throughout the marriage, and repeated instances of "silent treatment" followed by demands for sex.[29] Consequently, Mandhane J awarded Mrs. Ahluwalia $50,000 in compensatory damages for "ongoing mental health disabilities and lost earning potential",[30] $50,000 in aggravated damages "due to the overall pattern of coercion and control and the clear breach of trust",[31] and a further $50,000 in punitive damages to signal the Court's "strong condemnation" of Mr. Ahluwalia's 16-year pattern of abuse.[32]

On appeal, counsel for Mr. Ahluwalia sensibly avoided any challenge to Mandhane J's factual findings and conceded liability under the existing torts, albeit at a reduced quantum.[33] Instead, it was claimed that the tort of family violence should

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[24] *Divorce Act*, ss.16(3) and (4).

[25] *Ahluwalia (Trial), supra* note 4 at para 43.

[26] *Ibid* at 54. Justice Mandhane also found that recognition of the tort of family violence is consistent with Canada's obligations under the *Convention on the Elimination of all Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, and because it is "consistent with the normative standard of personal responsibility in our society" and the need for courts to condemn domestic violence: *Ahluwalia (Trial), supra* note 4 at paras 69, 70.

[27] *Ahluwalia (Trial), supra* note 4 at para 52.

[28] *Ibid* at paras 96-101.

[29] *Ibid* at paras 104-110.

[30] *Ibid* at para 114.

[31] *Ibid* at para 119.

[32] *Ibid* at para 120.

[33] Appellant's Factum, *supra* note 17 at paras 6, 19.

not be recognized because it would "fundamentally alter a system designed to minimize conflict, promote certainty and predictability, and reduce judicial discretion";[34] and that "the proposed tort … is not an evolution of the law, but rather a dramatic change that is better left to the legislature".[35] In other words, the influence of the efficiency and no-fault trajectories on modern family law will be undermined by recognizing the new tort. Counsel for Mrs. Ahluwalia countered by claiming that "the pervasiveness of family violence is a reason *to* recognize the tort", and repeated the argument accepted by the trial judge that "existing torts fail to address the *cumulative pattern* of harm that lies at the heart of family violence" (i.e., enabling SVs to bring claims that take account of the insidiousness of coercive control is more important than concerns about efficiency in the courts).[36] An alternative tort of coercive control was also proposed[37] – and rejected.[38] The ONCA unanimously and comprehensively upheld Mr. Ahluwalia's challenge, though it was more concerned with common law method and judicial deference than floodgate arguments centred on the potential impact of expanding the role of fault in the existing family law system.

The Court began its analysis by confirming that tort claims can proceed alongside family law claims in a single proceeding,[39] and clarified (later in the judgment) that in mixed proceedings of this sort, statutory claims under the relevant family law legislation are the "starting point" – "[o]nly after those determinations are made should the court consider other claims."[40] However, it followed this recognition with the statement that "significant change" to the common law "is best left to the legislature",[41] and the torts of battery, assault, and IIED could remedy the harm suffered by Mrs. Ahluwalia.[42] It was therefore inappropriate to recognize the tort of family violence,[43] especially because "the change wrought upon the legal system would be indeterminate or substantial".[44] Justice Mandhane's claim that "existing torts do not fully capture the cumulative harm associated with the pattern of coercion and control that lays at the heart of family violence" was rejected on the basis that existing

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[34] *Ibid* at para 4.

[35] *Ibid* at para 26.

[36] *Ahluwalia*, *supra* note 2 (Factum, Respondent at paras 2, 28) [Respondent's Factum].

[37] *Ibid* at paras 58-65.

[38] *Ahluwalia*, *supra* note 2 at para 106.

[39] *Ibid* at paras 41-46.

[40] *Ibid* at para 136.

[41] *Ibid* at para 50.

[42] *Ibid* at para 3.

[43] *Ibid* at para 51.

[44] *Ibid* at para 57.

torts "already address patterns of behaviour".[45] The Court then proceeded to slot Mr. Ahluwalia's conduct into the torts of battery, assault, and IIED.

The three instances of physical violence easily "satisf[ied] the requirements for the tort of battery."[46] Similarly, the "apprehension of imminent harmful or offensive contact" required to ground an assault claim was met because "[t]he pattern of abuse caused her to live in a near-constant fear of imminent harm".[47] In the Court's view, the same three instances of physical violence "show that this fear … was not conduct-dependent: simple acts such as asking a friend for help fixing a computer or receiving a compliment from a tour guide would be enough to provoke the husband's wrath."[48] The ONCA also held that the tripartite test for IIED was satisfied in this case: Mr. Ahluwalia's conduct was (i) "flagrant and outrageous"; (ii) "calculated to harm"; and (iii) "caused [Mrs. Ahluwalia] to suffer a visible and provable illness" (she had been diagnosed with Major Depressive Disorder and Moderate Anxious Distress in 2013).[49]

Having decided that "[t]he trial judge erred by creating a new tort which was not required here",[50] the Court went on to criticize Mandhane J's approach to the new tort, stating she "was misguided in reliance on the s.2 definition of 'family violence', which has a very specific application … meant for post-separation parenting plans".[51] On the question of damages, the ONCA upheld the trial judge's award of $100,000 in compensatory and aggravated damages but overruled the additional $50,000 in punitive damages on the basis that the goals of denunciation and deterrence were met by the compensatory and aggravated damages awards.[52]

A. Tort and Family Law

While the ONCA denied the existence of a tort of family violence, its reasoning nevertheless confirms an important point: tort law *does* have a role to play in certain

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[45] *Ibid* at para 59.

[46] *Ibid* at para 63.

[47] *Ibid* at para 67.

[48] *Ibid*.

[49] *Ibid* at paras 69-71; *Ahluwalia (Trial), supra* note 4 at para 15.

[50] *Ahluwalia, supra* note 2 at para 93.

[51] *Ibid* at para 94.

[52] *Ibid* at para 132.

family law matters.[53] Distinguishing *Frame v Smith*,[54] the ONCA held that tort claims can proceed in the family law arena when the governing legislation (in *Ahluwalia*, the *Divorce Act*) evinces no intention to preclude such claims. While this finding is not surprising considering the Court's decision in *Leitch v Novac* (allowing a tort claim for conspiracy to proceed in a family law matter),[55] it serves as an important practical reminder that the remedial armoury available to litigants and practitioners is not necessarily limited to the detailed statutory schemes governing (but not always covering) the field of family law.[56] Moreover, from a procedural perspective, the Court made no criticism of Mandhane J's finding that "case management judges should presumptively order … that the tort and statutory claims be tried together".[57]

From a historical perspective, this recognition of the overlap between tort law and family law seems entirely appropriate. Long before the modern field of "family law" emerged,[58] husbands were able to sue for the "loss of services" occasioned by injuries to their wives via the action of trespass *per quod consortium amisit* (ie, loss of consortium).[59] And when statutory accident compensation schemes emerged in the nineteenth century, they were confined to a narrowly defined group of *family* members (spouses and children).[60] Though we may object to the patriarchal ideology underpinning actions like loss of consortium (now abolished),[61] the point is that there is nothing historically anomalous about tort claims premised on the existence of certain types of family relations.

Recognizing this interaction between tort law and family law also speaks to an important theoretical insight: the rules of "family law" as it is typically taught and practiced have been "artificially segregated from other rules"[62] that also affect families in crucial ways. This recognition of family law's "exceptionalism", as Janet Halley

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[53] For analysis of tort claims alleging spousal violence in Canada in the 1990s see Bala, *supra* note 15.

