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“Weaponizing” The Tort of Family Violence? Myths, Stereotypes, Lawyers’ Ethics and Access to Justice

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Résumé de l'article

La violence entre partenaires intimes [VPI] est la cause d’une multitude de préjudices sexospécifiques, mais les voies de réparation économique que prévoit le droit canadien manquent de cohérence. Bien que le droit de la responsabilité délictuelle ait évolué et permette aux survivantes de la VPI de solliciter une indemnisation, les réparations pour cause de responsabilité délictuelle font rarement l’objet d’une demande et elles se limitent en grande partie à des délits intentionnels tels que les agressions, les voies de fait et l’infliction délibérée d’une détresse émotionnelle. Ces délits n’englobent pas toujours ceux dont sont victimes les survivantes de la VPI, notamment la violence économique et le contrôle coercitif. Dans Ahluwalia v Ahluwalia, une décision en matière de droit de la famille rendue en 2022, la juge Renu Mandhane a répondu à cette lacune du droit en reconnaissant l’existence d’un nouveau délit de violence familiale, mais sa décision a été infirmée par la Cour d’appel de l’Ontario en 2023 et l’affaire a pris maintenant la direction de la Cour suprême du Canada. Notre document présente une analyse féministe du rôle que joue le droit de la responsabilité délictuelle en offrant des réparations aux survivantes de la VPI. Nous situons les recours en responsabilité délictuelle et la décision Ahluwalia dans le contexte plus large des lois canadiennes portant sur la VPI et des critiques féministes concernant le droit de la responsabilité délictuelle et les théories connexes. Ce contexte plus large soulève des questions liées à l’accès à la justice et aux réponses socio-économiques à la VPI chez les membres de groupes marginalisés en particulier. Nous examinons également la manière dont divers mythes et stéréotypes ont influencé ce secteur du droit et le rôle que jouent les avocats et les juges à cet égard, y compris dans la décision Ahluwalia. Nous concluons que la reconnaissance du délit de violence familiale est un pas en avant important, mais restreint, pour contrer les préjudices économiques de la VPI, et nous exhortons les gouvernements à faire davantage pour y remédier de manière systémique.

"Weaponizing" The Tort of Family Violence? Myths, Stereotypes, Lawyers' Ethics and Access to Justice

Deanne Sowter
Jennifer Koshan*

Intimate partner violence [IPV] causes myriad and gendered harms, but Canadian law has inconsistently provided avenues of economic redress. Although tort law has evolved to allow IPV survivors to seek compensation, tort-based remedies are sought rarely and largely limited to intentional torts such as assault, battery, and the intentional infliction of emotional distress. These torts do not always encompass the harms sustained by IPV survivors, particularly those caused by economic abuse and coercive control. In Ahluwalia v Ahluwalia*, a 2022 family law case, Justice Renu Mandhane responded to this gap in the law by recognizing a new tort of family violence, but her decision was overturned by the Ontario Court of Appeal in 2023, and the case is now before the Supreme Court of Canada. Our paper provides a feminist analysis of the role of tort law in providing compensatory remedies for survivors of IPV. We situate tort remedies and* Ahluwalia *within the wider context of Canadian laws addressing IPV and feminist critiques of tort law and theory. This wider context raises issues about access to justice and socio-economic responses to IPV for members of marginalized groups in particular. We also examine how myths and stereotypes have influenced this area of law and the role of lawyers and judges in this respect, including in* Ahluwalia. *We conclude that recognition of the tort of family violence is an important but limited step forward in compensating the harms of IPV, and we urge governments to do more to systemically remediate these harms.*

La violence entre partenaires intimes [VPI] est la cause d'une multitude de préjudices sexospécifiques, mais les voies de réparation économique que prévoit le droit canadien manquent de cohérence. Bien que le droit de la responsabilité délictuelle ait évolué et permette aux survivantes de la VPI de solliciter une indemnisation, les réparations pour cause de responsabilité délictuelle font rarement l'objet d'une demande et elles se limitent en grande partie à des délits intentionnels tels que les agressions, les voies de fait et l'infliction délibérée d'une détresse émotionnelle. Ces délits n'englobent pas toujours ceux dont sont victimes les survivantes de la VPI, notamment la violence économique et le contrôle coercitif. Dans Ahluwalia v Ahluwalia, une décision en matière de droit de la famille rendue en 2022, la juge Renu Mandhane a répondu à cette lacune du droit en reconnaissant l'existence d'un nouveau délit de violence familiale, mais sa décision a été infirmée par la Cour d'appel de l'Ontario en 2023 et l'affaire a pris maintenant la direction de la Cour suprême du Canada. Notre document présente une analyse féministe du rôle que joue le droit de la responsabilité délictuelle en offrant des réparations aux survivantes de la VPI. Nous situons les recours en responsabilité délictuelle et la décision Ahluwalia dans le contexte plus large des lois canadiennes portant sur la VPI et des critiques féministes concernant le droit de la responsabilité délictuelle et les théories

connexes. Ce contexte plus large soulève des questions liées à l'accès à la justice et aux réponses socio-économiques à la VPI chez les membres de groupes marginalisés en particulier. Nous examinons également la manière dont divers mythes et stéréotypes ont influencé ce secteur du droit et le rôle que jouent les avocats et les juges à cet égard, y compris dans la décision Ahluwalia. Nous concluons que la reconnaissance du délit de violence familiale est un pas en avant important, mais restreint, pour contrer les préjudices économiques de la VPI, et nous exhortons les gouvernements à faire davantage pour y remédier de manière systémique.

I. INTRODUCTION

Kuldeep Kaur Ahluwalia endured seventeen years of physical and sexual violence, psychological, verbal, and financial abuse, and coercive control by her husband. After their separation, she sought financial compensation from him for mental and physical harms. In addition to family law entitlements including property equalization, child and spousal support, Ms. Ahluwalia claimed damages for the intimate partner violence [IPV] she had suffered through a new tort of family violence.

In *Ahluwalia v Ahluwalia*, Ontario Superior Court Justice Renu Mandhane held that a new tort of family violence should be recognized.[1] She found the elements of the new tort were made out and ordered compensation to be paid by Mr. Ahluwalia to Ms. Ahluwalia; however, in July 2023, the new tort was overturned by the Ontario Court of Appeal.[2] Writing for a unanimous court, Justice Mary Lou Benotto (Justices Gary Trotter and Benjamin Zarnett concurring) found that it was not necessary on the facts of the case to affirm this new tort, given that existing torts were available to ground an award of damages. Varying the trial decision, they upheld Mr. Ahluwalia's liability in other torts and reduced the damage award. The case is now before the Supreme Court of Canada.[3] To help inform the issues arising in the appeal, this paper examines the lower court decisions and their implications for survivors of IPV.

Intimate partner violence takes many forms, all of which cause harm to the survivor. Women are disproportionately victimized by IPV, and they often need to access the legal system for protective and financial remedies. The federal *Divorce Act* now includes "family violence" as a factor relevant to parenting determinations, which is also included in most provincial and territorial family law statutes.[4]

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1 *Ahluwalia v Ahluwalia,* 2022 ONSC 1303 [*Ahluwalia* ONSC].

2 *Ahluwalia v Ahluwalia*, 2023 ONCA 476 [*Ahluwalia* ONCA].

3 *Ahluwalia v Ahluwalia*, 2024 CanLII 43115 (SCC).

4 *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2(1). Provincial/territorial family legislation applies where the parties were not married or are not seeking a divorce. For a comparison of family law legislation across Canada for inclusion and definitions of family violence, see Wendy Chan 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.

However, as we examine in this paper, law has inconsistently provided avenues of economic redress for the harms caused by IPV.

Across Canada, legislative compensation for survivors of IPV is inadequate. Family laws do not fully account for IPV, providing few financial remedies.[5] The law of torts, one of the objectives of which is to provide compensation for intentional and negligent wrongs, is another option that might allow survivors to seek monetary damages.[6] Interspousal immunity historically prevented wives from seeking damages in tort, and although those laws were reformed in the 1970s and 80s,[7] tort claims for IPV have been rare. Relief has primarily been sought through intentional torts such as assault, battery, and the intentional infliction of emotional distress [IIED], which were all considered in *Ahluwalia*.

To review *Ahluwalia* and the role of torts in addressing the economic consequences of IPV, we employ a critical feminist methodology, interrogating the ramifications for survivors of recognizing (or failing to recognize) a tort of family violence. We examine tort law contextually and broadly, considering its theoretical foundations, its role in filling gaps in other areas of law, and feminist critiques of tort law. To place women, the predominant survivors of IPV, at the centre of our analysis, we also examine the ways that legal actors, including both lawyers and judges, have relied on myths and stereotypes in their advocacy and reasoning in the context of IPV and in this case specifically. Reliance upon myths and stereotypes has the power to obscure violence and impede survivors' abilities to access justice and material remedies, including through a tort of family violence.

In Part II, we provide context about IPV and its harms, as well as a review of the economic remedies that currently exist for survivors and critiques of the current law. Part III reviews both of the *Ahluwalia* decisions and subsequent case law considering *Ahluwalia*, before turning to our commentary in Part IV. Our commentary begins with consideration of tort law's objectives as applied to the tort of family violence. We then critically analyze the decisions, considering the myths and stereotypes both perpetuated and repudiated, before situating *Ahluwalia* and its implications within the access to justice crisis and offering suggestions for law and policy reform in Part V. We adopt a broad definition of access to justice that includes both substantive and procedural aspects and prioritizes the safety, security, and autonomy of survivors.[8] Through a critical feminist lens, we address issues such as the burden tort law places on survivors to litigate their economic needs, potential limitations issues, and the need for broader economic supports for survivors beyond what tort law can provide. In doing so, we raise concerns about reliance on stereotypical reasoning in lawyers' advocacy and judicial decision-making, arguing that while IPV myths have the power to distract the court from the abuse and retraumatize survivors, understanding their influence can help inform a tort of family violence, which in turn will promote access to justice for survivors rather than undermine it. In relation to compensating the harms caused by IPV, we conclude that

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5 See e.g. *Leskun v Leskun,* 2006 SCC 25; *Family Law Act*, RSO 1990, c F 3, s 5(6) [ON *FLA*].

6 In this paper we use the term "compensation" to include tort-based general damages for pain and suffering, aggravated damages, and pecuniary damages, all of which compensate the harms of IPV.

7 See e.g. *The Family Law Reform Act, 1975,* SO 1975, c 41, ss 1(1) and 1(3)(a).

8 See Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32 Windsor YB Access Just 149; Jennifer Koshan, Janet Mosher & Wanda Wiegers, "The Costs of Justice in Domestic Violence Cases" in Trevor Farrow & Les Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (UBC Press, 2020) at 149.

recognition of the tort of family violence is an important but limited step forward, citing the need for societal and systemic change as well.

The research we rely on in this paper underscores the importance of a feminist analysis that is mindful of intersectionality while exposing the problems with exceptionalizing IPV as a wrong. Our starting assumption reflects the gender-based violence [GBV] epidemic[9] and recognizes that IPV is prevalent. It follows that a legal system that treats IPV as an exceptional occurrence contributes to systemic inequalities. Believing that IPV is rare gives legal actors permission to harmfully assume that the case in front of them is not about IPV (especially in family law disputes), that IPV is being falsely alleged or 'weaponized', or if there was IPV it was not serious enough to require a remedy.[10] Our position throughout this paper is to challenge these assumptions and emphasize the commonality of IPV, as well as the ways that intersecting and systemic inequalities impact the harms suffered, the need for financial redress, and the importance of specifically-tailored remedies for IPV.

Finally, we note our terminology in this paper. Family violence is an umbrella term referring to all types of intra-familial violence, including for example IPV, violence against children, and elder and sibling abuse. IPV refers to violence by one intimate partner towards another (including all types of intimate relationships – cohabiting, former, married, etc.) and it is inclusive of coercive control, which focuses on tactics and patterns of abuse that undermine the survivor's autonomy.[11] We primarily use the term IPV because our focus is on violence by intimate partners, but the tort of family violence is broader in application and so we have also specifically referenced family violence where relevant. Although our focus is on adult survivors who seek redress through tort law, we acknowledge the harmful impact of IPV on children both directly and indirectly.[12] Finally, we use the terms survivor and victim interchangeably to avoid stereotypes and to recognize that some people do not identify with either term. We also use gendered pronouns to acknowledge that in heterosexual relationships, like that in *Ahluwalia*, women are the disproportionate survivors and men are the primary perpetrators of IPV, although we recognize that IPV can be experienced by persons of all genders and sexualities.[13]

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9 Joint Federal/Provincial Commission into the April 2020 Nova Scotia Mass Casualty, Mass Casualty Commission, "Final Report – Turning the Tide Together: Violence" vol 3 - (March 2023) at 274 online (pdf): <https://masscasualtycommission.ca/files/documents/Turning-the-Tide-Together-Volume-3-Violence.pdf>.

10 Joan Meier, "Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law" (2021) 110 Geo L J 835.

11 See e.g. Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York: Oxford University Press, 2007).

12 See e.g. Sibylle Artz et al, "A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence on Children and Youth" (2014) 5:4 Int'l J Child Youth Fam Stud 493.

13 See e.g. Statistics Canada, "Intimate partner violence: Experiences of sexual minority women in Canada, 2018" by Brianna Jaffray (26 April 2021), online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00005-eng.pdf?st=G93aStVm>. For a discussion of the lack of data that moves beyond a gender binary and heteronormative assumptions, see Chan et al, *supra* note 4.

