II. NEW TORTS [§35.2]

A. SUPREME COURT OF CANADA TO WEIGH IN ON NOVEL TORT OF FAMILY VIOLENCE [§35.3]

Jurists, lawyers, and others across Canada anxiously await the Supreme Court of Canada's determination of whether the tort of family violence ought to be recognized. The case on appeal is *Ahluwalia v. Ahluwalia*, 2023 ONCA 476.

The parties married in 1999 and immigrated to Canada, where the wife alleged a long-standing pattern of physical, emotional, and financial abuse by the husband. After their separation in 2016, the wife sought divorce, support, and damages. The trial judge recognized a new tort of family violence, awarded $150,000 in damages (including punitive damages), and granted full proceeds from the matrimonial home to the wife.

On appeal, the Court of Appeal for Ontario held that existing torts, such as assault, battery, and intentional infliction of emotional distress, adequately address intimate partner violence and declined to recognize new torts of family violence or coercive control. The court found that these torts, with their established lines of authority and clear thresholds, adequately provide compensation in appropriate cases.

The Supreme Court of Canada granted leave to consider whether a new tort of family violence should be established. The court will consider whether the bundle of torts relied on by the Court of Appeal for Ontario are sufficient to adequately address the complexities of family violence, the particular harm caused by family violence, and the specific factual matrix within which it occurs.

B. NEW TORT OF MALICIOUS PUBLICITY OF PERSONAL PRIVATE INFORMATION REJECTED BY THE MANITOBA COURT OF KING'S BENCH [§35.4]

The court declined to establish a new tort of "doxxing" (*Kinnarath v. Choiselat*, 2025 MBKB 34).

The plaintiff, a Muslim man involved in political activism centred on opposing anti-immigration and oppression of LGBTQS2+ people, interfered with a People's Party of Canada Electoral District Association for Winnipeg Centre ("PPCEDA") meet and greet event at an art gallery, which caused the gallery owner to cancel the event. After the cancellation, the CEO of the PPCEDA made Facebook and Twitter (now "X") posts referring to the plaintiff as a "terrorist", an

"arsonist", and a "vile person". The CEO further posted a photograph of the plaintiff as well as his personal contact information, including his full name, home address, phone number, email address, and the company for whom he worked. The CEO's posts were picked up by other forms of media, which published articles about the events leading to the CEO's post.

The plaintiff commenced an action in defamation and "publicity of private facts" against the CEO. The plaintiff argued that a new tort of malicious publicity of personal private information, or "doxxing", should be established.

The court outlined that doxxing refers to situations where personal identifiers are posted or published with the intent of disrupting the person identified or their family. In this case, the plaintiff claimed that the CEO's post was intended to disrupt his and his family's lives by inciting individuals to attend at his residence, and that this invasion of privacy could cause loss or damage.

While the court agreed that doxxing is an issue that has become serious, *The Privacy Act*, C.C.S.M. c. P125 includes a legislated tort to address violations of privacy, and therefore the court declined to establish a new, separate cause of action for doxxing.

C. BRITISH COLUMBIA SUPREME COURT LEAVES THE DOOR OPEN FOR THE TORT OF HARASSMENT [§35.5]

The court has again observed that the tort of harassment is unsettled in the province, but leaves the determination of its availability as a cause of action for a future case (*Besler v. What the Fungus*, 2025 BCSC 1813).

The defendant brought an application to strike certain portions of the plaintiff's pleadings, including for the tort of harassment. The court considered the hypothetical test set out in *Mainland Sawmills Ltd v. IWA-Canada*, 2006 BCSC 1195, which lays out the elements for the putative tort as follows:

(1) outrageous conduct by the defendant;

(2) the defendant intending to cause, or recklessly causing, emotional distress;

(3) the plaintiff suffering severe or extreme emotional distress; and

(4) actual and proximate causation of emotional distress by the defendant's outrageous conduct.