[54] [1987] 2 SCR 99.

[55] 2020 ONCA 257.

[56] *Ahluwalia, supra* note 2 at para 46: "the trial judge did not err by including a tort claim in a family law proceeding."

[57] *Ibid* at para 18.

[58] Luke Taylor, *Constructing the Family: Marriage and Work in Nineteenth-Century English Law* (Toronto: University of Toronto Press, 2023).

[59] John Fabian Witt, "From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family" (2000) 25:3 Law & Soc Inq 717 at 724.

[60] Taylor, *supra* note 58 at 264.

[61] See *infra* note 138.

[62] Janet Halley & Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism" (2010) 58:4 Am J Comp L 753 at 761.

and Kerry Rittich have described it, enables us to see that family law is not only constituted by "what you will find in a modern family law code, course, bar exam, or casebook", but also "family-targeted provisions peppered throughout substantive legal regimes that seem to have no primary commitment to maintaining the distinctiveness of the family".[63] These secondary rules, which Halley and Rittich call Family Law 2, encompass areas such as pension law (survivors' entitlements) and tax law (joint filing rules). Drawing on this analysis, Robert Leckey has called for family-law scholars to pay greater attention to "their field's criminal dimension"[64] – a domain left out of Halley and Rittich's more distributive analysis (and one with obvious relevance to the issue of family violence). In a similar manner, the preceding discussion suggests that tort law, or at least parts of it, ought to be included within an enlarged family law framework.[65] This taxonomical point also has practical significance given the extremely low incidence of tort claims currently advanced in family law proceedings.[66]

B. Do Existing Torts Address the Harm?

The core of the ONCA's judgment is the claim that "it was unnecessary to create a novel tort" because "existing torts, properly applied, address the harm suffered".[67] Contrary to the trial judge, who held that "existing torts do not fully capture the cumulative harm associated with the *pattern* of coercion and control that lays at the heart of family violence cases",[68] the ONCA declared that the torts of battery, assault, and IIED are capable of addressing patterns of behaviour, as well as specific instances of abuse.[69] This conservative and incremental approach to the boundaries of tort law is backed by strong authority. Referring to its own 2019 decision in *Merrifield v Canada (Attorney General)*,[70] the Court noted the statement in that case that "[c]ommon law change is evolutionary in nature: it proceeds slowly and incrementally

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[63] *Ibid.*

[64] Robert Leckey, "'Repugnant': Homosexuality and Criminal Family Law" (2020) 70:3 UTLJ 225 at 236.

[65] Existing legislation in Ontario can be seen as reflecting this overlap. For example, damages awards arising out of claims in tort can be treated as "excluded property" for the purposes of calculating "net family property": *FLA*, s 4(2).

[66] This paucity of claims was one reason why Mandhane J considered it appropriate to recognize the tort of family violence: *Ahluwalia, supra* note 2 at para 20. See also *Costantini v Costantini*, 2013 ONSC 1626 at para 22: "given the continuing prevalence of domestic violence in the community, only a tiny fraction of potential tort claims are ever advanced."

[67] *Ahluwalia, supra* note 2 at para 3; see also at para 51.

[68] *Ahluwalia (Trial), supra* note 4 at para 54.

[69] *Ahluwalia, supra* note 2 at para 60.

[70] 2019 ONCA 205 [*Merrifield*].

rather than quickly and dramatically".[71] Accordingly, it said, "[w]hen remedies already exist, a new tort is not required."[72] Given that the trial judge had found that the abuse experienced by Mrs. Ahluwalia satisfied the requirements of the existing torts, as well as the tort of family violence, the ONCA remained able to provide Mrs. Ahluwalia with a remedy (albeit at a reduced quantum); the Court also sent a message to family law practitioners to think more carefully about the potential application of existing intentional torts when faced with claims of family violence. Considered solely through the lens of this set of facts, then, the judgment has a certain formalist logic. However, from a broader perspective concerned with meeting the needs of family violence SVs, there are problems with the Court's reasoning, and strong countervailing factors militating in favour of recognizing or developing a cause of action specific to family violence.[73]

One issue is the Court's capacious approach to the meaning of "imminent" in its discussion of the tort of assault. Relying on the ONCA's recent clarification of this area of the law in *Barker v Barker*,[74] the Court in *Ahluwalia* observed that "[a] fear of future harm is not an apprehension of imminent harm" and hence fails to satisfy the test for assault.[75] However, the Court went on to assert that the pattern of abuse experienced by Mrs. Ahluwalia "caused her to live in a near-constant fear of imminent harm" because the three instances of physical assault (battery) in 2000, 2008, and 2013 were "not conduct-dependent: simple acts such as asking a friend for help fixing a computer or receiving a compliment from a tour guide would be enough to provoke the husband's wrath."[76] I do not question for a moment that Mrs. Ahluwalia lived in a state of anxiety and fear throughout this period, but in my view it distorts the legal concept of "assault" to say that a person who was physically assaulted in the year 2000 remained legally "assaulted" (i.e., "apprehensive of *immediate* physical contact")[77] years later. My point here is simply that the tort of assault is only capable of dealing with situations like this through strained interpretations of language and sweeping generalizations about the mental states of people subjected to long-term patterns of

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[71] *Ahluwalia, supra* note 2 at para 50 referring to *Merrifield, supra* note 70 at paras 20-21.

[72] *Ahluwalia, supra* note 2 at para 51.

[73] I am not suggesting that Mandhane J's adoption of the definition of "family violence" in the *Divorce Act* is necessarily the correct touchstone for any such cause of action.

[74] 2022 ONCA 567.

[75] *Ahluwalia, supra* note 2 at para 66.

[76] *Ibid* at para 67.

[77] *Ibid* at para 64 referring to Allen M Linden, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis, 2015) at §2.42. See also Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Books, 2020) at 273: "The plaintiff must actually apprehend an immediate battery and that apprehension must be reasonable in the circumstances."

abuse. Is the law really facilitating access to justice for SVs by requiring them to frame their claims in this way?[78]

Similarly, though the Court held that Mrs. Ahluwalia was subjected to IIED, from a broader perspective it seems unduly restrictive to confine tort claims for IIED to those who can show "flagrant and outrageous" conduct, and "a visible and provable illness" such as "depression or physical illness".[79] On the question of conduct, counsel for Mrs. Ahluwalia put it well in their factum for the ONCA:

> … focus[ing] on 'flagrant and outrageous' conduct risks missing 'what is invisible in plain sight,' i.e., tactics of domination that may – on their own – seem minor, trivial, or even imperceptible, but which function as part of an overarching pattern of coercion and control. Such examples can include purposefully shaming or embarrassing the victim in public or insisting on controlling the victim's social media accounts.[80]

The ONCA largely skirted this issue, focusing instead on the quantum of damages awards in prior cases involving patterns of physical and emotional abuse, and referring to conduct in those earlier cases such as "threats of violence, throwing a cupboard door at her, stalking, videotaping her through her bathroom window from a tree, and threatening to kidnap her daughter",[81] and "physical and verbal abuse on a daily basis and sexual assaults as frequent as four or five times a week".[82] In this sense, the judgment is unclear whether less obvious forms of domination, such as "[t]elling a woman what to wear or forbidding her to shop",[83] will meet the "flagrant and outrageous" standard required by IIED. It therefore seems plausible that the types of behaviour associated with the concept of coercive control – "tactics of isolation, manipulation, humiliation, surveillance, micro-regulation of gender performance, economic abuse, and threats"[84] – may fail to meet the standard of "flagrant and outrageous" conduct required by the tort of IIED.