II. BACKGROUND

A. Intimate Partner Violence and its Harms

The disproportionately frequent and grave abuse that women experience at the hands of their male partners includes physical, psychological, and financial abuse, coercive control, and lethal violence.[14] Marginalized women are victimized at higher rates, including girls and young women, Indigenous women, members of the 2SLGBTQQIA+ community, disabled women, and those living in rural and remote communities.[15] In particular, Indigenous women are twice as likely to experience physical violence by an intimate partner than non-Indigenous women and four times more likely to experience intimate partner homicide.[16] IPV can also include different tactics for different groups of survivors, including for example 2SLGBTQQIA+ identity abuse, abuse related to immigration status, and spiritual abuse, all of which may occur alongside systemic abuse and other structural inequalities.[17] As we elaborate on below, understanding the prevalence and myriad tactics associated with IPV, and the underlying context of intersecting inequalities in which IPV occurs, is crucial in assessing the adequacy of legal responses to IPV.

At the same time, barriers to reporting IPV suggest these statistics are misleadingly low. Under non-pandemic circumstances, 80% of victims do not report IPV to the police.[18] Their reasons are diverse and many, including embarrassment, fear the abuse will escalate, avoiding repercussions within their

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[14] Statistics Canada, "Family Violence in Canada: A Statistical Profile, 2019" by Shana Conroy, (2 March 2021) at 29, online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00001-eng.pdf?st=kiXK3BMz> [Stats Canada, FV 2019]; Statistics Canada, "Spousal Violence in Canada, 2019" by Shana Conroy, (6 October 2021) at 7-10, online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00016-eng.pdf?st=4VBye2zS> [Stats Canada, "Spousal Violence"]; Myrna Dawson et al, Canadian Domestic Homicide Prevention Initiative, "One is Too Many: Trends and Patterns in Domestic Homicide in Canada 2010-2015" (2018) at 10-12, online (pdf): <http://cdhpi.ca/sites/cdhpi.ca/files/CDHPI-REPORTRV.pdf>. See also *Michel v Graydon*, 2020 SCC 24 at para 95 [*Michel*].

[15] Statistics Canada, "Intimate Partner Violence in Canada, 2018: An Overview" by Adam Cotter, (26 April 2021) at 8-9, online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00003-eng.pdf?st=buxbpi70> [Stats Canada, IPV 2018]. We use "2SLGBTQQIA+" (Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual) in accordance with the discussion of that term by the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), vol 1a at 40, online: <https://www.mmiwg-ffada.ca/final-report/>.

[16] Statistics Canada, "Intimate Partner Violence: Experiences of First Nations, Metis and Inuit Women in Canada, 2018" by Loanna Heidinger (19 May 2021) at 5, online (pdf): <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00007-eng.pdf?st=CV-4Bay>; Stats Canada, FV 2019, *supra* note 14 at 31.

[17] See e.g. Julie Woulfe & Lisa Goodman, "Identity Abuse as a Tactic of Violence in LGBTQ Communities: Initial Validation of the Identity Abuse Measure" (2021) 36 J Interpersonal Violence 2656 (identity abuse refers to abuse tactics that leverage systemic oppression such as membership in the 2SLGBTQQIA+ communities to harm an individual); Janet Mosher, "Domestic Violence, Precarious Immigration Status, and the Complex Interplay of Family Law and Immigration Law" (2023) 35:1 Can J Family Law 297; Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593; Julia Tolmie et al, "Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework" (2024) 30:1 Violence Against Women 54.

[18] Stats Canada, "Spousal Violence", *supra* note 14 at 3.

community, and fear of not being believed.[19] Indigenous women commonly underreport abuse because the police are "more likely to be a threat to them than to provide safety or protection."[20] Black, racialized, and Indigenous women may face unfounded IPV-related charges or subjection to child protection consequences,[21] and 2SLGBTQQIA+ people suffer discrimination and negative interactions with the police, influencing their options as well.[22] Thus, intersectional inequalities and systemic barriers impact how IPV is experienced, understood, and officially reported, which may in turn affect access to and adequacy of legal remedies.

Intimate partner violence is not currently a specific criminal offence in Canada,[23] so statistics on police-reported IPV also fail to account for most non-physical forms of IPV, including emotional and financial abuse and coercive control.[24] Coercive control focuses on the cumulative impact of tactics and patterns of abuse rather than discrete incidents. Such tactics can include "isolation, manipulation, humiliation, surveillance, micro-regulation of gender performance, economic abuse, intimidation, and threats" as well as acts of physical and sexual violence.[25] When viewed in totality, these tactics undermine survivors' autonomy and may entrap them in abusive relationships.[26]

Because IPV has various manifestations, it can cause a broad range of harms, including physical, psychological, financial, and autonomy-based harms, as well as disadvantage in the legal system. IPV can cause disability, injury, chronic pain, chronic health conditions and disease (e.g., diabetes, heart disease, and cancer), undermine the victim's social status, and cause death.[27] In addition, a 2021 study showed that

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19 Stats Canada, IPV 2018, *supra* note 15 at 8; Department of Justice, "Family Violence: Relevance in Family Law" (2018) at 2-3, online (pdf): <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/sept01.pdf>; Rise Women's Legal Centre, Haley Hrymak & Kim Hawkins, "Why Can't Everyone Just Get Along?: How BC's Family Law System Puts Survivors in Danger" (January 2021) at 37-42, online (pdf): <https://www.womenslegalcentre.ca/publications/why-cant-everyone-just-get-along> [Rise Report].

20 Rise Report, *ibid* at 40.

21 See e.g. Patrina Duhaney, "Criminalized Black Women's Experiences of Intimate Partner Violence in Canada" (2022) 28:11 Violence Against Women 2765; Wanda Wiegers, "The Intersection of Child Protection and Family Law Systems in Cases of Domestic Violence" (2023) 35:1 Can J Family Law 183.

22 Jacqueline Harden et al, "The Dark Side of the Rainbow: Queer Women's Experiences of Intimate Partner Violence" (2020) 23:1 Trauma, Violence & Abuse 301 at 302-307.

23 The federal government was considering criminalizing coercive control until Parliament was prorogued on 6 January 2025. See Bill C-332, *An Act to Amend the Criminal Code (coercive control of intimate partner)*, 1st Sess, 44th Parl, 2024 (second reading, Senate, 5 December 2024) [Bill C-332]; and for a feminist critique see Janet Mosher et al, "Submission to Justice Canada on the Criminalization of Coercive Control" (2023) Osgoode Legal Studies Research Paper No. 4619067, online (pdf): <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4619067>.

24 Criminal harassment is an available offence in some IPV cases. See *Criminal Code*, RSC 1985, c C-46, s 264.

25 Mosher et al, *supra* note 23 at 5.

26 See e.g. Tolmie et al, *supra* note 17.

27 Marika Morris, "Acting on Violence Against Women is a Blueprint for Health" (May 2016) at 2, online (pdf): <http://endvaw.ca/wp-content/uploads/2016/09/Blueprint-and-the-social-determinants-of-health-May-10-2016.pdf>; Dr Gregory Taylor, Chief Public Health Officer, "Report on the State of Public Health in Canada 2016: A Focus on Family Violence in Canada" (2016) at 16-19, online (pdf): <www.canada.ca/content/dam/canada/public-health/migration/publications/department-ministere/state-public-health-family-violence-2016-etat-sante-publique-violence-familiale/alt/pdf-eng.pdf>.

30-74% of victims sustain traumatic brain injuries,[28] which can be caused by blunt-force trauma (e.g., being hit with something) and reduced oxygen (e.g., strangulation), both of which are "relatively common" forms of IPV.[29] Trauma from IPV-related psychological injuries can also have significant neurological impacts.[30]

It is well recognized that IPV can cause trauma, post-traumatic stress disorder (PTSD) and complex-PTSD.[31] However, not everyone experiences abuse or trauma the same way. Exposure to traumatic events has been found to be "disproportionately higher" for individuals disadvantaged by socioeconomic status, race, sexual orientation, gender identity, and immigration status.[32] Marginalized victims, particularly those who have experienced a lifetime of traumatic oppression such as "childhood abuse, racism, and homophobia", may experience multiple layers of abuse and trauma.[33] Some survivors may also experience trauma when they engage the justice system.[34] Trauma, PTSD, and complex-PTSD all contribute to victims' disadvantage in the justice system, compromising credibility outcomes, impacting the terms of consensual agreements, and contributing to the harms suffered and victims' financial needs.[35] While the physical and psychological consequences of IPV are important for cataloguing the harms that require compensation, at the same time, it is important not to suggest a framing of IPV which emphasizes individual trauma at the expense of recognizing the structural inequalities that contribute to survivors' responses to, and ability to recover and be safe from, violence.[36]

Financially, economic abuse (including tactics of coercive control) and the financial impacts of IPV are interrelated and mutually reinforcing. Economic abuse involves the abuser impeding the survivor's

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[28] Anna Cameron & Lindsay M Tedds, "Appendix E: Commissioned Discussion Paper: Gender-Based Violence, Economic Security, and the Potential of Basic Income" in Amanda Dale, Krys Maki & Rotbah Nitia, *A Report to Guide the Implementation of a National Action Plan on Violence Against Women and Gender Based Violence* (2021) at 249, online (pdf): <https://nationalactionplan.ca/wp-content/uploads/2021/06/NAP-Final-Report.pdf>.

[29] Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399 at 407.

[30] Melanie Randall & Lori Haskell, "Trauma-informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36 Dalhousie LJ 501 at 511-513.

[31] See Randall & Haskell, *ibid*; Judith Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (Perseus Books Group, 2015) [Herman, "Trauma"]; Pamela Cross et al, Department of Justice, "What You Don't Know Can Hurt You: The importance of family violence screening tools for family law practitioners" (2018) at 14, online (pdf): <www.justice.gc.ca/eng/rp-pr/jr/can-peut/can-peut.pdf>; Department of Justice, "HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisors" (January 2022) at 43-44, online (pdf): <www.justice.gc.ca/eng/fl-df/help-aide/docs/help-toolkit.pdf>; Stats Canada, "Spousal Violence", *supra* note 14 at 10.

[32] Randall & Haskell, *supra* note 30 at 508; Karla O'Regan et al, Centre for Research & Education on Violence Against Women & Children, "Trauma-Informed Approaches to Family Violence in Family Law" (2021) at 2, online (pdf): <www.fvfl-vfdf.ca/briefs/Briefs%20PDF/Family_Violence_Family_Law_Brief-7-EN.pdf>.

[33] Stephanie L Baird, Ramona Alaggia, & Angelique Jenney, "'Like Opening Up Old Wounds': Conceptualizing Intersectional Trauma Among Survivors of Intimate Partner Violence" (2019) 36(17-18) J Interpersonal Violence 8118 at 8134.

[34] Randall & Haskell, *supra* note 30 at 517-519.

[35] See Epstein & Goodman, *supra* note 29; Wendy Chan & Rebecca Lennox, "'This Isn't Justice': Abused Women Navigate Family Law in Greater Vancouver" (2023) 35:1 Can J Fam L 81; Ellen Gutowski & Lisa Goodman, "'Like I'm Invisible': IPV Survivor-Mothers' Perceptions of Seeking Child Custody through the Family Court System" (2020) J Family Violence DOI: <10.1007/s10896-019-00063-1>.

[36] Tolmie et al, *supra* note 17 at 57.

ability to acquire, use, and maintain economic resources, which in turn threatens the survivor's economic security, self-sufficiency, and autonomy.[37] The financial impact on many survivors is profound, undermining their economic security and ability to leave abusive relationships. Survivors often suffer long-term economic consequences, including poor credit, housing issues, unemployment and precarious work, few to no assets, poverty and homelessness.[38] Securing financial compensation for victims of IPV is also an important method of preventing future violence and addressing the systemic costs of IPV.[39]

B. Existing Remedies and Their Shortcomings

In 1987, after interspousal immunity had been abolished in most provinces,[40] the Supreme Court of Canada decided *Frame v Smith,* considering the relationship between tort law and family law.[41] In *Frame,* the father sought damages for the tort of IIED for the mother's interference in his parenting time. For the majority, Justice La Forest commented that tort claims in the context of parenting litigation were disadvantageous.[42] In this case, damages would do little to bring back the children's "love and companionship", and if damages focused on the father's expenses, the amount would not be worth litigating.[43] The deciding factor, however, was the existence of a complete legislative scheme for parenting issues, including remedies for a party's failure to comply with court orders.[44]

Dissenting, Justice Wilson found there could be a cause of action for breach of fiduciary duty. However, she agreed with the majority's concerns that allowing tort remedies in parenting cases would do nothing to encourage "conduct conducive to the maintenance and development of a relationship between both parents and their children."[45] Instead, she wrote that they "would be tailor-made for abuse" and incentivize litigation.[46] Justice Wilson held 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."[47]

Although *Frame v Smith* focused on remedies for the denial of parenting time, subsequently judges took the decision, particularly Justice Wilson's dissent, out of the parenting context and relied on it to

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37 Cameron & Tedds, *supra* note 28 at 247. See also Rachel J Voth Schrag, Sarah R Robinson & Kristen Ravi, "Understanding Pathways within Intimate Partner Violence: Economic Abuse, Economic Hardship, and Mental Health" (2019) 28:2 J Aggression, Maltreatment & Trauma 222 at 223.

38 See e.g. Cameron & Tedds, *ibid* at 248-249; Lieran Docherty et al, "Hidden in the Everyday: Financial Abuse as a Form of Intimate Partner Violence in the Toronto Area" (last visited 12 December 2024) online (pdf): <https://womanact.ca/wp-content/uploads/2020/11/WomanACT_Hidden-in-the-everyday_Financial-Abuse-Report.pdf> at 19; C Nadine Wathen, Jennifer CD MacGregor & Barbara J MacQuarrie, "The Impact of Domestic Violence in the Workplace: Results From a Pan-Canadian Survey" (2015) 57:2 J Occupational & Environmental Medicine e65.

39 See e.g. Canada, Department of Justice, "An Estimation of the Economic Impact of Spousal Violence in Canada, 2009" by Ting Zhang et al (2012) at 80, online (pdf): <https://justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12_7/rr12_7.pdf>.