Similar to *Sandher Fruit Packers Ltd. v. MacAskill*, 2024 BCSC 1855, the court declined to strike the claim for harassment simply on the basis that it has not been formally recognized in this province. The court considered whether the pleadings disclosed a reasonable cause of action based on the hypothetical test set out in *Mainland*. The court found that the facts as pleaded were conclusory statements about the plaintiff suffering severe emotional distress, with no differentiation between the plaintiffs or specific facts relating to that distress. On that basis, the court struck the claim for the novel tort.

III. NEGLIGENCE [§35.6]

A. FEDERAL COURT CLARIFIES THAT CANADA'S DUTY OF CARE TO INDIGENOUS CHILDREN DOES NOT EXTEND TO HOW THE PROVINCES INDEPENDENTLY IMPLEMENT THEIR OWN LEGISLATION [§35.7]

The Federal Court delineated the scope and limits of the federal government's duty of care toward Indigenous children (*Varley v. Canada (Attorney General)*, 2025 FC 753).

In the 1960s, provincial governments began applying child welfare legislation to Indigenous children, which resulted in large-scale removal of these children from their communities and adoption by non-Indigenous families. This practice, known as the Sixties Scoop, resulted in significant and irreparable harm to both the children taken and their families and communities left behind. Canada had reimbursed the provinces' expenses for extending their welfare services to Indigenous children and was later found to have breached its corresponding duty of care. In 2018, a settlement agreement was reached to pay compensation to First Nations and Inuit survivors, but not Métis or non-status Indigenous victims.

The plaintiffs brought a class action against the federal government on behalf of survivors excluded from the 2018 settlement agreement. The court analyzed whether the federal government owed Métis and non-status Indigenous victims a duty of care in the implementation of the provincial government's welfare legislation. The Federal Court determined that the plaintiffs' claim failed on two bases: first, the apprehension, placement, and adoption of Métis and non-status children took place without any intervention, control, or funding by the federal government; and second, because the federal government's decision not to fund provincial welfare programs for these children resulted from a core policy decision that is immune from liability in tort.

On the first point, since Canada did not fund the programs for Méis and non-status children as it did for First Nation and Inuit children, the court was unable to find sufficient proximity to give rise to a duty of care. The plaintiffs further argued, in essence, that the federal government should have prevented or otherwise intervened in the provinces' negative impact on Indigenous culture and identity, and that this omission was a breach of the federal government's fiduciary duty. The court found these arguments contrary to constitutional division of powers, the principle of federalism, and would undermine the autonomy and separation of the provincial and federal governments.

On the second point, the court noted that while Canada's omissions were not a result of a specific policy, they were part of a general policy decision not to assume responsibility for the provision of services that the provinces were already offering. This policy flows from the policy decision to fund services only for status Indigenous people and thus would attract the protections of a core policy decision.

B. PSYCHIATRISTS MAY OWE A DUTY OF CARE TO NON-PATIENT THIRD PARTIES [§35.8]

The court held that a psychiatrist may owe a duty of care to third parties connected to the patient (*McKee v. Shahid*, 2025 ONCA 666).

The plaintiff brought an action for negligence against her son's psychiatrist after her son, who suffered serious addiction and mental health issues, killed her husband. The plaintiff alleged that the psychiatrist was negligent in treating her son and by failing to warn her and her husband about the dangers their son posed to them.

The psychiatrist successfully brought a motion to strike the claim. The motion judge found that the alleged novel duty conflicted with the duty the psychiatrist owed to his patient.

The Court of Appeal found that the motion judge erred in finding that the claim in negligence was bound to fail, and that establishment of the alleged novel duty should be decided on a proper evidentiary record.

The court noted that the duty of care alleged—that a psychiatrist owes a duty to the parents of a patient suffering from serious mental health issues, including a propensity for threats and violence toward his parents—did not fall within an established category. However, the *Anns-Cooper* test did not lead to the conclusion that the claim was bound to fail. The court found that the psychiatrist's primary duty to their patient, and proposed secondary duty to the patient's parents, did not conflict, but rather, were complimentary: the parents and the patient all had an interest in the patient receiving appropriate care,