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[78] For relevant statements of intention concerning the functioning of the civil courts and the family law system, see *Courts of Justice Act*, RSO 1990, c C.43, s 71; *FLA*, Preamble.

[79] *Ahluwalia, supra* note 2 at paras 69-70.

[80] Respondent's Factum, *supra* note 36 at para 46 citing Carmen Gill & Mary Aspinall, *Expert Report prepared for the Joint Federal/Provincial Commission into the April 2020 Nova Scotia Mass Casualty: Understanding Violence in Relationships* (Canada: Mass Casualty Commission, 2022) at 33.

[81] *Ahluwalia, supra* note 2 at paras 76 referring to *MacKay v Buelow* (1995) 11 RFL (4th) 403 (Ont Gen Div).

[82] *Ahluwalia, supra* note 2 at para 79 referring to *NC v WRB* [1999] OJ No 3633 (SC).

[83] Stark, *supra* note 16 at 254.

[84] Koshan et al, *supra* note 16 at 12.

The third limb of an IIED claim is proof of a "visible and provable illness". In *Saadati v Moorhead*,[85] the SCC held that proof of nervous shock does not necessarily have to involve expert medical evidence. In *Ahluwalia*, the ONCA extended this principle to the intentional torts,[86] meaning that IIED claims may become slightly easier to prove. Logically, though, it seems likely that the stronger claims will still be those in which evidence of medical diagnosis is tendered – as it was in *Ahluwalia*. The ONCA's judgment might, therefore, ameliorate some of the difficulties hitherto associated with proving the tort of IIED (and address the strikingly low rate of success plaintiffs have had bringing such claims in family law proceedings),[87] but it remains the case that patterns of coercion and control (or other forms of abuse) still need to result in "a visible and provable illness". With respect, this approach effectively medicalizes family violence SVs and forces them to fit potentially complex responses to trauma within existing frameworks.[88] Given the generally low rate at which instances of IPV are reported to police or disclosed to medical authorities,[89] the even lower rate at which racialized and immigrant women report family violence to authorities,[90] the higher rate at which Indigenous women experience IPV compared to non-Indigenous women,[91] and the difficulties the latter groups in particular may have with the medical establishment (including basic issues of access and historical distrust),[92] it is not unreasonable to think that SVs, especially those whose narratives

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[85] 2017 SCC 28.

[86] *Ahluwalia, supra* note 2 at para 70.

[87] According to Julien and Marilyn Payne, "[c]laims based solely on 'intentional infliction of mental suffering' have been less prevalent – and less successful – perhaps a reflection that mental suffering is hardly a unique circumstance among separating spouses." Thus, "[m]ost successful claims for damages [in family law proceedings involving a tort claim] in Canadian courts have been confined … to damages for physical assaults": Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 9th ed (Toronto: Irwin Books, 2022) at 116.

[88] As Evan Stark pointed out nearly 30 years ago, "[t]he coercive control framework shifts the basis of women's justice from stigmatizing psychological assessments of traumatization to the links between structural inequality, the systemic nature of women's oppression in a particular relationship, and the harms associated with domination and resistance *as it has been lived*." Evan Stark, "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" (1995) 58 *Albany LR* 973 at 976 (emphasis in original). See also at 1010: "the coercive control frame opens a political space in which it is possible for women to command justice resources without being psychologically disabled."

[89] Statistics Canada, *Spousal violence in Canada, 2019* (Shana Conroy, 2021) at 11-12, <https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00016-eng.htm>.

[90] Purnima George et al, "In search of interdisciplinary, holistic and culturally informed services: The case of racialized immigrant women experiencing domestic violence in Ontario" (2022) 60:3 *Family Court Review* 530.

[91] Canada, Department of Justice, "Understanding Indigenous Women and Girls' Experiences with Victimization and Violence", <https://www.justice.gc.ca/socjs-esjp/en/women-femmes/wgv-ffv?msclkid=f2812794c2b911ec8c4da4c0864a2b1f>. According to Conroy, *supra* note 89 at 14, Indigenous women report IPV to authorities at the same rate as non-Indigenous women.

[92] See e.g. Lauren Vogel, "Broken trust drives native health disparities" (2015) 187:1 *Canadian Medical Association Journal*, E9-E10; Tara Horill et al, "Understanding access to healthcare among Indigenous

do not fit within the existing frameworks of Western medicine, could be left without adequate evidence of "a visible and provable illness", and hence without a remedy, at least under this tort.

Aside from the difficulties that plaintiffs might face in meeting the criteria for successful claims under the torts of battery, assault, and IIED is the question of why it should be necessary for survivors to plead separate causes of action (potentially in different courts if a judge hearing a family law matter refuses an application for leave to join a tort proceeding)[93] for conduct that often involves a complex interplay of physical and psychological abuse. Disarticulating the harm of a fist (battery) from the fear of its next strike (assault), and the cumulative operation of those forms of violence alongside coercive and controlling behaviour (wedged into IIED), seems to disregard the interconnected patterns of harm that characterize family violence.[94] Granted, the ONCA was at pains to emphasize that the existing torts can encompass patterns of behaviour,[95] but it seems procedurally simpler and more reflective of the lived experiences of SVs to recognize a freestanding cause of action based on family violence so that the layered, self-reinforcing nature of different forms of violence can be acknowledged and at least partially remedied. As the next Part shows, recognizing the new tort would also comport with the twentieth century shift away from treating wives as chattels, and modern conceptions of substantive gender equality.[96]

III. The Gender Trajectory; or A Brief History of the Legal Subordination of Women[97]

History is conspicuously absent from both the trial and appeal court *Ahluwalia* judgments. Yet, as counsel for Mrs. Ahluwalia noted in their submissions to the ONCA, the common law has a long history of subordinating the interests of wives in favour of their husbands.[98] Beginning with the doctrine of coverture, this Part revisits

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peoples: A comparative analysis of biomedical and postcolonial perspectives" (2018) 25 *Nursing Inquiry* 1 at 4.

[93] *Courts of Justice Act*, RSO 1990, c C.43, s 21.9; *Family Law Rules*, r 1(5). See also *G(MH) v B(RJ)*, 2021 ONSC 2467.

[94] Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners" (2015) 32:2 *Windsor YB Access Just* 149.

[95] *Ahluwalia, supra* note 2 at paras 74, 91.

[96] See e.g. *Moge v Moge* [1992] 3 SCR 813.

[97] See John Stuart Mill, *The Subordination of Women*, 3rd ed (London: Longman, Green, Reader, and Dyer, 1870).

[98] Strictly, the factum refers only to Canadian law and states that, historically, it "has not been kind to survivors of family violence": Respondent's Factum, *supra* note 36 at para 22. The same can be said of Canadian common law's progenitor, English law, as well as other common law jurisdictions such as the

some of the ways in which male dominance was inscribed in, and created by, a suite of rights and privileges, some of them tortious, accorded to husbands: the right of husbands to restrain and chastise (i.e., beat) their wives; the marital rape exemption; and the tort-based actions for loss of services and consortium, and criminal conversation. From this historical perspective on the common law's prioritization of male sex-rights[99] – and the eventual eradication of these forms of legal patriarchy – I suggest that there is symbolic and reparative importance in furthering what I am calling the gender trajectory in family law by recognizing a cause of action specifically designed to provide women (as the group disproportionately affected by IPV)[100] with a measure of legal redress against their (typically) male abusers.