40 See e.g. *The Family Law Reform Act, 1975,* SO 1975, c 41, ss 1(1) and 1(3)(a) [1975 *FLRA*]; *The Family Law Reform Act, 1978,* SO 1978, c 2, ss 65(1) and (3)(a) [1978 *FLRA*]; *Charter of Rights Amendments Acts,* 1985, SBC 1985, c 68, s 80 [*CRAA*]; *Gratuitous Passengers and Interspousal Tort Immunity Statutes Act,* SA 1990, C 22, s 2 [*ITISA*].

41 *Frame v Smith,* [1987] 2 SCR 99.

42 *Ibid* at paras 8-9.

43 *Ibid* at para 10.

44 *Ibid* at para 11.

45 *Ibid* at para 44.

46 *Ibid*.

47 *Ibid* at para 47.

decline tort remedies in family law cases generally.[48] One question for the courts in *Ahluwalia,* which we will address in Part III, was whether a tort claim could be brought within a family law case.

In cases involving married spouses, the idea of a no-fault approach to divorce may suggest that law should not offer redress for IPV-related harms in the context of a family law dispute. To be sure, the shift away from only allowing divorces on limited grounds based on matrimonial offences was intended to make divorces easier to obtain and the process less adversarial.[49] However, Victorian ideas of fault-based divorce, which were almost exclusively concerned with adultery, should not be conflated with ideas that family law was about establishing wrongdoing.[50] Fault had a narrow definition historically. Outside of Nova Scotia, cruelty – the ground that clearly engages IPV – was not a ground for divorce in Canada until 1968 when the federal government introduced the first comprehensive divorce legislation.[51] Under the current *Divorce Act,* cruelty is not its own ground, but rather a way to (theoretically) achieve a divorce faster than one year following separation.[52] Since 1968, cruelty has consistently been underused, and cases have primarily focused on extreme physical violence.[53] In other words, the purpose of divorce law, and family law more broadly, has never been to protect women from violent husbands, nor to compensate survivors of IPV.

Currently, family law provides very little statutorily to compensate for IPV-related harms. IPV has been, and continues to be, a legally exceptional consideration to a framework that is primarily aimed at supporting parties to settle their disputes themselves. In relation to spousal support, consideration of a victim's inability to work due to physical injury or psychological trauma caused by IPV may help ground entitlement, informing the victim's needs and difficulty in becoming self-sufficient.[54] A lump sum of spousal support may also be ordered instead of periodic support to sever ongoing contact between the parties.[55] However, the *Divorce Act* and many provincial/territorial family law statutes prevent courts from considering spousal "misconduct"; none specifically include IPV as a consideration relevant to support.[56] In Ontario, married spouses can seek an unequal division of net family property, for instance, if a spouse incurred debts or depleted their property recklessly or in bad faith – which could cover some financial

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48 Mary Jo Maur, "Torts and Family Law: What's New, What's Old and How to Use It" (2022) 41 CFLQ 23 at 26; *Ahluwalia* ONCA, *supra* note 2 at para 45.

49 Deanne Sowter, "Tracing the Breakdown of Marriage: A Feminist Critique of Canadian Divorce Law" (2023) 35:4 Child and Fam LQ 389 at 399-404 [Sowter, "Tracing"].

50 Mary Lydon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (IB Tauris, 1989).

51 Sowter, "Tracing", *supra* note 49; *Divorce Act*, RSC 1967-68, c 24, s 3(d).

52 *Divorce Act, supra* note 4, s 8(2)(b)(ii) (in effect it often takes longer than one year to prove cruelty because it will likely be contested, and courts are back-logged; whereas waiting one year to establish that there has been a "breakdown of marriage" is typically faster).

53 Sowter, "Tracing", *supra* note 49.

54 See e.g. *Leskun, supra* note 5; *Family Law Act*, SBC 2011, c25, s 166(a) [BC *FLA*]; *AC v KC,* 2023 ONSC 6017.

55 See e.g. *Davis v Crawford,* 2011 ONCA 294.

56 *Divorce Act, supra* note 4, s 15.2(5); *Leskun*, *supra* note 5. For a discussion of pre-*Leskun* case law on this point, see Fiona Kelly, "Private Law Responses to Domestic Violence: The Intersection of Family Law and Tort" (2009) 44 SCLR (2d) 321 at 329. For a comparison of provincial/territorial family legislation on spousal support, see Jennifer Koshan, Janet Mosher & Wanda Wiegers, *A Comparison of Gender-Based Violence Laws in Canada: A Report for the National Action Plan on Gender-Based Violence Working Group on Responsive Legal and Justice Systems* (1 August 2023), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3995519> (Koshan, Mosher & Wiegers, "Comparison") at 18-20.

abuse.[57] Property regimes vary across the country though, and statutory property regimes are not always available for separating cohabitees, who may need to claim an equitable remedy instead.[58] Exclusive possession orders for the family home are also available under family property legislation in circumstances including IPV, but these orders provide temporary relief.[59] Beyond these narrow remedies, family law offers no financial compensation for IPV.

Outside of family law, there are limited legislative remedies providing financial relief for survivors. Restitution orders are available under the *Criminal Code*, but they are limited to pecuniary losses related to IPV that is criminalized.[60] These orders also require engagement with the criminal law system and a finding of guilt. Victim compensation laws exist in some provinces and territories, but in others, this remedy is unavailable or restricted to pecuniary losses.[61] In jurisdictions that do offer victim compensation, the victim may be required to report the matter to police, also raising concerns about the need to engage with the criminal legal system.[62] Civil protection order legislation provides limited financial remedies, for example requiring respondents to make rent or mortgage payments for the family residence, and only in a couple of jurisdictions.[63] Neither is social assistance legislation an adequate alternative, providing minimal coverage of expenses directly related to the harms of IPV and wholly inadequate levels of support that are often subject to work and immigration status requirements.[64]

Torts have traditionally been used to fill gaps in other remedies, and the existing torts of battery (direct physical interference with another's person), assault (threats of imminent offensive or harmful contact), and IIED (flagrant and outrageous conduct that is calculated to and does result in visible and provable injury) may provide compensation for some survivors of IPV.[65] The tort of harassment has also been recognized in some jurisdictions,[66] as have the torts of stalking[67] and non-consensual distribution of intimate images.[68] These too may provide compensatory or other remedies, such as injunctive relief, for some survivors of IPV.[69]

However, one of the key arguments in *Ahluwalia* was that existing torts provide a patchwork of remedies that a broader tort of family violence would better encompass, including the harms of coercive control. Intangible harms associated with non-physical injuries are notoriously underestimated and devalued in tort cases, based on gendered assumptions about resilience, exaggeration, and undervaluing

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57 See e.g. ON *FLA*, *supra* note 5, ss 5(6)(b) and (d). See also BC *FLA*, *supra* note 54, s 95.

58 See e.g. *Kerr v Baranow,* 2011 SCC 10; ON *FLA*, *ibid,* s 1(1), 4 and 5.

59 See e.g. ON *FLA*, *ibid,* s 24(3)(f).

60 *Criminal Code, supra* note 24, s 738.

61 For a comparison of jurisdictions see Koshan, Mosher & Wiegers, "Comparison", *supra* note 56 at 37-40.

62 *Ibid* at 39-40.

63 *Victims of Family Violence Act*, RSPEI 1988, c V-3.2, s 4(3)(j1); *Family Violence Protection Act*, SNL 2005, c F-3.1, s 6(l).

64 See Koshan, Mosher & Wiegers, "Comparison", *supra* note 56 at 60-67.

65 See *Ahluwalia* ONCA, *supra* note 2 at paras 62-69.

66 *Alberta Health Services v Johnston*, 2023 ABKB 209 (recognizing the tort of harassment); *Caplan v Atas*, 2021 ONSC 670 (recognizing the tort of internet harassment).

67 *Domestic Violence and Stalking Act*, CCSM c D93; *Family Abuse Intervention Act*, SNu 2006, c 18.

68 See Koshan, Mosher & Wiegers, "Comparison", *supra* note 56 at 73-74 for a discussion of legislation; see also *ES v Shillington*, 2021 ABQB 739 (recognizing a common law tort).

69 The torts of false imprisonment and intimidation may also capture some IPV, but they are rarely used in this context in Canada. See Maur, *supra* note 48 at 51-53.

the seriousness of the injuries.[70] IPV-related tort claims in Canada have been infrequent and where successful, damage awards have tended to be quite low.[71] Success has been most likely in cases where the respondent was criminally convicted.[72] That said, recent research shows that damage awards are sometimes higher than they once were, but generally they continue to be low, despite increased recognition of the harms of IPV.[73]

The patchwork of torts and the costs of pursuing a claim also have implications for access to justice, particularly for survivors who are members of marginalized groups.[74] More broadly, tort law remedies run the risk of re-privatizing IPV and contributing to the harms of the neoliberal state, including an emphasis on individual responsibility and the failure to provide appropriate public funding for survivors' economic needs.[75] Tort law claims against institutional actors for IPV-related harms are exceedingly rare in Canada.[76]

At the same time, tort claims can play a role in educating the public about the harms of IPV and their economic consequences, and when high-profile cases receive media attention this can have possible deterrent effects. Tort claims are also a potential alternative to more carceral approaches to IPV, which have been critiqued because of the impacts of criminalization on persons experiencing systemic and intersecting inequalities.[77] We will return to these issues in Parts IV and V, but at this stage, we argue that torts can provide a useful means of pursuing compensatory justice for at least some survivors given the absence of other avenues of financial redress for IPV.

With this context in mind, we now turn to our discussion of the *Ahluwalia* decisions.

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70 Elizabeth Adjin-Tettey, "Sexual Wrongdoing: Do the Remedies Reflect the Wrong?" in Janice Richardson & Erika Rackley, eds, *Feminist Perspectives on Tort Law* (Routledge, 2012) 179. In the American context, see e.g. Martha Chamallas, "Social Justice Tort Theory" (2021) 14 J Tort Law 309.

71 See Laura Buckingham, "Striking Back: The Tort Action for Spousal Violence" (2007) 23:2 Can J Fam L 273 (reviewing 25 reported decisions, with damage awards over $40,000 in only 3 cases); Kelly, *supra* note 56 (reviewing 27 reported decisions, finding even the most serious cases involved awards between $20,000 and $40,000); Samantha Eisen, "Damages for Spousal Violence: Why are they so low?" (2024) 43 CFLQ 181 at 185 (since 2007, in 38% of reported family court final decisions, the court either dismissed the claim or ordered less than $2,500 in damages).

72 Buckingham, *ibid* at 300; Kelly, *ibid* at 338-339.

73 Eisen, *supra* note 71 at 184-188.

74 Kelly, *supra* note 56 at 339.

75 For a discussion of neoliberalism and economic responses to IPV see e.g. Deborah M Weissman, "In Pursuit of Economic Justice: The Political Economy of Domestic Violence Laws and Policies" (2020) Utah L Rev 1; see also Kelly, *ibid* at 340-41 in the specific context of torts and family law.

76 For discussion of such a case see Elizabeth A Sheehy, "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from Jane Doe to Bonnie Mooney" (2005) 17:1 Can J Women & L 87. Maur, *supra* note 48, notes some negligence claims against child protection authorities in the family violence context, which are beyond our scope.

77 See e.g. Duhaney, *supra* note 21; Mosher et al, *supra* note 23.

III. *AHLUWALIA V AHLUWALIA*

A. Trial Decision

1. Facts

The parties were married in India in 1999. Following the birth of their first child, Mr. Ahluwalia immigrated to Canada in 2001, followed by Ms. Ahluwalia and their child six months later.[78] Their second child was born in 2004. Although the parties had trained as professionals in India (Mr. Ahluwalia was a lawyer), they lacked social and financial support in Canada, and did not have the resources to accredit their foreign credentials.[79] They worked in a plastics factory and in food services in Etobicoke, Ontario and when their second child was born, Mr. Ahluwalia began work as a truck driver while Ms. Ahluwalia volunteered for Punjabi community television and radio programs in their new home in Brampton, Ontario.[80] When Mr. Ahluwalia became a truck owner-operator it gave him an increase in income, and after a two-year stint in Edmonton, Alberta they resettled in Brampton, where they lived until their separation in July 2016.[81] The parties' finances were described by Justice Mandhane as "tight".[82]

The trial judge accepted Ms. Ahluwalia's evidence regarding emotional and financial abuse and coercive control. Mr. Ahluwalia "insulted and belittled [her] about her appearance and her difficulties conceiving, and repeatedly threatened to leave her and the children penniless".[83] He also subjected her to "silent treatment" that only ended "when she complied with his 'demand' for sex".[84] He controlled the family's finances, closely monitoring her spending and depriving her of access to joint accounts and credit cards while contemplating separation.[85] He was physically violent on three specific occasions, which included punching and slapping Ms. Ahluwalia to the point of causing extensive bruising, and strangling her.[86] This abuse was not disputed on appeal.

Mr. Ahluwalia was criminally charged with assault and uttering death threats in 2021, charges that were still outstanding at the time of the appeal but were ultimately dismissed.[87] He applied for a divorce, seeking amongst other relief, sale of the family home and property equalization.[88] In her answer, Ms. Ahluwalia also sought equalization in addition to child and spousal support. She later amended her answer to seek general, exemplary, and punitive damages for the abusive conduct, which she argued had caused her mental and physical harm.[89] Ms. Ahluwalia was self-represented during the 11-day trial, while Mr. Ahluwalia was represented by counsel.