A. Coverture and Correction

The conceptual core of the common law's insistence on male dominance over women was the doctrine of coverture. As William Blackstone observed in 1765: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything".[101] The consequences of this erasure of wives' legal personhood were legion: wives could not sue without their husbands' concurrence (or be sued without joining the husband); wives were deemed incapable of making contracts on their own behalf; and any income earned by a wife was automatically considered her husband's property. For present purposes, the most salient dimension of this legal subordination was a husband's right to "give his wife moderate correction".[102] According to Blackstone, "the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children".[103] Staunch defender of (or, as Duncan Kennedy has put it, apologist for)[104] the common law that he was, Blackstone

United States and Australia. See e.g. Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (Princeton, NJ: Princeton University Press, 1989); Reva Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105: 8 Yale LJ 2117.

[99] See generally Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 2018).

[100] *Supra* note 16. The existing evidence suggests that women are overwhelmingly the victims of coercive control. See Andy Myhill, "Measuring Coercive Control: What Can We Learn From National Population Surveys?" (2015) 21(3) Violence Against Women 355.

[101] William Blackstone, *Commentaries on the Laws of England*, 4 vols (Oxford: Clarendon Press, 1765-69), Book I, 430.

[102] *Ibid* at 432.

[103] *Ibid*, Book I at 432. Eighteenth-century legal thought conceived of the family in terms of a household comprising relations between masters and servants, husbands and wives, and parents and children, *in that order of priority*. The master/husband was thus constituted as patriarch within his own domain, able to dispense justice as he saw fit to servants, wives, and children.

[104] Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28:2 Buff L Rev 205.

concluded his discussion of coverture and the rights of husbands by claiming that, "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."[105]

There were limits to the right of chastisement, but these boundaries left an awful lot of wiggle room. In a case from 1790, *Evans v Evans*,[106] a wife sought a divorce on the grounds of cruelty.[107] In the course of rejecting her application (principally on evidentiary grounds), Sir William Scott observed that "misconduct may authorize a husband in restraining a wife of her personal liberty", though "no misconduct of hers could authorize him in occasioning a premature delivery, or refusing her the use of common air."[108] In other words, a husband was well within his rights to deprive his wife of her liberty, he just could not induce in her a miscarriage or keep her locked below deck on a ship without some form of ventilation.[109]

It is hardly surprising, then, to find Sir Henry Maine in his seminal 1861 text, *Ancient Law*, asserting that "the operation and nature of the ancient Patria Potestas" (power of the father) could best be understood "by reflecting on the prerogatives attached to the husband by the pure English Common Law, and by recalling the rigorous consistency with which the view of a complete legal subjection on the part of the wife is carried by it."[110] In 1870, John Stuart Mill wrote in *The Subjection of Women* that "[t]here remain no legal slaves, except the mistress of every house;"[111] and in 1878, Frances Power Cobbe published a piece in *The Contemporary Review* entitled "Wife-Torture in England."[112] Reflecting the deeply classist structure of English society at the time, Cobbe wondered,

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[105] Blackstone, *supra* note 101, Book I at 433. A rather more bleak, or realistic, assessment of the position of wives in this period is found in Daniel Defoe's *Roxana* from 1724, in which the heroine declares that, "the very Nature of the Marriage-Contract was, in short, nothing but giving up Liberty, Estate, Authority, and every-thing, to the Man, and the Woman was indeed a meer Woman ever after, that it to say, a Slave." Pateman, *supra* note 99 at 120.

[106] (1790) 1 Hag Con 35.

[107] The case simply refers to divorce, though this presumably meant divorce *a mensa et thoro* (from bed and board), which was a form of separation, not a true divorce (*a vincula matrimonii*), which at the time was only possible via annulment or parliamentary decree: Blackstone, *supra* note 101, Book I, 428-9.

[108] (1790) 1 Hag Con 35 at 48.

[109] American courts approached the issue in similar terms. See Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2002) at 150-52.

[110] Henry Sumner Maine, *Ancient Law* (Dorset Press, 1986) at 133.

[111] Mill, *supra* note 97 at 147.

[112] Frances Power Cobbe, "Wife-Torture in England", *The Contemporary Review* (April 1878) at 55.

> How does it come to pass that while the better sort of Englishmen are thus exceptionally humane and considerate to women, the men of the lower class of the same nation are proverbial for their unparalleled brutality, till wife-beating, wife-torture, and wife-murder have become the opprobrium of the land?[113]

The right of husbands (of high or low class) to restrain and chastise their wives remained extant until 1891, when the Court of Appeal in *R v Jackson* declared that it no longer formed part of English law.[114] The case concerned a couple called Edmund and Emily Jackson. In a nutshell, Emily refused to live with Edmund and he successfully obtained a decree for restitution of conjugal rights (an order commanding one spouse to return to the matrimonial home).[115] Nonetheless, Emily remained steadfast in her refusal, and so Edmund took matters into his own hands: "I, therefore, on Mar 8 instant, took my said wife and have since detained her in my house, using no more force or constraint than was necessary to take her or to prevent her from returning to her said relations."[116]

Relying on the 1840 case of *Re Cochrane*,[117] Edmund's counsel submitted that Edmund had "done nothing more than what he has at common law a right to do, namely, have possession of his wife and keep her to prevent her escaping from him"; and that the "result of the [earlier] cases is that the husband may confine his wife in his house and even use such violence as may reasonably be necessary to restrain her."[118]

The Court of Appeal disagreed, dismissing "quaint and absurd dicta … in the books as to the right of a husband over his wife in the matter of personal

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[113] *Ibid* at 56.

[114] *R v Jackson, ex parte Jackson* [1891-94] All ER Rep 61 [*Jackson*].

[115] In 1887, Edmund and Emily married. Two days later, Edmund travelled to New Zealand on the understanding that Emily would soon join him there. Emily, however, urged Edmund to return to England, which he did in July 1888. Emily then refused to live with him. *Ibid* at 62.

[116] *Ibid*. Emily's sister gave a rather more vivid account of Emily's capture. After a struggle involving Emily, Edmund, two of Edmund's friends, and Emily's sister, "she [Emily] was dragged backwards into the bottom of the carriage by her husband, I clinging to her all the time. … My sister's legs were sticking out of the carriage when she was on the bottom of the carriage, and Dixon Robinson, after pushing me away, got hold of her legs and shoved them into the carriage and jumped in, and immediately drove away with her. The struggle took place in the full view of the congregation coming out of church. She resisted going with him to the utmost of her power, and struggled violently against him, and was only taken away by main force." *Ibid* at 63.

[117] (1840) 8 Dowl 630.

[118] *Jackson, supra* note 114 at 64.

chastisement,"[119] and expressly overruling *Re Cochrane*.[120] (The Court did, however, leave open the possibility that a husband who "found his wife on the staircase just going to elope with someone, … might have some right to restrain her."[121]) Nevertheless, and presaging what Brenda Cossman has called "law's spectacular failure" to address sexual violence against women (and the emergence of #MeToo as an extra-legal response),[122] it is abundantly clear that the formal disavowal of husbands' legal rights to restrain and chastise their wives did little to curb sex-based family violence.[123] The case also said nothing about the various other ways in which the law upheld what Adrienne Rich and Carole Pateman have called "male sex-rights."[124]

B. The Marital Rape Shield

Perhaps the most egregious example of the common law's sex-based double standard is its longstanding insistence that a husband was incapable of raping his wife.[125] The rationale for this legal shield was that, upon marriage, a wife provided ongoing and irrevocable consent to her husband's sexual advances.[126] To give but one example, in an English case from 1949, Byrne J declared:

> As a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during

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[119] *Ibid* at 65.

[120] *Ibid* at 67.

[121] *Ibid* at 65.

[122] Brenda Cossman, *The New Sex Wars: Sexual Harm in the #MeToo Era* (NY: NYU Press) at 9.

[123] As Lord Wilson recently observed, "the pressures on a battered wife not to be responsible for securing the criminal conviction of her husband severely compromise enforcement of this area of the law": Lord Wilson, "Out of his shadow: The long struggle of wives under English Law", The High Sheriff of Oxford's Annual Law Lecture (9 October 2012) at 13.

[124] Pateman, *supra* note 99 at 2 referring to Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" (1980) 5:4 *Signs* 645.

[125] See e.g. Sir Matthew Hale: "the husband cannot be guilty of a rape committed by himself, upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." *The History of the Pleas of the Crown* (London: E & R Nutt, and R Gosling, 1736), Vol I at 629.

[126] Strictly, this implied consent was limited to penile-vaginal intercourse, meaning that the criminalization of sodomy functioned as something of a de facto rape clause for wives who could prove that their husbands had anally penetrated them. See *R v Jellyman* (1839) 173 ER 637.

> such time as the ordinary relations created by the marriage contract subsist between them.[127]

The immunity remained part of English law until 1991 when it was declared null by the House of Lords.[128] Canada removed the exemption from its *Criminal Code* slightly earlier in 1983[129] – but only after women's rights groups protested the treatment of MP Margaret Mitchell who, in 1982, "raised the issue of violence against women. She was laughed at by MPs in the House of Commons when she demanded the government take action to stop domestic violence."[130]

C. Loss of Services and Consortium

In the household-model of family relations (i.e., encompassing the relations of master and servant, husband and wife, and parent and child)[131] that dominated common law thinking until the 19th century,[132] masters were able to enforce their rights to the services of their servants through an action in trespass "against third parties who intentionally injured a servant and thereby caused the master to lose the servant's services."[133] As John Fabian Witt has noted, "[a] similar property right existed between a head of household and his wife" in the form of an action for loss of consortium.[134] According to Blackstone, "*beating* a man's wife or otherwise ill using her … if it be a common assault, battery, or imprisonment", grounded "the usual remedy to recover damages, by action of trespass *vi et armis*".[135] In other words, a husband could bring a trespass claim (joined by his wife) based on the harm experienced by his wife. However, "if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and

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[127] *R v Clarke* [1949] 2 All ER 448 at 448. According to the House of Lords in *R v R* [1992] 1 AC 599 at 605, the case in which the exemption was finally declared void, *Clarke* was the first case in which a judge questioned the limits of the exemption, finding that the immunity was lost where a judicial order had been made providing that a wife was no longer bound to cohabit with her husband.

[128] *R v R* [1992] AC 599.

[129] *An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person* (SC 1983). The exemption, based on English common law, was codified in Canada's first *Criminal Code, 1892*. It took until 1993 for all states in the USA to abolish the exemption.

[130] Carolyn Alphonso & Marjan Farahbaksh, "Canadian law only changed 26 years ago", *The Globe & Mail* (April 1, 2009), https://www.theglobeandmail.com/news/world/canadian-law-only-changed-26-years-ago/article1150644/.

[131] Blackstone, *supra* note 101, Book 1 at 410.

[132] Taylor, *supra* note 58, ch 2.

[133] Witt, *supra* note 59 at 723.

[134] *Ibid*.

[135] Blackstone, *supra* note 101, Book III at 140.

assistance of his wife, the law then gives him a *separate* remedy by an action upon the case for this ill-usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages."[136] In essence, when a wife was subjected to "common assault", she could only sue the man in a joint claim with her husband (and any damages award would become her husband's property); but if her beating was "very enormous", her husband alone had a right to claim against the third-party for the loss of his wife's domestic and sexual services.[137]

In Ontario, the right of husbands to sue for loss of consortium was abolished in 1978 by the *Family Law Reform Act*.[138] The preamble to the *FLRA* expressly "recognize[d] the equal position of spouses as individuals within marriage", while s. 65(1) confirmed the abolition of coverture by affirming that "a married woman has a legal personality that is independent, separate and distinct from that of her husband";[139] accordingly, in place of the older gendered action, the *FLRA* created a right on the part of *either spouse* to claim damages for loss of "guidance, care and companionship".[140]

D. Criminal Conversation

A property-based conception of wives also underpinned the action for criminal conversation, which was in essence an action of trespass *vi et armis* against a man who committed adultery with another man's wife.[141] While adultery was a sin punishable by the ecclesiastical courts, "considered as a civil injury, (and surely there can be no greater) the law gives a satisfaction to the husband … wherein the damages recovered are usually very large and exemplary," albeit calibrated to "circumstances … [such] as the rank and fortune of the plaintiff and defendant."[142] In this way, the action "formalized a husband's right to sexual monopoly over his wife, his ownership of her sexual fidelity, by granting him a remedy for its loss in a world without divorce."[143]

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[136] *Ibid.*

[137] *Ibid.*

[138] *Family Law Reform Act*, SO 1978, c 2, s 69(3) [*FLRA*]. The action was abolished in England in 1982: *Administration of Justice Act 1982* (UK), s 2. It has also been abolished in most other Canadian jurisdictions: Osborne, *supra* note 77 at 215.

[139] *FLRA*, s 65(1).

[140] *FLRA*, s 60(2)(d). The right was also extended to "children, grandchildren, parents, grandparents, brothers and sisters": s 60(1).

[141] As Hendrik Hartog has noted, "[t]he participation and desires of the wife were imagined as of no more relevance than the participation and desires of a tree in the theft of a man's lumber." Hartog, *supra* note 109 at 137.

[142] Blackstone, *supra* note 101, Book III at 139-40.

[143] Hartog, *supra* note 109 at 139. Indeed, the prioritization of male sex-rights sometimes went so far as to render irrelevant the impact of enormous damages awards on the wives and children of men found guilty of

Strictly speaking, the recognition of judicial divorce in England was accompanied by the abolition of the action for criminal conversation.[144] In reality, though, the *Matrimonial Causes Act, 1857* replaced the old common law cause with a statutory claim to be "heard and tried on the same Principles, in the same Manner, and subject to the same or like Rules and Regulations as Actions for Criminal Conversation are now tried and decided in Courts of Common Law".[145] That statutory right of husbands (never held by wives) to claim damages for adultery remained part of English law until 1970.[146] The common law action for criminal conversation became and remained part of the law in Ontario until 1978 when, like the action for loss of consortium, it was abolished by the *FLRA*.[147]

E. Subordination and Symbolism

As "covered" women, wives in the common-law world were, until fairly recently, subject to (or the subjects of) a slew of rules designed to uphold a property-based conception of husbands' marital interests, and to provide legal support for male sex-rights. Upon marriage, wives lost their legal personhood and became susceptible to legally-sanctioned physical and sexual violence at the hands of their husbands. And should a wife be injured or transgress her duty of fidelity, her husband was entitled to claim damages for the loss of her (domestic *and sexual*) services, and/or the harm to his honour.

I think that this history of sexual subordination ought to be borne in mind when considering the desirability of recognizing a tort of family violence. We know that women still experience family violence at far higher rates than men and that it is men who overwhelmingly commit acts of physical and sexual violence against women, and/or engage in coercive and controlling behaviour. Viewed from this historical and contemporary perspective, is there not an argument for building upon the eradication of the types of formalized gender inequality noted above by

committing adultery with another woman: *ibid* at 141. Obviously, wives possessed no such complementary prerogative.