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78 *Ahluwalia* ONSC, *supra* note 1 at paras 7-10.
79 *Ibid* at paras 9-10.
80 *Ibid* at paras 10-11.
81 *Ibid* at paras 14-18.
82 *Ibid* at para 14.
83 *Ahluwalia* ONCA, *supra* note 2 at para 13.
84 *Ibid*.
85 *Ibid* at para 14.
86 *Ibid* at paras 9-12.
87 The husband was found not guilty following a trial in an unreported decision (email correspondence on file with authors).
88 *Ahluwalia* ONSC, *supra* note 1 at para 20.
89 *Ibid* at paras 20-27. Issues related to parenting and sale of the family home were settled.

2. Analysis

Before assessing the merits of the tort claim, Justice Mandhane was required to rule on whether the family law proceedings were the appropriate forum. Mr. Ahluwalia argued that hearing the tort claim in this context raised concerns "about the proceedings being 'weaponized'."[90] Justice Mandhane agreed that courts "must be careful not to arm family law litigants to overly complicate the litigation through speculative and spurious tort claims."[91] However, she found that family proceedings were a proper forum for raising a tort claim, noting that family violence was now recognized in the *Divorce Act*, albeit with the recent amendments providing no specific avenue for victims "to obtain reparations for harms that flow directly from family violence and that go well-beyond the economic fallout of the marriage."[92] She also relied on an access to justice rationale, finding that survivors should not be expected to file both family and civil claims following a violent relationship.[93]

On the issue of liability for damages, the trial judge addressed three issues: (1) Whether a tort of family violence should be recognized; (2) Whether Mr. Ahluwalia was liable in damages for his conduct during the marriage; and (3) If so, what damages should he pay?[94]

Justice Mandhane began her discussion by noting the general principle that a tort entails breach of a recognized legal duty where the appropriate remedy is a claim for damages.[95] Moreover, although courts should exercise caution in accepting new torts, it is legitimate to do so "where the interests are worthy of protection and the development is necessary to stay abreast of social change".[96] She acknowledged that the proposed tort of family violence overlaps with existing torts such as assault, battery, and IIED, yet she held that "it is fundamentally different in terms of the assessment of both liability, causation, and damages."[97]

From here, Justice Mandhane found that the proper starting point for the new tort of family violence was the definition of "family violence" in the *Divorce Act*, which she used to articulate the following modes of liability:

> Conduct by a family member towards the plaintiff, within the context of a family relationship, that:
> 1. is violent or threatening, or
> 2. constitutes a pattern of coercive and controlling behaviour, or
> 3. causes the plaintiff to fear for their own safety or that of another person.[98]

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90 *Ibid* at para 36.
91 *Ibid* at para 41.
92 *Ibid* at paras 44-46. Even before the amendments, tort claims were often raised in family proceedings. See Buckingham, *supra* note 71 at 288; Kelly, *supra* note 56 at note 15.
93 *Ahluwalia* ONSC, *supra* note 1 at para 47.
94 *Ibid* at paras 37-38.
95 *Ibid* at para 49.
96 *Ibid* at para 50 (citing *Merrifield v Canada (Attorney General),* 2019 ONCA 205). See also *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 123.
97 *Ibid* at para 51.
98 *Ibid* at para 52.

The first mode requires intentional conduct on the part of the defendant/family member, which is "consistent with the well-recognized intentional torts of assault and battery".[99] Similarly, the third mode necessitates that the defendant/family member "engaged in conduct that they would know with substantial certainty would cause the plaintiff's subjective fear", which is consistent with the existing torts of battery and IIED.[100] It is the second mode of liability that Justice Mandhane found to be unique compared to the incident-based nature of existing torts, by capturing "the cumulative harm associated with the pattern of coercion and control that lays at the heart of family violence cases and which creates the conditions of fear and helplessness."[101] To establish this mode, the defendant family member must have "engaged in behaviour that was calculated to be coercive and controlling."[102] Overall, to make out the tort of family violence, Justice Mandhane held that the plaintiff must prove:

> that a family member engaged in a pattern of conduct that included more than one incident of physical abuse, forcible confinement, sexual abuse, threats, harassment, stalking, failure to provide the necessaries of life, psychological abuse, financial abuse, or killing or harming an animal or property.[103]

As to the rationale for accepting this new tort, Justice Mandhane relied on several arguments. First, she recognized that claims based on the tort of battery in the spousal context are rare and "out-of-step with the evolving social understanding about the true harms associated with family violence", making the assessment of damages problematic.[104] Justice Mandhane also found that existing intentional torts present "a real risk that triers of fact will miss the relevant social context and engage in stereotypical reasoning about the proper comportment and behaviour of survivors when assessing credibility."[105] In the case at hand, she noted that several problematic stereotypes were relied upon: that the claims of violence should not be believed because Ms. Ahluwalia "was an educated person" and because she immigrated to Canada to join her husband after the first incident of violence – insinuating that if she was abused, she would have left the relationship; and that she "was more likely to have fabricated the family violence because she was cast in a movie about intimate partner violence post-separation" – suggesting that IPV is the subject of fantasy.[106]

Second, although "family violence" is recognized in the *Divorce Act* for the purpose of parenting arrangements, Justice Mandhane found that awards for spousal support do not generally consider family violence and are "insufficient to compensate for the true harms and financial barriers associated with family violence".[107] These harms were held to include "acute and chronic health issues …, mental, psychological, and social problems …, underemployment and absenteeism, low career advancement, substance abuse, self-harm, suicidal ideation, death by suicide, and femicide", which are the types of harm

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99 *Ibid* at para 53.
100 *Ibid*.
101 *Ibid* at para 54 (emphasis in the original).
102 *Ibid* at para 53.
103 *Ibid* at para 55.
104 *Ibid* at para 61, see also paras 60-63.
105 *Ibid* at para 63.
106 *Ibid* at para 65.
107 *Ibid* at para 66, see also paras 5 and 68.

regularly compensated in tort actions.[108] She also recognized that "the negative financial and social impact of family violence is almost exclusively borne by the survivor".[109] Moreover, she found that the tort of family violence is consistent with recognition of "the economic barriers facing survivors" in case law[110] as well as in provincial legislation (e.g. for early termination of residential tenancies and leaves of absence from employment).[111]

Third, comparative jurisprudence and Canada's international legal obligations also support the recognition of the tort of family violence. In particular, Justice Mandhane pointed to the *Convention on the Elimination of all Forms of Discrimination Against Women* and its General Recommendation No. 35, which calls on state parties to implement legislative measures to enhance survivors' access to justice and to effective remedies, including civil remedies for "all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity…".[112]

Lastly, Justice Mandhane found that although family violence has societal dimensions, a new tort would be "consistent with the normative standard of personal responsibility in our society."[113] This principle of responsibility is also recognized in the *Criminal Code*, which stipulates that an intimate partner context is an aggravating factor for sentencing.[114]

Having accepted the tort of family violence, Justice Mandhane found that Mr. Ahluwalia was liable for his psychological, verbal, financial, and sexual abuse of Ms. Ahluwalia, which were part of a pattern of coercive control.[115] In the alternative, she held that he was liable for the three specific incidents of physical violence under the tort of assault,[116] as well as for IIED, because his pattern of coercive control was "flagrant and outrageous," calculated to produce harm, and caused Ms. Ahluwalia's depression and anxiety.[117]

Justice Mandhane awarded $50,000 for compensatory damages related to the mental health impacts on Ms. Ahluwalia because of the abuse, including past and future care costs and lost earning potential.[118] She made it clear that this compensatory award was distinct from spousal support, which was both insufficient to cover, and not inclusive of, Ms. Ahluwalia's mental health needs.[119] She also awarded $50,000 in aggravated damages for coercive control and breach of trust, noting that Mr. Ahluwalia had "preyed on" Ms. Ahluwalia's "vulnerability as a racialized, newcomer woman".[120] Here, she cited the impact of his actions on the children's mental health, which in turn "made their care more challenging and aggravated

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108 *Ibid* at para 66.
109 *Ibid* at para 67.
110 See e.g. *Michel, supra* note 14 at paras 95-96, cited in *Ahluwalia* ONSC, *ibid* at para 67.
111 *Ahluwalia* ONSC, *ibid* at para 68.
112 *Ibid* at para 69, citing *General recommendation No 35 on gender-based violence against women* (2017), para 29, online: United Nations <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based>.
113 *Ahluwalia* ONSC, *ibid* at para 70.
114 *Ibid* at para 40, citing *Criminal Code*, *supra* note 24, s 718.2.
115 *Ahluwalia* ONSC, *ibid* at paras 105-110.
116 *Ibid* at para 103.
117 *Ibid* at para 111.
118 *Ibid* at paras 114-116.
119 *Ibid* at paras 117-118.
120 *Ibid* at para 119.

the Mother's damages".[121] Lastly, she awarded $50,000 in punitive damages to condemn Mr. Ahluwalia's conduct, noting that this award could have been higher, but he was still facing criminal charges and the possibility of further punishment.[122] Overall, the $150,000 damage award for the tort of family violence was recognized as "high", but justified on the facts and not out of line with other case law.[123]

B. Appeal Decision

1. Issues on Appeal

Mr. Ahluwalia appealed, arguing that a new tort of family violence should not have been created. He conceded liability under the torts of assault and IIED, but argued that the quantum of damages was too high.[124] His position was that the tort of family violence was "poorly constructed" and "too easy to prove", applying to a "vast number of cases" which would create a "floodgate of litigation that would fundamentally change family law", a change "better left to the legislature."[125] In essence, he argued that the IPV epidemic is so extreme that recognizing it by creating a tort of family violence would overwhelm the family justice system.

In contrast, Ms. Ahluwalia sought to uphold the tort of family violence and damage award, arguing that a new tort was necessary "because existing torts do not address the cumulative pattern of harm caused by family violence."[126] Alternatively, she proposed a novel tort of coercive control, which would be made out where an intimate partner "inflicted a pattern of coercive and controlling behaviour" that "cumulatively was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm."[127]

The Barbra Schlifer Commemorative Clinic and Luke's Place filed a joint intervenor factum in the appeal, advocating for the tort of family violence to be upheld.[128] They disagreed with the alternative of a tort of coercive control, arguing that it would leave survivors with an unhelpful patchwork of torts to navigate. Moreover, they argued that a tort of family violence was necessary because existing torts do not "adequately remedy the prolonged and compounding systemic abuse of trust and confidence within a relationship."[129] They also suggested that a tort of family violence allowed judges to approach cases flexibly and "holistically", allowing differential consideration of violence and damages in "differently situated women's lives."[130]

Thus, the issues on appeal included whether: (1) The trial judge erred by including a tort claim in a family law action; (2) The trial judge erred by creating a new tort; (3) The trial judge erred in fashioning the tort of family violence; (4) The Court of Appeal should recognize a tort of coercive control; and (5)

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121 *Ibid*.
122 *Ibid* at para 120.
123 *Ibid* at para 113.
124 *Ahluwalia* ONCA, *supra* note 2 at para 29.
125 *Ibid* at para 29.
126 *Ibid* at para 33.
127 *Ibid* at para 34.
128 "Factum of the Intervenors Barbra Schlifer Commemorative Clinic and Luke's Place" in *Ahluwalia* ONCA, *supra* note 2 (2023) [Intervenor Factum].
129 *Ahluwalia* ONCA, *supra* note 2 at para 36.
130 Intervenor Factum, *supra* note 128 at para 35.

The trial judge erred in assessing damages.[131] The Court of Appeal declined to recognize a new tort, whether of family violence or coercive control, finding that existing torts covered the harms of IPV in this case, and reduced the damage award to $100,000.

2. Analysis

The Ontario Court of Appeal rejected Mr. Ahluwalia's argument that *Frame* should be interpreted to bar all tort actions in family law cases, and distinguished *Frame* for three reasons. First, in that case the legislation provided a complete answer to the issue of failing to comply with parenting orders.[132] Second, the Ontario Court of Appeal has previously recognized the presence of a tort claim in a family law proceeding.[133] Third, IPV is pervasive and victims "do not lose their remedies when they marry or begin a domestic partnership."[134] Justice Benotto also held that *Frame* does not preclude the tort of IIED from being brought in a family law proceeding.[135] Thus, Justice Mandhane did not err in considering Ms. Ahluwalia's tort claim.