[144] The different grounds upon which men and women could seek a divorce under the 1857 Act are yet another example of how the law was used to uphold male sex-rights. While men could seek a divorce based on a wife's adultery *simpliciter*, women had to plead an aggravating circumstance such as sodomy: *An Act to amend the Law relating to Divorce and Matrimonial Causes in England*, 1857, 20 & 21 Vict c 85 [*Matrimonial Causes Act*].

[145] *Matrimonial Causes Act*, s 33.

[146] *Law Reform (Miscellaneous Provisions) Act 1970* (UK), s 4.

[147] *FLRA*, s 69(1). The action was effectively abolished in December 1977 by the Court of Appeal, which ruled that the *Family Law Reform Act, 1975*, c 41 "abolishes any proprietary interest that it is said a husband previously had in his wife": *Skinner v Allen* (1978) 18 OR (2d) 3, 9.

recognizing a tort that would almost certainly provide more women than men with a targeted legal basis upon which to claim damages for the harms of IPV?[148]

I am not suggesting that such recognition would atone for the ways that law has been used to subordinate women.[149] I am, however, suggesting that there might be a measure of symbolic (and very practical) importance in recognizing the impact of history on sexual inequality and, consonant with the gender trajectory in modern Canadian family law, providing women generally with a cause of action that effectively flips the common law's historical gender bias on its head by acknowledging the specific and very often gender-based harms of family violence.[150]

IV. The Potential Impact on the Existing Family Law System

The preceding Part suggested that, for historical and contemporary reasons, recognizing a tort of family violence could have symbolic and practical importance for women generally, and specifically women who have experienced IPV. This Part approaches the issue from a different perspective: one concerned with efficiency and access to justice (or at least access to the courts) for the wider population; or, as the ONCA put it, "whether the change wrought [by recognizing the tort] upon the legal system would be indeterminate or substantial."[151]

A. The No-Fault Trajectory

In 1930, the federal government exercised its constitutional power over "marriage and divorce" to introduce judicial divorce in Ontario. The *Divorce Act (Ontario)*[152] essentially mirrored the gendered scheme of the English *Matrimonial Causes Act*, which permitted a man to petition the courts for a divorce based on his wife's adultery; wives, however, were forced to prove that their husbands had committed aggravated adultery, for instance, sodomy with a male lover. The Canadian government eventually moved away from this fault-based model with the passage of the *Divorce Act, 1968* –

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[148] The gendered nature of IPV also suggests that there may be scope for an equality-based argument for recognizing the tort, or developing an alternative cause of action, either at common law or through statute. See *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15; *Fraser v Canada (Attorney General)*, 2020 SCC 28.

[149] Nor am I suggesting that law no longer subordinates and/or fails women. See Cossman, *supra* note 122.

[150] As Evan Stark noted in *Coercive Control*, *supra* note 16 at 249, "it is the social endowment men inherit from sexual inequality, not the motives or frequency of these acts, that allows them (but rarely women) to shape discrete acts into patterns of domination that entrap partners and make them subordinate."

[151] *Ahluwalia*, *supra* note 2 at para 57.

[152] SC 1930, c 14.

Canada's first national divorce statute.[153] The Act retained the option of divorce based on fault, though it removed the higher threshold for women.[154] Crucially, it also introduced the option of no-fault divorce on the grounds that "there has been a permanent breakdown of the marriage" by reason of "the spouses … living separate and apart … for a period of not less than three years" or "the petitioner's desertion of the respondent, for a period of not less than five years."[155] These reforms clearly map onto the gender and no-fault trajectories within modern Canadian family law, but they were partial, opening moves. The Act still allowed judges to consider fault for the purposes of corollary relief. As one commentator at the time noted: "The granting or withholding of an order to secure or to pay a lump sum or periodic sums for the maintenance of a spouse is within the discretion of the court which is to be exercised *having regard to the conduct of the parties* and the condition, means and other circumstances of each of them."[156] On its face, this retention of fault as a potentially relevant consideration in determining support was gender-neutral in the sense that it recognised mutual rights and obligations of support between spouses. In reality, social norms made it unlikely that there would be "any significant demand for maintenance by husbands".[157]

Despite the introduction of mutual support obligations, gender disparity continued in the sphere of family property. In its much-maligned decision in *Murdoch v Murdoch*,[158] the SCC denied a wife a property interest in the matrimonial home on the basis that the property was in the husband's name alone, and her decades of labour on the ranch was simply "work done by any ranch wife."[159] Soon after, the legislature in Ontario responded with the *FLRA*,[160] which declared that "each spouse is entitled to have the family assets divided in equal shares notwithstanding the ownership of the assets by the spouses."[161] This move towards gender neutrality and at least formal equality in questions of family property division was made explicit in Ontario's 1990 *FLA*,[162] which declared that "child care, household management and financial

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[153] *Divorce Act, 1968*, SC 1967-68, c 24.

[154] *Ibid*, s 3.

[155] *Ibid*, s 4(1)(e).

[156] Julien D Payne, "The Divorce Act (Canada), 1968" (1969) 7:1 Alberta LR 1 at 30 (emphasis added).

[157] *Ibid*.

[158] [1975] 1 SCR 423 [*Murdoch*]. For critiques of the decision see e.g. Peter Jacobson, "Murdoch v. Murdoch: Just about what the Ordinary Rancher's Wife Does" (1974) 20:2 McGill LJ 308; Mysty S Clapton, "*Murdoch v. Murdoch*: The Organizing Narrative of Matrimonial Property Law Reform" (2008) 20:2 CJWL 197.

[159] *Murdoch, supra* note 158 at 436.

[160] SO 1978, c 2.

[161] *Ibid*, s 4(1).

[162] RSO 1990, c F.3.

provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, … entitling each spouse to the equalization of the net family properties."[163]

At the federal level, the introduction of the *Divorce Act, 1985*[164] made "breakdown of a marriage" the sole ground for divorce, albeit provable by either living separate and apart for at least one year, or proof of adultery or physical or mental cruelty.[165] The Act also included a new direction to courts tasked with determining spousal support: "the court shall not take into consideration any misconduct of a spouse in relation to the marriage."[166]

These federal and provincial reforms to the law of divorce, corollary relief, and property division show the intersection of decades of reform along the gender and no-fault trajectories: men and women were eventually granted equal rights to divorce without proof of fault; spouses (including cohabiting couples)[167] were recognized as having mutual support obligations, determined without consideration of fault; and spouses (for property purposes, meaning married couples only in Ontario) were eventually granted equal rights to family property.[168]

B. Efficiency and the Family Law System

The advent of no-fault divorce in 1968 was also a crucial factor in the emergence of the efficiency trajectory and efforts to improve access to justice for people experiencing family breakdown. As the Family Justice Working Group observed in its 2013 report, *Meaningful Change for Family Justice*, "[t]he number of families turning to the law began to grow exponentially when no fault divorce became a possibility."[169] By 2013, it wrote, "[f]amily law cases comprise[d] about 35% of all civil cases. They take up a disproportionate amount of court time, with many more events per case, three times more adjournments, and twice as many hearings."[170] Numerous expert reports

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[163] *FLA*, s 5(7).

[164] RSC 1985, c 3 (2nd Supp).

[165] *Divorce Act 1985*, s 8(1), (2).

[166] *Ibid*, s 15(6).

[167] *FLA*, s 29.