Justice Benotto did not generally dispute Justice Mandhane's rationales for supporting a new tort, stating that the question was not "whether [IPV] exists" or "whether societal steps should be taken to ameliorate the problem" but whether a tort of family violence should be created.[136] The Court held that existing torts were sufficient in this case, including in relation to the patterns of behaviour that Justice Mandhane had suggested were unique. Relying on previous case law, Justice Benotto found the tort of battery can encompass multiple instances of physical violence, as occurred in this case.[137] The tort of assault involves the "apprehension of imminent harmful or offensive contact" which includes the fear a survivor may live under, as in this case.[138] The requirements for the tort of IIED were also met.[139]

Justice Benotto found that Justice Mandhane had failed to cite support for her concern about existing torts not sufficiently capturing intimate relationships or IPV (a concern echoed by the intervenors).[140] The Court of Appeal held that existing torts do allow for consideration of domestic relationships.[141] They listed several cases that recognized patterns of physical and psychological abuse as tortious behaviour[142] and cases that specifically considered the pattern as a reason to award higher damages.[143] Justice Benotto observed that courts have also "considered patterns of abusive conduct that occur following a marital breakdown as relevant to costs", implicitly recognizing 'systems abuse' – the idea that abusers often

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131 *Ahluwalia* ONCA, *supra* note 2 at para 36.
132 *Ibid* at para 41.
133 *Ibid* at para 42, citing *Leitch v Novac,* 2020 ONCA 257.
134 *Ahluwalia* ONCA, *ibid* at para 43.
135 *Ibid* at para 45.
136 *Ibid* at para 2.
137 *Ibid* at paras 61-63.
138 *Ibid* at paras 64-68.
139 *Ibid* at para 69.
140 Intervenor Factum, *supra* note 128 at paras 29-32; see also *Ahluwalia* ONCA, *ibid* at para 36.
141 *Ahluwalia* ONCA, *ibid* at para 73.
142 *Ibid* at paras 74-79.
143 *Ibid* at paras 80-85.

manipulate the legal system against survivors.[144] Similarly, the Court highlighted examples of cases that occurred over prolonged periods where the individual incidents may not have been tortious in themselves but cumulatively warranted damages.[145] Thus, the Court held, a tort of family violence was unnecessary because existing torts can recognize a pattern of behaviour within an intimate relationship and therefore address the harms caused by IPV in this case.[146]

The Court also held that even if a new tort were needed, the *Divorce Act's* definition of "family violence" was the incorrect starting place.[147] The definition was crafted for a "very specific application", namely, "post-separation parenting plans."[148] Justice Benotto found the intention of the legislature was to introduce the concept of family violence "only in the context of parenting."[149] By adopting it for the creation of a new tort, the Court held that "the trial judge ignored the clear intention of the legislature", which was an error.[150]

Justice Benotto also rejected the proposed alternative of creating a tort of coercive control. The new tort would have eliminated the need to prove harm, only requiring that conduct was "calculated to cause harm."[151] In contrast, the tort of IIED requires both calculation and proof of harm. Ms. Ahluwalia had argued that the elimination of the requirement to prove harm filled a gap in the law when a victim does not have proof of emotional injuries. However, an altered framework was rejected by the Court of Appeal, citing existing torts as adequate.[152] There was also no gap in this case; "the requirement to establish visible and provable injuries" had been met.[153] Finally, the elimination of the need for proof "would cause a significant impact on family law litigation best left to the legislature."[154]

While upholding liability, the Court of Appeal reduced the damage award to $100,000.[155] They deferred to Justice Mandhane's decision regarding both compensatory and aggravated damages, finding that these awards reflected an "emerging understanding of the evils of intimate partner violence and its harms" consistent with the common law evolving in alignment with society.[156] However, they held that Justice Mandhane had erred in awarding punitive damages. Although Mr. Ahluwalia's conduct required condemnation, Justice Mandhane failed to consider whether the compensatory and aggravated damages were "insufficient to achieve the goals of denunciation and deterrence."[157]

In the wake of *Ahluwalia*, courts in Ontario and other Canadian jurisdictions have had to grapple with tort claims made in reliance on Justice Mandhane's decision. In all of these cases, courts denied claims

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144 *Ibid* at para 86. For a discussion of systems abuse see e.g. Linda Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2nd ed, s 7.4.32, online: *CanLII,* <https://www.canlii.org/en/commentary/doc/2017CanLIIDocs2> [Neilson, "Responding"].

145 *Ahluwalia* ONCA, *ibid* at paras 88-90.

146 *Ibid* at para 92.

147 *Ibid* at paras 94-102.

148 *Ibid* at para 94.

149 *Ibid* at para 100.

150 *Ibid* at para 102.

151 *Ibid* at para 105.

152 *Ibid* at para 106.

153 *Ibid*.

154 *Ibid*.

155 *Ibid* at para 133.

156 *Ibid* at para 128.

157 *Ibid* at para 132.

based on the tort of family violence, relying on the Ontario Court of Appeal decision in *Ahluwalia*.[158] Some of these cases reflect the struggle survivors face to fit their experiences into the patchwork of recognizable tortious behaviour.[159] They also reveal the educative function that a new tort can have in informing survivors of possible remedies. We offer our commentary in the next Part.

IV. COMMENTARY

A. Placing *Ahluwalia* within Tort Law and Theory

1. Tort Theory and Feminist Critiques

Prior to family law reforms across Canada, married women's property legislation prevented spouses from suing each other in tort.[160] This stemmed from the doctrine of coverture imported from English law – the idea that once a man and woman married, they became one in law and that one was the husband.[161] Coverture precluded a wife from entering into contracts in her own name and made her husband liable for her tortious conduct.[162] A husband also had tortious remedies available to him which the wife did not, such as being able to sue his wife's lover for the tort of "criminal conversation" when she committed adultery.[163] If harm came to a wife because of a wrong, the husband could sue for damages; but the wife had no recourse on her own, particularly if the person who caused the harm was her husband. Coverture is an ideological structure, intertwined with the societally reinforced power a husband held over his wife, and legally supported by the husband's right to physically control his wife and her property.[164] Like resistance to introducing federal divorce legislation and criminalization of marital rape, prohibiting spousal tort liability was thought to uphold spousal harmony – the priority was placed on ensuring the sanctity of the family unit which legal remedies for divorce or IPV were thought to destroy.[165] Interspousal

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158 Some cases also deal with amendment of pleadings related to *Ahluwalia*. See *Barreto v Salema*, 2024 ONSC 4972; *Hammond v Holtz,* 2024 BCSC 447; *DB v ML,* 2023 NBKB 223; *Mirsayah v Pajouh*, 2023 BCSC 2294; *Mane v Mane*, 2023 ONSC 5343; *Colenutt v Colenutt*, 2023 ABKB 562. More favourably, several decisions cite *Ahluwalia* for the ability to bring a tort claim in family proceedings, to compare factual contexts and damage awards, and/or to support the pervasive nature of IPV. See e.g. *Zunnurain v Chowdhury*, 2024 ONSC 5552 (awarding $200,000 damages for the torts of assault, battery and IIED).

159 See e.g. *Hammond, ibid* at para 94; *Colenutt*, *ibid* (which included a limitation issue that will be discussed below).

160 See e.g. *Married Women's Property Act*, RSO 1950, c 223, s 7.

161 See Maeve E Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (University of South Carolina Press, 1993) at 34-35.

162 *Ibid* at 41-45.

163 See *Kungl v Schiefer,* [1962] SCR 443.

164 See Doggett, *supra* note 161 at 59-61.

165 See Law Reform Commission of British Columbia, "Report on Interspousal Immunity in Tort", 1983 CanLIIDocs 10 at 6, online: <https://canlii.ca/t/sg69>; Jennifer Koshan, "The Criminalisation of Marital Rape and Law Reform in Canada: A Modest Feminist Success Story in Combatting Marital Rape Myths" in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford: Hart Publishing, 2017) 139 at 145.

immunity was abolished in England in 1962[166] and in Ontario in 1975,[167] with other provinces following later.[168]

Perhaps because of this historical trajectory, tort law theories have not focused on interspousal harms and intangible harms suffered most often by women; rather tort law has primarily focused on tangible physical harms. These theories prioritize two fundamental rights: to personal security and to property,[169] which women in heterosexual marriages did not have until the *Married Women's Property Acts,* and even then, rights were limited.[170] Tort law and theories were advanced from the male perspective, including special rules to protect husbands from "vengeful" wives through interspousal immunity. Women's experiences with violence, particularly within the home at the hands of their spouse, have never been a focus of tort theory or law, nor have the experiences of persons in queer relationships – indeed, tort law has historically contributed to the subordination of these groups.[171] A tort of family violence would be a significant legal shift that centres all survivors, including those in unmarried and queer relationships, by grounding a dedicated avenue for damages caused by IPV.

The function and purpose of tort law has always been contentious. Historically, tort law was created as a "substitute for revenge" – money was paid in lieu of prolonging blood feuds between men and had a punitive rationale, a type of civil fine.[172] In contrast, deep distrust of women's anger was thought to violate ideas of femininity and women were encouraged to forgive and forget.[173] More recently, tort law's functions are framed around two primary objectives: compensation and deterrence, although others have proposed broader corrective and distributive justice purposes.[174] Scholars have also considered tort laws' social justice aims, including the need to "identify, address, and ameliorate the effects of … systemic inequalities and disparities."[175] Others have suggested that torts have a psychological or therapeutic function, giving people an opportunity to right a wrong where the law would not otherwise provide an avenue of recourse, although that view has been challenged by feminists due to the re-traumatization that legal processes can entail, especially for members of marginalized groups.[176]

Feminist legal scholars have offered other critiques, challenging tort law's reliance on the apparent neutrality of the reasonable man and its undervaluing of women's experiences and losses. Relevant to IPV, they have noted that early tort law jurisprudence distinguished between physical and emotional

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166 See *Law Reform (Husband and Wife) Act 1962* (UK)*,* 10 & 11 Eliz 2, c 48, s 1.

167 See 1975 *FLRA*, *supra* note 40, ss 1(1) and 1(3)(a); 1978 *FLRA*, *supra* note 40, ss 65(1) and (3)(a). See also *Manning v Howard,* 1975 CanLII 610 (ONCA) (a divorced woman could sue her former husband in tort)

168 See e.g. *CRAA*, *supra* note 40, s 80; *ITISA*, *supra* note 40, s 2.

169 See Allen M Linden et al, *Canadian Tort Law,* 12th ed (LexisNexis, 2022) at 4.

170 See generally Constance B Backhouse, "Married Women's Property Law in Nineteenth Century Canada" (1988) 6:2 L & Hist Rev 211.

171 Sophia Moreau, "Beyond Discrimination Law: Realizing Equality Through Other Laws, Such as Tort Law" (2024) 4 Am J L & Equality 427.

172 Linden, *supra* note 169 at 19.

173 See Judith Lewis Herman, "Justice from the Victim's Perspective" (2005) 11:5 Violence Against Women 571 at 576 [Herman, "Justice"].

174 See Linden, *supra* note 169 at 2; Stephen GA Pitel, "The Characteristics of Torts" in Erika Chamberlain & Stephen GA Pitel eds, *Fridman's the Law of Torts in Canada,* 4th ed (Thomson Reuters, 2020).

175 Chamallas, *supra* note 70 at 6. See also Moreau, *supra* note 171.

176 Compare Linden, *supra* note 169 at 19 and Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence" (1993) 25 Ottawa L Rev 203 with Mandi Gray, *Suing for Silence* (UBC Press, 2024), ch 3.

harms.[177] In the US, in early so-called "fright cases" involving miscarriage, premature birth, and "hysterical disorders", courts refused to award damages if there was no physical harm.[178] The reasonable man standard meant that emotional responses to events primarily experienced by women were considered abnormal and not worth compensation.[179] According to Leslie Bender, "tort law thus marginalized women's injuries by taking them out of the realm of compensable physical harms."[180] This history is clearly seen in the doctrine of interspousal immunity as well as the treatment of torts involving interpersonal violence.[181] Similarly, regarding torts for sexual assault, Elizabeth Adjin-Tettey suggested that one reason compensation is low is because where the harm is intangible, the person cannot be returned to the position they would have been but for the wrong.[182] As a result, compensation for forms of GBV such as sexual assault is sometimes viewed as imposing an undue burden on the payor because the victim's suffering will not be alleviated, resulting in lower awards.[183]

Martha Chamallas has argued that making a person whole must also account for more systemic forms of injustice, such as those based on gender and race, and notes the "sexual exceptionalism" in damage awards for sexual violence torts.[184] This type of exceptionalism is a critique that is easily extended to IPV. Chamallas also notes the difficulties with relying on the tort of IIED to address dignitary and autonomy-based harms, including courts' demand for proof of medical or psychological treatment for injuries.[185] Her guiding principles for a social justice approach to tort law, which include incorporating victims' perspectives based on lived experiences, incorporating anti-discrimination norms, and enhancing dignity,[186] favour recognition of the tort of family violence. Similarly, Sophia Moreau's equality-based theory of tort law cites the absence of a specific tort for IPV as an example of how marginalized groups are disproportionately disadvantaged by tort law in a manner that exacerbates their subordination.[187]

Studies on IPV-related torts in Canada also raise concerns about the ways that the traditional objectives of tort law do not fit the context or harms of IPV.[188] They note how judicial decisions reinforce the tenacity of ideas such as the private nature of intimate relationships, assumptions about the importance of maintaining spousal harmony, and the dominant paradigm of single incidents of assault by a non-

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177 Leslie Bender, "Overview of Feminist Torts Scholarship" (1992-1993) 78:4 Cornell L Rev 575 at 578.
178 *Ibid* at 577-578.
179 *Ibid* at 578. See also Caroline Forrell, "Comment on *Lyman v Huber*" in Martha Chamallas & Lucinda Finley, eds, *Feminist Judgments: Rewritten Torts Opinions* (Cambridge: Cambridge University Press, 2020) 172 (noting that the objective test for IIED is a barrier to IPV-related claims).
180 Bender, *ibid* at 578.
181 See Forrell, *supra* note 179 at 179 (arguing that the immunity "still haunts tort claims in the domestic setting" in the US).
182 Adjin-Tettey, *supra* note 70 at 182.
183 *Ibid* at 182.
184 Chamallas, *supra* note 70 at 6, 12.
185 *Ibid* at 16.
186 *Ibid* at 18-19.
187 Moreau, *supra* note 171 at 447.
188 Buckingham, *supra* note 71 at 290-307.

spouse.[189] These studies confirm that tort claims related to IPV are highly gendered and support the need for the evolution of this area of law to be consistent with equality-based norms.[190]

With this context in mind, we now turn to our commentary on *Ahluwalia*.

2. Tort Theory and *Ahluwalia*

The trial decision in *Ahluwalia* went some way towards acknowledging the feminist critiques of tort law by recognizing a new tort of family violence and its application in a case involving intersecting inequalities. However, both decisions fell short of comprehensively reflecting a nuanced understanding of IPV and the harms that torts should compensate, thereby impeding access to justice for survivors.

In particular, the Court of Appeal's reliance on existing torts that could apply to IPV did not deeply consider the contextual relevance of the violence occurring within an intimate relationship. They also failed to engage with the type of intersectional inequalities that may further complicate the dynamics involved and the harms suffered – for example, Ms. Ahluwalia's vulnerability due to her immigration status, which Justice Mandhane did consider. Although the Court of Appeal found that existing torts could cover patterns of abuse, the examples they gave from previous case law were largely of multiple incidents of physical and emotional abuse, rather than the cumulative tactics that characterize coercive control.[191] An incident-based approach tends to maintain the hierarchy of physical harms over emotional, dignitary, and autonomy-based harms, given that the latter are often less discrete and obvious.[192]

Another critical and complex element is the requirement of intent. While the Court of Appeal found that IIED was a sufficient basis for recognizing emotional harms related to IPV, the requirement to prove intent and specific injuries is significantly more burdensome than the tort of family violence as framed by Justice Mandhane (particularly the second mode of liability). Proof of both intent and the emotional and autonomy-based harms of IPV is a challenge for survivors to mount and for courts to accept. There are also evidentiary challenges for existing torts, including assault and battery, coupled with a longstanding problem of privileging evidence of physical over psychological harms.[193] It is instructive that in the earlier studies of IPV-related torts in Canada, success was often tied to a criminal conviction.[194] Although this was not a barrier to liability in *Ahluwalia*, intentional torts will create hurdles for many survivors, including those who are most marginalized and avoid engagement with the criminal legal system, medical and other professionals.

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189 Buckingham, *ibid* at 286; Kelly, *supra* note 56 at 333; Eisen, *supra* note 71 at 184-188.

190 Buckingham, *ibid* at 277-78 and Kelly, *ibid* (all tort cases in their samples involved female plaintiffs and male respondents). Judges must develop tort law consistently with *Charter* values such as substantive equality (see e.g. *M (A) v Ryan*, [1997] 1 SCR 157). We therefore disagree that recognizing new "nominate torts" such as family violence amounts to "judicial activism", as argued by Kerry Sun & Stéphane Sérafin, "The Nominalism of the New Nominate Torts" (2024), Supreme Court Law Review, 2nd series, online: *SSRN*, <https://ssrn.com/abstract=4676558>.

191 *Ahluwalia* ONCA, *supra* note 2 at paras 74-85. For a more recent case that does recognize patterns of coercive control as a form of IIED, see *Wang v Li*, 2024 ONSC 2352; *contra* see *Agbasi v Hassan*, 2024 ONSC 2101. For another critique of the Court of Appeal's conclusion that existing torts address the harms of IPV, see Luke Taylor, "Family Violence, Gender, and Access to Justice: *Ahluwalia v Ahluwalia*" (2024) UNBLJ (forthcoming).

192 See e.g. Mosher et al, *supra* note 23.

193 Rosemary Hunter, "Gender in Evidence: Masculine Norms vs Feminine Reforms" (1996) 19 Harv Women's LJ 127 at 142.

194 See Buckingham, *supra* note 71 at 300; Kelly, *supra* note 56 at 338.

Accordingly, we suggest that the tort of family violence as framed by Justice Mandhane should be accepted and interpreted to include recklessness as to the impact of the conduct on the plaintiff.[195] This is analogous to the tort of non-consensual distribution of intimate images, a tort that is legislated in many Canadian jurisdictions and that employs a standard of knowledge or recklessness as to lack of consent.[196] It is also consistent with the approach taken in British Columbia's *Family Law Act*, which was recently amended such that the definition of "family violence" provides that intent is not a required element.[197] Similarly, the proposed criminal offence of coercive control would have included a standard that considered if the accused was "reckless" as to whether the pattern of abuse could caused their partner to believe their safety was threatened.[198]

A patchwork of torts in IPV cases also raises access to justice concerns arising from limitations periods. In the last decade, all Canadian jurisdictions have eliminated limitations periods in claims for assault, battery, and/or sexual misconduct in the intimate partner context.[199] But depending on the wording of the legislation, these exceptions may not apply to some IPV-related torts, including IIED or torts committed after the parties' relationship has ended.[200]

For example, in *Colenutt v Colenutt*, a woman applied to amend her pleadings in a family law dispute to add the tort of family violence, relying on *Ahluwalia*.[201] Her allegations included coercive control, harm to animals, as well as physical and sexual assault. The application to amend was decided after the Court of Appeal had released its decision in *Ahluwalia,* and the Alberta Court of King's Bench denied recognition of the tort of family violence on that basis.[202] The court went on to find that while the wife's claim based on assault and sexual assault could proceed, her IIED claim was limitation-barred, as the amendments to exempt IPV-related claims did not expressly include this tort.[203]

Colenutt is troubling on several levels. First, the court did not restrict its rejection of the tort of family violence to the facts of the case, as the ONCA did in *Ahluwalia*. One of the wife's allegations – harm to animals (or threats thereof) – is included within modern understandings of family violence, but that conduct may not meet the requirements of IIED.[204] The facts of *Colenutt* therefore required consideration of the tort of family violence beyond a mere reliance on *Ahluwalia*. Second, the patchwork approach to IPV-related torts meant that while the wife's claims for physical and sexual assault could move forward, her claim for IIED could not, due to the applicable limitation periods. Considering the compensatory objective of tort law, it is problematic when a survivor's experiences are legally parsed such that damages

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195 See Camille Carey, "Domestic Violence Torts: Righting a Civil Wrong" (2013) 62 U Kan L Rev 695 at 704-7.

196 See e.g. *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9, s 3.

197 BC *FLA*, *supra* note 54, s 1.

198 Bill C-332, *supra* note 23, cl 1.

199 See Koshan, Mosher & Wiegers, "Comparison", *supra* note 56 at 47-49.

200 See e.g. *Colenutt, supra* note 158 (IIED subject to usual limitations periods in Alberta's legislation); *Hunt v Hunt*, 2024 BCSC 1048 (post-dependency IPV subject to usual limitations periods in BC's legislation). It may be possible to rely on discoverability principles to avoid limitations periods in some IPV-related tort cases, which the court in *Colenutt* neglected to do. This issue is beyond our scope here, but it is especially important in the IPV context where it may take time for victims to understand that conduct qualifies as "family violence."

201 *Colenutt, supra* note 158.

202 *Ibid* at paras 10-11.

203 *Ibid* at paras 69-77.

204 See e.g. the *Divorce Act, supra* note 4*,* s 2(1).

are available for some harms of IPV but not others. Recognition of a tort of family violence would be more inclusive of both existing torts and the different tactics, patterns, and harms that IPV encompasses, including coercive control. Third, *Colenutt* and other limitations cases suggest that recognition of the tort of family violence – and even reliance on the existing torts of IIED and assault/battery that occurs post-separation – likely require amendment of limitations legislation. Such amendments would be consistent with the legislative intent in creating exceptions for GBV-related torts and should be pursued regardless of the eventual outcome in *Ahluwalia*.

Finally, the ONCA in *Ahluwalia* was concerned about the impact that a tort of family violence would have on litigation strategies in family law disputes. This rationale engages myths and stereotypes about IPV, which we turn to next.

B. Myths and Stereotypes

1. Defining IPV Myths and Stereotypes

In this part, we raise concerns about the influence of IPV myths and stereotypes on lawyers' advocacy and judicial decision-making, arguing that awareness of stereotypical reasoning is critical to articulating a new tort of family violence that adequately compensates survivors and improves their access to justice. As one of us has previously observed, the terms *myths* and *stereotypes* are often used as one phrase or interchangeably.[205] Taken together, "myths and stereotypes are assumptions or expectations that are false or faulty and are linked to disadvantaging beliefs, attitudes, and narratives."[206] According to Justice Sheilah Martin in *R v Kruk,* a recent sexual assault case, myths and stereotypes reflect "widely held ideas and beliefs that are not empirically true" yet they are embedded in the law and work to "demean and diminish" the status of survivors.[207]

More specifically, IPV myths and stereotypes operate to deny, minimize, or justify the abuse. Jay Peters notes that myths and stereotypes about IPV and survivors serve a "social function" by blaming women (i.e., why didn't she leave) and exonerating the abuser (i.e., "he was probably abused as a child"), minimizing the "seriousness and scope of the problem."[208] Common IPV myths include: the violence ends once the parties separate; claims of family violence are falsely made or exaggerated to gain an upper hand in family disputes; and the survivor deserved or desired the abuse or cannot be believed, especially if she did not leave the abuser or report the abuse right away.[209]

Victims are also subjected to additional layers of myths and stereotypes based on assumptions connected to their race, Indigeneity, sexual orientation, gender identity, disability, and socio-economic status. For instance, Leigh Goodmark has argued that racialized women "face an uphill battle in having

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[205] Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35:1 Can J Fam L 33 [Koshan, "Myths"].

[206] *Ibid* at 38-39; this definition was accepted in *KMN v SZM*, 2024 BCCA 70 at para 110 [*KMN*].

[207] *R v Kruk*, 2024 SCC 7 at para 37.

[208] Jay Peters, "Measuring Myths about Domestic Violence: Development and Initial Validation of the Domestic Violence Myth Acceptance Scale" (2008) 16 J Aggression, Maltreatment & Trauma 1 at 3.

[209] Koshan, "Myths" *supra* note 205; *Barendregt v Grebliunas*, 2022 SCC 22 (Factum of the Interveners West Coast Leaf Association and Rise Women's Legal Centre) at 6-7, online (pdf): <https://scc-csc.ca/WebDocuments-DocumentsWeb/39533/FM040_Interveners_West-Coast-LEAF-Association_&_Rise-Women's-Legal-Centre.pdf>.

their victimization recognized and rectified."[210] Racialized women are not perceived as victims stereotypically,[211] and Black women may face the stereotype that they are aggressors or provoked the abuse.[212] Survivors often need to fight one stereotype to try to conform to another to be believed.

Tort law has developed in a way that reflects and reinforces some IPV myths and stereotypes. As noted above, feminist scholars argue that there is a hierarchy of harms in tort law, and those taken seriously are the ones that occur in the public sphere and affect the market, whereas the intangible and "private" harms which primarily impact women are taken less seriously.[213] Intangible harms, such as those caused by sexual assault and IPV, are viewed with suspicion, as being exaggerated or something to be endured.[214] This is why psychological harm often needs to be accompanied by physical harm in the tort law context, for the violence to be taken seriously and seen as deserving of compensation.[215]

In the next part, we explore the complicity of lawyers in perpetuating myths and stereotypes in *Ahluwalia*, followed by a discussion of the myths and stereotypes reflected in both decisions.

2. Lawyers' Ethics

As can be seen in *Ahluwalia,* lawyers' professional ethics have failed to prevent lawyers from perpetuating harmful myths and stereotypes in their advocacy. One of the most pervasive myths in family law is that women lie about abuse to gain a tactical advantage.[216] According to Linda Neilson, the myth that claims of IPV "are often false or exaggerated" to "obtain the upper hand" is "one of the most common and dangerous fallacies in the legal system."[217] It is not empirically proven that women commonly make false claims of abuse.[218] On the contrary, the opposite is true: survivors tend to downplay and understate abuse. When perpetrators raise the defence of fabrication, it typically rests on stereotypical reasoning and is not accompanied by any supporting evidence.[219] Stereotypes about women as manipulative, vindictive, and deceitful in relation to their ex-partners are relied upon to suggest the survivor is lying.[220] There are two motives attributed in this context. Lawyers suggest the family violence claim is part of a "game

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210 Leigh Goodmark, "When is a Battered Woman Not a Battered Woman? When She Fights Back" (2008) 20 Yale LJ & Feminism 75 at 86.

211 *Ibid* at 86.

212 See Duhaney, *supra* note 21 at 2767.

213 Adjin-Tettey, *supra* note 70 at 190; Buckingham, *supra* note 71 at 286; Kelly, *supra* note 56 at 333.

214 Adjin-Tettey, *ibid* at 184, 190-191; Kelly, *ibid* at 338-339.

215 Adjin-Tettey, *ibid* at 190-191.

216 See Neilson, "Responding", *supra* note 144 at 4.5.2; Epstein & Goodman, *supra* note 29 at 431-432; Rise Report, *supra* note 19 at 46; Jane Wangmann et al, "What is 'good' domestic violence lawyering?: Views from specialist legal services in Australia" (2023) 00:0 Intl JL Pol'y & Fam 1 at 9-10; *Johnston v Da Silva,* 2023 ONSC 2710 at para 12.

217 Neilson, "Responding", *ibid* at 4.5.2.

218 See e.g. Justice Canada, *Family Violence: Relevance in Family Law* (2018) at 5-6, online: <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/sept01.pdf>.

219 See e.g. *R v RMD*, 2022 ABKB 851 and commentary in Jennifer Koshan, "The Myth of False Allegations of Intimate Partner Violence" (8 November 2023), online: *ABlawg*, <http://ablawg.ca/wp-content/uploads/2023/11/Blog_JK_RMD.pdf>.

220 Epstein & Goodman, *supra* note 29 at 433-438; Rosemary Hunter, "Narratives of Domestic Violence" (2006) 28:4 Sydney L Rev 733 at 753-754 [Hunter, "Narratives"]

playing" exercise to impede contact with children or to gain financially.[221] To explain the purported deception, the lawyer may also suggest the victim has mental health issues, implying they are unreliable and prone to exaggeration.[222] In essence, the claim of IPV is seen through the lens of legal strategy instead of safety and harms that are worthy of redress.[223]

Mr. Ahluwalia's lawyer perpetuated several harmful IPV myths and stereotypes in her advocacy. During cross-examination, the lawyer asked Ms. Ahluwalia "why she did not complain to the police" after her husband physically assaulted her, including by strangling her.[224] The lawyer suggested Ms. Ahluwalia should "not be believed because she immigrated to Canada with the father after the first incident of violence."[225] And the lawyer also suggested that she "was more likely to have fabricated the family violence because she was cast in a movie about intimate partner violence post-separation."[226]

The narrative the lawyer constructed was that Ms. Ahluwalia lied about IPV, claiming damages under the tort of family violence to gain a financial advantage. According to Justice Mandhane, the lawyer suggested Ms. Ahluwalia's motivation for lying was because of "anger over him abandoning her, and her desire for financial gain."[227] The lawyer's support for this narrative included evidence that Ms. Ahluwalia "did not leave the relationship, did not include the tort claim in her 2016 Answer, and only complained to the police in advance of the family law trial in 2021."[228] The lawyer also suggested that Ms. Ahluwalia only sought medical attention after her husband said he wanted a divorce – suggesting an attempt to obtain false evidence of abuse.[229] These examples of IPV myths, that is, of idealized victims who behave a certain way (i.e., they call the police promptly, leave the relationship early, and make a claim at the right time), and of ascribed motives (i.e., for revenge and financial gain) are commonly used to discredit claims of violence. This is so even though they have been thoroughly repudiated by GBV researchers.[230] Moreover, the suggestion that survivors can easily leave abusive relationships or report violence has been debunked by the Supreme Court of Canada.[231] It is well-recognized that safety, financial, occupational, psychological, child-care, immigration, and other factors often trap women in abusive relationships. And fear of police and other authorities is profound in the case of marginalized survivors previously subjected to systemic racism, colonialism, and other oppressions.