[168] Absent a domestic contract stipulating otherwise: *FLA,* s 2(10).

[169] Action Committee, *supra* note 14 at 12.

[170] *Ibid*. More recent statistics indicate that little has changed: in 2019-20, family law cases accounted for nearly one-third of all civil cases in Canada, and "[f]amily cases were more active in the courts in 2019/2020 compared to non-family cases. Family Cases reported an average of 11 court events per case, while non-family cases reported 6": Statistics Canada, *Profile of family law cases in Canada, 2019/2020* (Lyndsay

have considered in detail the reasons why so many family law cases still proceed to litigation, the disproportionate amount of time and money expended in many such cases, and avenues for reform.[171] It is beyond the scope of this paper to do more than note the pervasiveness of this issue – the point is that Ontario's family law system is generally acknowledged as having been in a state of administrative crisis for decades, with excessively long waiting times for hearings, and the broader issue of the sheer expense of civil litigation and a corresponding increase in self-represented litigants.[172] As the Working Group bluntly noted in its 2013 report, "Canadians do not have adequate access to family justice … the procedures by which [the] substantive law is invoked are increasingly complex, unaffordable and inaccessible."[173]

Accordingly, recent years have seen a slew of provisions inserted into the *Divorce Act*, the *FLA,* and the *FLR* designed to increase efficiency and access to justice by encouraging parties to resolve their disputes through forms of alternative dispute resolution.[174] As the SCC recently observed, "[t]here is a trend in family law away from an adversarial culture of litigation to a culture of negotiation."[175] Additionally, the property equalization provisions in the *FLA*,[176] combined with the development and widescale adoption of the *Spousal Support Advisory Guidelines*[177] and federal and provincial *Child Support Guidelines*,[178] make determinations around property division and support potentially a relatively formulaic exercise, assuming there is proper

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Ciavaglia Burns, June 28, 2021), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00011-eng.htm>.

[171] See e.g. Action Committee, *supra* note 14; Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* (Toronto, February 2013). The SCC has observed that "access to justice in family law is not always possible due to the high costs of litigation": *Michel v Graydon*, 2020 SCC 24 at para 96.

[172] See e.g. Action Committee, *supra* note 14; Law Commission of Ontario, *supra* note 171; Rachel Birnbaum, Michael Saini & Nicholas Bala, "Growing Concerns About the Impact of Self-Representation in Family Court: Views of Ontario Judges, Children's Lawyers and Clinicians" (2018) Can Fam LQ 121; Warren K. Winkler, "Family Law and Access to Justice: A Time for Change" (Speech delivered to the Fifth Annual Family Law Summit, Toronto, June 17, 2011), <https://www.ontariocourts.ca/coa/about-the-court/archives/2011-family-law-access-justice/>.

[173] Action Committee, *supra* note 14 at 1.

[174] *Divorce Act*, ss 7.3, 7.7(2)(a); *FLA*, ss 47.2, 47.3(2)(a); *FLR*, r 8.1 (especially r 8.1(3)(a)).

[175] *Colucci v Colucci*, 2021 SCC 24 at para 69 [*Colucci*].

[176] *FLA*, Pt I, especially s 5.

[177] Canada, Department of Justice, *Spousal Support Advisory Guidelines* (July 2008); Canada, Department of Justice, *Spousal Support Advisory Guidelines: The Revised User's Guide* (April 2016). While use of the SSAG is not mandatory, they have received widespread support from courts in Canada. See e.g. *Fisher v Fisher*, 2008 ONCA 11.

[178] *Federal Child Support Guidelines*, SOR/97-175. The *Divorce Act*, s 15.1(3), requires courts to make child support orders in accordance with the *Guidelines*. In Ontario, see *Child Support Guidelines*, O. Reg. 391/97. The *FLA* provides that courts "should … apportion the obligation according to the child support guidelines": s 33(7)(b).

disclosure[179] and sound advice about the time and expense of contested family law litigation.

The point I am making here is that in addition to the almost complete eradication of fault as a relevant consideration in federal and Ontario family laws, both jurisdictions have also tried to address the problem of accessing courts to resolve family disputes by limiting judicial discretion in the financial dimensions of family breakdown, and by instituting various diversionary methods to encourage people to resolve their disputes outside of the courts. Recognizing a tort of family violence has the potential to undermine these efficiency and no-fault trajectories by expanding the highly circumscribed role currently played by fault in the family law system.

Drawing on these concerns with institutional efficiency, counsel for Mr. Ahluwalia submitted that the "proposed tort … would apply to a vast number of cases and create a floodgate of litigation that would fundamentally change family law."[180] Why? Because "[t]he prevalence of family violence must also be viewed in conjunction with the low threshold to establish the proposed tort".[181] In other words, the broad definition of "family violence" in the *Divorce Act*, designed at present to deal with parenting decisions, sets too low a bar for proving family violence in the context of damages claims. The ONCA agreed that Mandhane J's adoption of the *Divorce Act* definition was "misguided" because of its "very specific application,"[182] and that "the legislature must be taken to have intentionally introduced this concept only in the context of parenting."[183] The Court did not, however, express any opinion on whether the definition of family violence is or would be too broad.[184] As a matter of statutory interpretation and common law development, the Court's reasoning on this point is sound – there *is* something anomalous about hinging the recognition of a new common law tort on a statutory definition designed to deal with parenting orders, not claims for damages by former intimate partners.

A related concern, not addressed in the appeal judgment, is that tethering the tort to the *Divorce Act*'s definition of family violence would almost certainly lead to an increase in the complexity of cases involving allegations of family violence in the

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[179] See *LeVan v LeVan*, 2008 ONCA 388; *Dowdall v Dowdall*, 2021 ONCA 260.

[180] Respondent's Factum, *supra* note 36 at para 26.

[181] *Ibid* at para 45.

[182] *Ahluwalia, supra* note 2 at para 94.

[183] *Ibid* at para 100.

[184] Conversely, the ONCA rejected a proposed tort of coercive control on the basis that it eschewed any requirement to prove harm in favour of proof that conduct was calculated to cause harm: *ibid* at paras 105-106. The elimination of this requirement "would cause a significant impact on family law litigation best left to the legislature": *ibid*. See further Mary-Jo Maur, "The Ontario Court of Appeal's Decision in Ahluwalia v Ahluwalia – Prudence? Or Opportunity Missed?" (2023) 42:2 CFLQ 107.

context of parenting orders. In such cases, it seems reasonable to assume that claimants will want, or be encouraged, to plead the tort of family violence, in addition to claims made under s. 16 of the *Divorce Act* concerning the best interests of children.[185] Whilst speculative, it does not seem farfetched to imagine that practitioners will feel compelled to recommend to clients that they pursue damages claims alongside parenting applications alleging family violence – both as a means of reducing the potential for judicial perceptions of inconsistency (why plead family violence for one purpose but not another?), and as a risk-minimization strategy for lawyers wary of potential negligence claims.[186]

Even with a different, possibly stricter, definition of family violence to that which is currently found in the *Divorce Act*, there are potentially serious administrative implications in recognizing a tort of family violence. Disputes that might otherwise be determined according to statutory provisions that deliberately eschew fault-based awards could turn into lengthy, contested adjudications on the extent to which one party wronged (i.e., inflicted violence upon) their spouse/partner. Not only would this undercut the shift in recent decades "away from an adversarial approach towards a resolution-based system,"[187] it would compound the problems of an already under-resourced family law system, creating further expense, enmity, and delay. To place this argument in the context of the broader trends identified at the outset of this article, recognizing a tort of family violence would effectively involve a re-introduction of the concept of fault into Ontario's family law system, with the potential to significantly undermine efficiency-based efforts in recent decades to channel people away from contested litigation. Put somewhat differently, in the absence of a significant expansion of judicial resources, the benefit of expanding access to appropriate remedial justice for SVs of family violence has the potential to negatively affect the broader population's access to the family law system.