Mr. Ahluwalia's lawyer also perpetuated the longstanding myth of the 'hysterical woman'. This stereotype is relied upon to explain away violence by suggesting the survivor is irrational; therefore what

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221 UK, Ministry of Justice, "Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report" by Rosemary Hunter, Mandy Burton & Liz Trinder (2020) at 49 online (pdf): <https://kar.kent.ac.uk/81894/1/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf> [Hunter Report].

222 Hunter, "Narratives", *supra* note 220 at 753-754; Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31 Can J Fam L 57 [Zaccour, "Hysterical"]; Neilson, "Responding", *supra* note 144 at 7.4.9; Epstein & Goodman, *supra* note 29 at 421-422.

223 See e.g. *Bassett v Magee*, 2020 BCSC 1994 at para 61.

224 *Ahluwalia* ONSC, *supra* note 1 at paras 100-101.

225 *Ibid* at para 65.

226 *Ibid*.

227 *Ibid* at para 74.

228 *Ibid*.

229 *Ibid* at paras 91-94.

230 Koshan, "Myths", *supra* note 205; Hunter, Narratives, *supra* note 220; Rise Report, *supra* note 19 at 46-47.

231 See *R v Lavallee,* [1990] 1 SCR 852*; R v Mallott,* [1998] 1 SCR 123*; R v Stairs,* 2022 SCC 11.

she says is unreliable and she should not be believed.[232] This tactic has been used to discredit women's experiences of sexual violence and IPV since at least the nineteenth century.[233] In family law, portraying the survivor as psychologically unstable to defend against a claim of IPV is common.[234] In this case, Ms. Ahluwalia suffered mental health issues caused by the IPV. Mr. Ahluwalia's lawyer tried deflecting her client's responsibility by suggesting "situational causes" including immigration stress, a miscarriage, as well as the "parties' difficult relationship", thereby suggesting irrationality and a lack of causation of harm.[235] The lawyer also tried to rely on Ms. Ahluwalia's vulnerability during cross-examination, when she tried to "shake" her chronology or recollection of events.[236] It appears the lawyer was attempting to make her appear unreliable, perhaps hysterical, as though she had been telling an inconsistent story and was therefore lying.

In her written closing, the lawyer fueled this narrative by arguing that creating a tort of family violence would encourage family law proceedings to be "weaponized" and would thereby negatively affect children.[237] In other words, the lawyer relied on the stereotype that women are vengeful and would use the tort of family violence to gain a financial advantage as well as seek revenge, which will harm children – invoking another harmful stereotype often perpetuated in family law by suggesting Ms. Ahluwalia was a 'bad mother'.[238]

When lawyers advocate using IPV myths, it can be retraumatizing for the survivor. Deborah Epstein and Lisa Goodman's research shows that survivors often want validation, they want to be believed and to have their experience acknowledged.[239] When legal actors do the opposite, it causes survivors to feel powerless, worthless, and to have "self-doubt".[240] Their experience is denied the way it was by their partner, but now it is done at an "institutional level".[241] In short, the professionals' conduct "echoes" the IPV, causing re-traumatization.[242] When courts rely on lawyers' mischaracterizations of IPV or survivors, this contributes to institutional betrayal and also impairs the courts' role in determining the legal issues.[243]

Lawyers' professional ethics suggest a lawyer should not rely on harmful myths and stereotypes in their advocacy, but problematically, only in some instances.[244] Lawyers have an obligation to the

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232 Jonnette Watson Hamilton, "The Use of Metaphor and Narrative to Construct Gendered Hysteria in the Courts" (2002) 1 JL & Equal 155; Herman, "Trauma", *supra* note 31 at 7-14.

233 Herman, "Trauma", *ibid* at 7-14.

234 Gutowski & Goodman, *supra* note 35 at 2; Zaccour, "Hysterical" *supra* note 222.

235 *Ahluwalia* ONSC, *supra* note 1 at para 115.

236 *Ibid* at para 73.

237 *Ibid* at para 36.

238 See Vivienne Elizabeth, Nicola Gavey & Julia Tolmie, "Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes" (2010) 18 Fem Leg Stud 253 at 257-258; Christine Harrison, "Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence" (2008) 14:4 Violence Against Women 381; Epstein & Goodman, *supra* note 29 at 425-432.

239 Epstein & Goodman, *ibid* at 447-448.

240 *Ibid* at 449.

241 *Ibid* at 448.

242 Negar Katirai, "Retraumatized in Court" (2020) 62 Ariz L Rev 81 at 88-89.

243 Carly P Smith & Jennifer Freyd, "Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma" (2013) 26 J Traumatic Stress 119.

244 Deanne Sowter, "Intimate Partner Violence and Ethical Lawyering: Not Just Special Rules for Family Law" (2024) 102 Can Bar Rev 130.

administration of justice.[245] During litigation, they have obligations to the court, including to ensure facts, law, and evidence are presented truthfully.[246] Arguments based on myths and stereotypes have the power to cause undue prejudice, confuse the legal issues, and mislead the court. Yet, there are few clear rules in family law that prevent lawyers from creating narratives based on stereotypical reasoning.[247] Criminal law clearly makes judicial reliance upon rape myths an error of law[248] and in turn, supports the argument that criminal defence lawyers cannot advance arguments based on those myths.[249] However, family law has not traditionally prohibited stereotypical reasoning based on IPV myths nor has it been as responsive as criminal law in debunking myths and stereotypes.[250] Moreover, the Federation of Law Societies of Canada *Model Code of Professional Conduct* is silent on family violence as well as on myths and stereotypes.[251] Similarly, family law legislation says nothing about myths and stereotypes. Prior to the 2021 amendments to the *Divorce Act,* Luke's Place and the National Association of Women and the Law (supported by thirty-one anti-violence and equity seeking groups) sought amendments dispelling certain myths and stereotypes and making it unlawful for judges to draw related adverse inferences.[252] Those recommendations were not implemented.

Instead, because of the power of IPV myths and stereotypes and their reflection of complex societal norms, in some contexts it could be considered effective advocacy for an abuser's lawyer to perpetuate them. Lawyers have been shown to impose pressure on survivors to accept terms of agreement that are against the survivors' interests, including by increasing their risk; they have also been able to persuade judges that claims of violence are false or exaggerated, impacting survivors' entitlement to legal remedies.[253] In *Ahluwalia,* Justice Mandhane was not persuaded that Ms. Ahluwalia had lied, but the lawyer's advocacy may have succeeded in infusing the case with doubt about the potential consequences of introducing a new tort of family violence, which was of particular concern on appeal.

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245 *Groia v Law Society of Upper Canada,* 2018 SCC 27; Federation of Law Societies of Canada, "Model Code of Professional Conduct" (April 2024) at R 2.1-1[2] online (pdf): *FLSC* <https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/Model%20Code%20Oct%202022.pdf> [*Model Code*].

246 *Model Code, ibid* at R 5.1-2.

247 For a recent decision finding that accusations of "false allegations of IPV" must be backed up by evidence to avoid myths and stereotypes, see *KMN, supra* note 206 at paras 110-127. See also Deanne Sowter & Jennifer Koshan, "BC Court of Appeal Recognizes the Myth of False Allegations of Intimate Partner Violence" (22 April 2024) online (blog): <www.slaw.ca/2024/04/22/bc-court-of-appeal-recognizes-the-myth-of-false-allegations-of-intimate-partner-violence/>.

248 See *Kruk, supra* note 207.

249 Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018).

250 Koshan, "Myths", *supra* note 205. But see *KMN, supra* note 206.

251 See *Model Code, supra* note 245. The Federation is currently considering amending the *Model Code* to respond to the Truth and Reconciliation Commission's Call to Action #27, which would see the Advocacy rule amended to respond to stereotypes. See Federation of Law Societies of Canada, "Consultation Report: Draft Amendments in Response to Call to Action #27 - *Model Code of Professional Conduct*" (28 November 2023) at 22 (on file with authors).

252 Luke's Place Support and Resource Centre and National Association of Women and the Law, "Bill C-78: *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*" (2019) at 6 online (pdf): <https://nawl.ca/wp-content/uploads/attachments/NAWL_Lukes_Place_Brief_on_C-78_(final_for_resubmission).pdf>.

253 See Hunter Report, *supra* note 221 at 62; Wangmann et al, *supra* note 216; Heather Douglas, *Women, Intimate Partner Violence and the Law* (London: Oxford University, Press, 2021) at 170-181; Neilson, "Responding", *supra* note 144 at 12.1.

3. Judicial Reasoning

In the *Ahluwalia* trial decision, Justice Mandhane's acceptance of the tort of family violence was a groundbreaking legal development. Her decision is consistent with the growing acknowledgement of the harms of IPV and the development of tort law consistent with substantive equality norms. Particularly noteworthy is her recognition of coercive control and the need to name, and compensate for, patterns and not just incidents of abuse. This recognition dispels one of the traditional misconceptions about IPV, that the most significant harms to survivors are accomplished via physical violence. In addition to the myths and stereotypes that she explicitly called out,[254] Justice Mandhane's decision implicitly dispelled several others:

- that family violence is not harmful to children unless they experience it directly;[255]
- that IPV survivors do not stay with (or immigrate to be with) their abusers, and should not be believed if they do;[256]
- that survivors should not be believed about IPV if they do not report it to the police or other authorities (e.g., medical professionals) until after separation;[257]
- that women are likely to fabricate IPV out of anger or hope of financial gain.[258]

Similarly, the Court of Appeal explicitly rejected some IPV myths and stereotypes. They dispelled the myth that IPV is rare and a private matter.[259] In doing so, Justice Benotto built on the now famous reference that non-disclosure of financial information is the "cancer of family law proceedings"[260] by calling IPV the "cancer of domestic relationships."[261] She also implicitly dispelled the myths that violence ends upon separation[262] and that indirect exposure to family violence is not harmful to children.[263]

At the same time, both decisions may inadvertently perpetuate other myths and stereotypes about IPV. As one of her bases for recognizing a new tort, Justice Mandhane suggested that IPV is uncommon, stating that "the marriage before me was not typical… It was not just 'unhappy' or 'dysfunctional'; it was violent."[264] However, IPV is quite common – 30% of all the police-reported violence in 2019 were reports of IPV, and as we noted in Part I, 80% of IPV is not reported at all.[265] To suggest that IPV's exceptionality explains why it is not addressed in legal remedies may perpetuate the idea that it is uncommon, which may in turn affect the credibility of survivors' claims and their entitlement to compensation. Justice Mandhane also addressed the argument that claims for damages could be "weaponized" in family law disputes by noting that courts "must be careful not to arm family law litigants to overly complicate the

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254 See our discussion above at notes 105-106 and accompanying text.
255 See *Ahluwalia* ONSC, *supra* note 1 at paras 43 and 119.
256 *Ibid* at paras 63-64 and 74.
257 *Ibid* at paras 74-75 and 94.
258 *Ibid* at para 74.
259 See *Ahluwalia* ONCA, *supra* note 2 at para 1.
260 See *Leskun, supra* note 5 at para 34; *Michel, supra* note 14 at para 33.
261 *Ahluwalia* ONCA, *supra* note 2 at para 43.
262 *Ibid* at para 86.
263 *Ibid* at paras 94-99.
264 *Ahluwalia* ONSC, *supra* note 1 at para 5.
265 Stats Canada, FV 2019, *supra* note 14 at 29; Stats Canada, "Spousal Violence", *supra* note 14 at 3.

litigation through speculative and spurious tort claims."[266] This comment – and its military metaphor – may also perpetuate the misassumption that women use IPV claims strategically in family litigation. Strategic use of family and other litigation to perpetuate abuse, that is, systems abuse, is the greater concern.

The myth that women falsely claim IPV to gain a strategic advantage in family law disputes was also perpetuated by Justice Benotto's reasons. In rejecting the tort of coercive control, she observed that "for every claim that has merit, there are some which involve claims made for strategic reasons", linking this point to the move away from no-fault divorce.[267] While recognizing the importance of providing compensation for psychological abuse, Justice Benotto feared that lowering "the level of impugned conduct may unintentionally encourage allegations of fault in every case, thereby undermining the movement towards a resolution-based system."[268] We acknowledge that family violence allegations are sometimes false,[269] but argue the Court went too far in presuming that a new tort would increase the hostility between parties, leading to adversarial approaches to dispute resolution, and even fabrication. This fear was prioritized over potential benefits to survivors (e.g., economic restitution, deterrence, access to justice, safe parenting determinations, and so on). Moreover, focusing on the risk of increased adversarial conduct in family disputes contributes to the exceptionalization of IPV. It suggests that the priority is a system that works for most family law litigants, who are assumed not to have experienced IPV, instead of a system that responds to the marginalized victims who are many, and who are often unable to find any sense of redress or justice through the family justice system.[270]

Justice Mandhane endeavored to create a tort that was less vulnerable to stereotypical reasoning; however, the Court of Appeal rejected the attempt, finding that aspects of abusive conduct could fit within existing torts. Put another way, the advantage of a new tort of family violence is that it would require an evidentiary basis and presumably education of lawyers and judges on IPV to appreciate the significance of seemingly unrelated tactics of abuse. In contrast, relying on existing torts may lead lawyers and courts to compartmentalize conduct, perpetuating myths and stereotypes. The status quo risks an emphasis on physical violence because it can be seen easily; coercive control and psychological, emotional, and financial abuse struggle to be seen. A relationship defined by no physical violence, with threats of harm such as deportation, poverty, and a severed parent-child relationship, could be misinterpreted as typical of post-separation conflict or emotionality, rather than evidence of abuse amounting to assault or IIED and deserving of compensation. While the Court of Appeal did purport to take IPV seriously, the notion of a harm hierarchy posited by feminist torts scholars appears to have influenced its finding that existing torts are sufficient to compensate the harms of IPV. Both decisions underscore the risk of stereotypical

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266 *Ahluwalia* ONSC, *supra* note 1 at para 41.

267 *Ahluwalia* ONCA, *supra* note 2 at para 120.

268 *Ibid* at para 122. For a response to this point by another appellate court, see *KMN, supra* note 206 at para 126 (finding that an assumption of strategic claims of IPV with no evidentiary basis "is impermissible and will give rise to reversible error").

269 See e.g. *MW v. NLMW*, 2021 BCSC 1273 at para 150 (wife admitted making false allegation of IPV but the court accepted her explanation).

270 See Gutowski & Goodman, *supra* note 35; Rise Report, *supra* note 19; Herman, "Justice", *supra* note 173.

reasoning in IPV-related claims, which is why we have previously argued for robust judicial guidelines for, and education about, IPV.[271]

Justice Benotto's rejection of the *Divorce Act's* definition of "family violence" as a starting point for the creation of a new tort is also concerning. She held that this definition only applies to post-separation parenting plans – presumably meaning parenting orders as well.[272] This section of the decision contrasts with the rest because it implies that a child's experience of family violence is more worthy of legal attention than the impact of IPV on their mother. This is an interesting turn, in that another myth is that children's exposure to IPV is not serious or harmful.[273] To be clear, both facets of family violence are equally serious and harmful. And it is correct that the 2021 amendments adding family violence to the *Divorce Act* focused on parenting disputes and children's exposure to IPV. However, "family violence" is defined very similarly when it applies to victims directly – for example, in provincial and territorial legislation providing for protection orders, early termination of leases, and employment leave.[274] It is also common for courts to borrow from other areas of law in creating new torts to fill gaps in existing legal remedies.[275] Using a definition of family violence that was informed by a robust legislative process seems like a highly appropriate starting point for considering the scope of a new tort.

Justice Benotto's narrow approach also harkens back to family law before the Supreme Court's decision in *Moge*, when the emphasis on self-sufficiency in spousal support cases contributed to the feminization of poverty.[276] In *Moge*, Justice Claire L'Heureux-Dubé observed that the spousal support provisions of the *Divorce Act* could not have been intended "to financially penalize women in this country", a reading which would be "perverse in the extreme".[277] Yet, despite the new definition of family violence and the legislative background to the *Divorce Act* emphasizing the importance of its recognition,[278] the definition and its use in the *Act* is primarily focused on parenting.[279] In other words, the Court of Appeal was not wrong about the *Divorce Act*, but their approach has potentially negative repercussions for family law. Statutory interpretation principles recognize family law's "holistic approach", yet the Court of Appeal's stance on "family violence" suggests it is not relevant outside of parenting matters.[280] We worry about how the Court of Appeal's narrow finding in this regard may be misinterpreted by lawyers and lower courts in future family law cases.

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271 Deanne Sowter & Jennifer Koshan, "Judging Family Violence: Recommendations for Judicial Practices and Guidelines in Family Violence Cases" (20 December 2021) online (blog): *Slaw* <www.slaw.ca/2021/12/20/judging-family-violence-recommendations-for-judicial-practices-and-guidelines-in-family-violence-cases/>.

272 *Ahluwalia* ONCA, *supra* note 2 at para 94.

273 Hunter, "Narratives", *supra* note 220 at 759; *Barendregt v Grebliunas*, 2022 SCC 22 at para 143 (implicitly repudiating the latter myth).

274 Koshan, Mosher & Wiegers, "Comparison", *supra* note 56.

275 See e.g. *Jones v Tsige*, 2012 ONCA 32 (recognizing the tort of intrusion upon seclusion with reference to privacy legislation, amongst other sources).

276 See *Moge v Moge,* [1992] 3 SCR 813.

277 *Ibid* at 857.

278 Department of Justice, "Legislative Background: *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make Consequential amendments to another Act* (Bill C-78 in the 42nd Parliament)" (June 2019) online (pdf): *DOJ* <www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/legislative_background_E.PDF>.

279 *Divorce Act, supra* note 4, s 16.

280 *Michel, supra* note 14 at paras 97-104.

V. ACCESS TO JUSTICE AND OTHER CONCLUDING THOUGHTS

Recognition of a tort of family violence would address gaps in compensatory remedies and alleviate the need to litigate multiple torts. The Court of Appeal's reliance on existing torts in *Ahluwalia* results in a more complicated approach that requires survivors to fit their experiences, and their perpetrators' tactics, into multiple legal categories. Some of those categories may currently be subject to limitation periods, while others are not. Parsing the lived experience of IPV into legal claims based on different torts may result in unavailable or reduced damage awards, and the overall complexity of cases will often necessitate representation by legal counsel (although Ms. Ahluwalia was unrepresented at trial – a common situation for survivors because of the limits of legal aid).[281]

Another barrier to fulfilling the compensatory aims of tort law is that insurance coverage has traditionally been unavailable for intentional acts, such that damage awards for existing IPV-related torts may remain unpaid if the abuser is impecunious.[282] Several Canadian jurisdictions have now amended their insurance legislation to allow recovery by innocent victims of intentional acts,[283] and a tort of family violence framed around calculated *or reckless* conduct would alleviate remaining insurance challenges and support legal remedies for survivors.

In terms of process, the decision at both levels of court to allow the tort claim(s) to be heard within family law proceedings has potential access to justice advantages. Survivors need not commence multiple actions, and damages for the tort claim could be paid alongside property equalization where possible, determined at the time of trial.

However, there are significant financial and enforcement concerns about abusers being unable or unwilling to pay. Family law courts may undervalue damages in comparison to what survivors are awarded in civil courts,[284] perhaps offsetting them against property or support awards.[285] Abusers may also seek releases of tort liability during negotiations of family law issues.[286] At the same time, the continued availability of civil claims for the tort of family violence outside of family law proceedings supports access to justice for cohabitees or even married survivors who are not seeking family law remedies. It is also worth emphasizing that recognition of a new tort of family violence should not deter ongoing advocacy intended to improve the family justice system's approach to financial remedies for survivors.

Even if a new tort is accepted, proceedings will be complex, and *Ahluwalia* highlights the need for increased legal aid for survivors of abuse. Otherwise, the cost of legal representation in conjunction with traditionally low damage awards and the uncertainty of insurance coverage may dissuade survivors from making tort claims, whether in family proceedings or otherwise.

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281 See generally Chan & Lennox, *supra* note 35.

282 See e.g. Craig Brown & Melanie Randall, "Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State" (2004) 30 Queen's LJ 311.

283 See e.g. *Insurance Act*, RSO 1990, c I.8, s 129.1.

284 See Eisen, *supra* note 71 at 185 (since 2007, the quantum of damages awarded by civil courts ranged from $12k to $1.1M with less than $100k in only 20% of the cases; whereas the damages in family courts were $500 to $300k, and in 90% of those it was less than $100k).

285 Kelly, *supra* note 56 at 336-337.

286 See e.g. *McCann v Barens,* 2023 BCSC 2000 (allowing the wife's tort claim for sexual and physical violence to proceed; she earlier amended her claim to remove "family violence", apparently due to limitations issues (at para 66)).

To invoke the metaphor from *Ahluwalia*, another concern is the possible weaponization of a tort of family violence by abusers. As we have discussed, systems abuse – using the legal system to perpetrate abuse – is a recognized practice.[287] For example, survivors have been subjected to defamation actions for speaking out about abuse.[288] In family law, parental alienation accusations are also raised by abusers to counter claims of family violence.[289] Alienation is a controversial concept, especially when applied to mothers seeking to protect their children from violence.[290] Nonetheless, a tort of parental alienation has been advocated, which – if recognized – may put survivors at risk of unfounded liability.[291] The legal recognition of coercive control in family law has also been weaponized, sometimes resulting in women's protective actions being recast as coercive and controlling and leading to adverse parenting outcomes.[292] It is not a stretch to imagine that a tort of family violence would be co-opted by abusers against survivors, and that their claims would sometimes be successful based on myths and stereotypes about IPV.[293] This, in our view, is a larger concern than that of false claims by women seeking strategic advantage, vengeance, or 'easy money'.

This discussion leads to the question of whether legislative recognition of the tort of family violence would be advantageous. This is not to say that judicial recognition of the tort is not important, but legislative creation of a new tort could be accompanied by amendments to limitations legislation, a problem we noted earlier. A legislated tort of family violence could also include a preamble or purpose statement recognizing the gendered and other inequalities implicated in IPV, which could be used as an interpretive tool to combat the possible misuse of the tort by abusers.[294] There is precedent for a legislated approach to GBV-related torts in the codification of the torts of non-consensual disclosure of intimate images and stalking in some jurisdictions.[295] Legislated torts may operate alongside judicially recognized

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287 See e.g. Neilson, "Responding", *supra* note 144 at 7.4.32.

288 See e.g. Gray, *supra* note 176.

289 See e.g. Linda Neilson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (2018), online: *FREDA* <www.fredacentre.com/wp-content/uploads/Parental-Alienation-Linda-Neilson.pdf>; Elizabeth Sheehy & Susan B Boyd, "Penalizing Women's Fear: Intimate Partner Violence And Parental Alienation In Canadian Child Custody Cases" (2020) 42:1 J Soc Welfare & Fam L 80; Suzanne Zaccour, "Does Domestic Violence Disappear from Parental Alienation Cases? Five Lessons from Quebec for Judges, Scholars, and Policymakers" (2020) 33:2 Can J Fam L 301.

290 For an argument that allegations of parental alienation in family court should be legislatively banned, see National Association of Women and the Law, Banning Parental Alienation Accusations in Family Court (May 2024), online: <https://nawl.ca/wp-content/uploads/2024/05/NAWL-FEWO-brief-PA-EN.pdf>.

291 See Zechariah Martin, "Remedies for Parental Alienation in Canadian Family Law" (2023) 42 CFLQ 85; Maur, *supra* note 48, mentions several cases where fathers sought damages against mothers for "alienation".

292 Mosher et al, *supra* note 23.

293 In at least two cases involving IPV-related torts post-*Ahluwalia*, men have responded to tort claims by arguing they are the true victims. See *Barreto, supra* note 158 at para 255; *Hunt, supra* note 200 at para 56 et seq.

294 This is not to say that a "gender clause" is necessary. The Standing Senate Committee on Legal and Constitutional Affairs stated in relation to the 2021 *Divorce Act* amendments that "the gender-neutral drafting used in Bill C-78 does not obviate the need to take into account the gendered nature of family violence." See Observations to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-78) (2019) at 3, online: <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/reportBillC-78-revised_e.pdf>.

295 See above notes 67 and 68.

torts, for example in situations involving retrospective application.[296] However, we cannot rely on legislators to enact such laws, especially in jurisdictions where IPV is not seen as a priority.

Overall, our conclusion is that judicial recognition of the tort of family violence is an important step forward in compensating the harms of IPV, and it would be detrimental for victims should the Supreme Court uphold the Ontario Court of Appeal's ruling in *Ahluwalia*. A tort of family violence would provide financial remedies for some survivors, and it should include acknowledgement of the gendered and other systemic inequalities inherent in family violence to avoid misuse. With or without judicial recognition, legislative codification of the tort and amendment of limitations legislation and insurance legislation (where necessary) should be introduced.

However, we also recognize that tort remedies and the private law system only go so far and can problematically align with neoliberal policies emphasizing individual responsibility. While tort actions provide some degree of control to survivors, they also individualize what is a systemic problem and ignore the structural factors that contribute to IPV, such as poverty and un/under-employment, which are in turn related to systemic racism, colonialism, ableism, homophobia and transphobia.[297] A more systemic approach would recognize that society bears some responsibility for the costs of IPV, entitling survivors to publicly-funded financial supports that address structural inequalities, including housing, education and training benefits, pay and employment equity, adequate social assistance, and access to properly subsidized childcare. The National Action Plan to End Gender-Based Violence provides an opportunity for the federal, provincial, and territorial governments to establish these types of systemic measures, which in turn may have preventive effects.[298]

In the meantime, torts can fill some gaps in economic need for some survivors, and that can be most effective if the tort of family violence is recognized, exempted from limitation periods, made available in family proceedings, properly supported by access to legal representation, and freed from the application of myths and stereotypes by lawyers and judges.

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[296] See e.g. *Shillington, supra* note 68.

[297] See e.g. Deborah Weissman, "Gender Violence as Legacy: To Imagine New Approaches" (2023) UC Law SF J Gender & Justice 55.

[298] Women and Gender Equality Canada, *National action plan to end gender-based violence* (November 2022), online: <https://women-gender-equality.canada.ca/en/gender-based-violence/intergovernmental-collaboration/national-action-plan-end-gender-based-violence/first-national-action-plan-end-gender-based-violence.html#introduction>.