There is also the possibility that tort claims between former partners could at least partly undo the default family property scheme that currently exists for married couples in Ontario. Instead of simply calculating net family property[188] and determining what, if any, equalization payments need to be made, parties might view the tort of family violence as an effective way to increase their share of the marital property pie – which is precisely what Mandhane J's decision in *Ahluwalia (Trial)*

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[185] Section 16(3)(j) of the *Divorce Act* requires judges to have regard to "any family violence" and its impact when determining what is in a child's best interests. Section 16(4) sets out factors that courts must consider for the purposes of subsection (3)(j).

[186] It seems conceivable that a lawyer who advises a client to plead family violence for the purpose of parenting orders, but who fails to advise of the potential for a tort claim based on the same or similar allegations, might infringe rules of professional conduct. For example, the Law Society of Ontario's *Rules of Professional Conduct* define "competent lawyer" in part as one who "develop[s] and advis[es] the client on appropriate causes of action": r 3.1.1(b).

[187] *Ahluwalia, supra* note 2 at para 120.

[188] *FLA*, s 5.

would have achieved if no appeal had been made. (The damages award was almost the same value as the parties' shared family property). Consequently, cases that might otherwise involve a relatively simple set of calculations, and which could possibly be resolved by the parties themselves, or via mediation, could become complex trials designed to determine fault – the very outcome the family law system has for decades sought to minimize.[189] Recognizing the tort of family violence therefore carries the risk of undermining "the promotion of certainty, predictability and finality in the determination of support obligations and property division and the removal of judicial discretion on those areas to the extent possible."[190] Allied to this concern is the fact that in Ontario, tort claims for more than $200,000 can be tried by jury, which would further complicate matters and involve increased time and expense for all involved (including the courts).[191]

C. Countervailing Factors

It is certainly possible that recognizing a tort of family violence will result in not only more litigation but also more complex proceedings to determine fault. Equally, though, it is questionable how many cases involving IPV that end up in the courts would (or should) otherwise be resolved privately or through mediation. In *Colucci v Colucci*, the SCC noted an important caveat to the emergent "culture of negotiation" in family law: cases involving "family violence or significant power imbalances."[192] The federal Department of Justice has also cautioned against using mediation in family violence cases, going so far as to say that "in light of the safety issues and the extreme power imbalance, [mediation] should be avoided."[193] While there is a growing view that screening, experienced counsel, and trauma-informed mediators can, in appropriate cases, reduce the risk of unfair bargains in mediations,[194] family violence researchers have also observed that, "[t]he effects of coercive control are not left at the door. Rather, intimidation, isolation, humiliation, exploitation, and micromanaging tactics"

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[189] Of course, mediation may be inadvisable or impossible in high-conflict situations, especially where there has been family violence. See Pt IV(C) *infra*.

[190] *Serra v Serra*, 2009 ONCA 105 at para 39.

[191] Tort claims are not precluded from being tried by jury in the Superior Court of Justice under s 108(2) of the *Courts of Justice Act*. Tort claims for under $200,000, however, are excluded from jury trial pursuant to s 108(3) of the *Courts of Justice Act* and Rule 76 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (simplified procedure).

[192] *Colucci, supra* note 175 at para 69.

[193] Canada, Department of Justice, *Best Practices for Representing Clients in Family Violence Cases* (by Cynthia Chewter), https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/bpfv-mpvf/viol2b.html.

[194] Coker, *supra* note 13 at 46; Jennifer Orange & Sabrina Khela, "*Women Talking:* An Alchemy for Feminist Alternative Dispute Resolution" (forthcoming, *Journal of Law and Equality*, on file with the author) at 4-8.

may preclude a fair and equal bargaining process.[195] For these reasons, recognizing a tort of family violence might not undermine the general move towards negotiated settlements because cases involving IPV are often less suited to mediation than cases where parties stand on a more equal footing. On the other hand, the element of privacy offered by mediation is often an important factor for people who want some kind of redress and acknowledgement of harm without the public nature of litigation.[196] For this reason, some survivors (and perpetrators) might prefer to negotiate in a controlled environment, suggesting that recognition of the tort of family violence might not result in a dramatic increase in contested litigation.

Floodgate concerns might also be somewhat ameliorated by the different mechanisms for enforcement of support orders versus enforcement of money judgments. For instance, spousal support orders made by courts in Ontario are automatically lodged with the Family Responsibility Office,[197] which is empowered to order garnishing of wages from a payor's employer.[198] For this reason, it might be seen as preferable by at least some parties to seek increased spousal support based on the emotional consequences of family violence,[199] rather than damages in tort. However, for this to avoid the same basic problem of contested litigation, payors would need to accept higher-than-usual support obligations based on allegations of family violence, absent judicial findings. High damages awards might incline potential payors to settle via increased support, but they would seem equally likely to encourage survivors to pursue claims in tort.

V. Conclusion

While the ONCA denied the existence of a tort of family violence on formalist, doctrinal grounds, this paper has shown that there is a lot more stake in the case than the appropriate boundaries of tort law and common law method. From a broader perspective attuned to history and more recent trends within Canadian family law, it becomes apparent that *Ahluwalia* exposes a tension between gender-based reform of a historically patriarchal legal system, and efficiency-based concerns about expanding the role of fault in an already overburdened civil litigation system. In its starkest form, this tension can be understood as a question about access to justice: should SVs of IPV have access to a cause of action that recognizes the insidious, gendered nature of

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[195] Karla O'Regan et al, *Family Law Mediation in Family Violence Cases: Basics and Best Practices* (Fredericton: Family Violence & Family Law Brief No 13, 2022) at 6.

[196] Orange & Khela, *supra* note 194.

[197] *Family Responsibility and Support Arrears Enforcement Act*, SO 1996, c 31, s 9(1).

[198] *Ibid*, s 22.

[199] *Leskun v Leskun*, 2006 SCC 25. For a recent case in which the emotional consequences of family violence were held to justify increased spousal support see *AC v KC*, 2023 ONSC 6017 (Mandhane J).

family violence, or do concerns about efficiency and the broader public's access to the courts (and possibly to justice) outweigh this desideratum?

In my view, the symbolic and practical importance of recognizing the gendered nature of IPV through an appropriately tailored cause of action outweighs efficiency-based floodgate concerns centered on expanding the role of fault in Canadian family law. As I have argued in this paper, the torts of battery, assault, and IIED, do not adequately capture the essence of coercive control; I also believe there is symbolic and practical merit in providing women, as the group most affected by IPV, with a cause of action that inverts the law's historical male bias by allowing women to sue men for physical and emotional abuse. I acknowledge that recognizing the new tort carries risks for the functioning of the civil and family law system in Ontario; however, given that cases involving family violence are not always (to put it mildly) suited to negotiated settlement, it may be desirable that these sorts of cases are generally tried in courts of law. On a more normative level, there is also something distinctly objectionable about sacrificing the possibility of increased justice for abused women on the altar of institutional efficiency. When the SCC hears the appeal from the ONCA, it will hopefully deal with this tension between gender-based (in)justice and institutional efficiency, rather than simply falling back on formalist principles of common law development.