

The Tort of Family Violence: A New Legal Remedy for Gender Based Violence

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The Tort of Family Violence

Domestic abuse, also known as gender-based violence (GBV), is a pattern of behaviour in which one person in a relationship uses physical, sexual, or emotional abuse to exert power and control over their partner. GBV can take many forms and can affect people of all genders, sexual orientations, races, and socioeconomic backgrounds. There are several forms of GBV. One form of GBV is physical abuse, which can include hitting, punching, kicking, or using weapons to harm one's partner. Physical abuse can have serious and long-lasting consequences, including physical injuries, emotional trauma, and even death. Sexual abuse is another common form of GBV and can include forcing a partner to engage in sexual activity against their will, using threats or coercion to obtain sex, or using physical force to engage in sexual activity. Sexual abuse can have serious physical and emotional consequences, including sexually transmitted infections and trauma. Victims of GBV also often face emotional abuse which can include manipulating or controlling a partner through threats, intimidation, or emotional manipulation. Emotional abuse can have serious consequences, including low self-esteem, depression, and a sense of isolation.

Gender-based Violence in the South Asian Community

In the South Asian community, cultural and societal norms often play a significant role in perpetuating GBV. For example, traditional gender roles may view men as the head of the household and women as submissive, leading to a power imbalance in relationships that can facilitate abuse. The rigid gender roles also often place women in a subordinate role where the

male is seen as superior, and the wife's job is simply to "maintain the bond" within families and stay silent to their own struggles.¹

South Asian culture may also place a strong emphasis on maintaining the honour and reputation of the family, which can make it difficult for women to seek help or leave abusive relationships for fear of bringing shame upon their loved ones. Aisha Gill and Avtar Brah contend that shame and honour are interrelated, particularly for women. The maintenance of honour involves avoiding shameful behaviour as well as policing the "conduct of other women to ensure that they do the same" whereas the men are required to uphold their honour by making sure "'their' women avoid shame".² It is evident that in societies with values rooted in maintaining honour, a woman conforming to social norms and traditions is of utmost importance.³

Additionally, South Asian women may face unique barriers to leaving abusive relationships due to the close-knit nature of many South Asian communities. It may be difficult for a woman to leave an abusive relationship without the support of her family and community and seeking help from outside sources may be seen as a betrayal. In a study done by Neely Mahapatra and Abha Rai on South Asian immigrant women seeking outside help from GBV, a participant in the study explained that despite being able to talk to family and community members about the abuse she was enduring, she was advised to stay in the relationship as "time would heal everything and improve the attitude of husband's and in-laws".⁴ In addition, many participants said that their families expected them to uphold cultural and societal expectations as

¹ Ahmad et al, "Why doesn't she seek help for partner abuse?" (2009) 69:4 *Social Science & Medicine*, at 617.

² Aisha K Gill & Avtar Brah, "Interrogating cultural narratives about 'honour'-based violence" (2014) 21:1 *European Journal of Women Studies*, at 74.

³*Ibid*, at 74.

⁴ Neely Mahapatra & Abha Rai, "Every cloud has a silver lining but... pathways to seeking formal-help and South-Asian immigrant women survivors of intimate partner violence" (2019) 40:11 *Health Care for Women International*, at 1182.

leaving the marriage would result in being condemned by the South Asian community. The fear of being ostracised by one's entire community often plays a large role in why victims of GBV in South Asian communities avoid seeking help. As earlier mentioned, the honour and shame-based values in these communities go beyond one's immediate family and are largely concerned with maintaining one's status in the larger South Asian community. Often for women that have newly migrated to Canada or the United States and are living in the South Asian diaspora, loss of social support after immigration further depletes the quality of support that victims of GBV have.⁵ In their countries of origin, women had support networks that "seemed to buffer conflict in relationships" but in their new countries they were often intentionally isolated after being abused.⁶ This can create a sense of isolation and make it harder for a woman to leave an abusive situation.

South Asian culture tends to reinforce traditional gender roles and cultural norms that place men in a position of power over women, making it difficult for women to assert their rights and seek fair treatment in the event of a divorce. In the South Asian community, GBV is often exacerbated by a lack of access to resources and support. Many victims may not know where to turn for help or may fear retribution from their abusers if they seek help. In addition, cultural and language barriers can make it difficult for victims to access the support they need. This can have serious consequences when it comes to the division of assets, as women may be disadvantaged due to their lack of power and influence in the relationship.

⁵ *Supra* note 1 at 617.

⁶ *Ibid*, at 617.

What is Financial Abuse?

Intimate partner violence was the leading form of violence experienced by women in Canada in 2016, with over 90,000 reports of partner violence.⁷ Moreover, this statistic only includes reported incidences and is most likely an underrepresentation of the problem at hand. GBV occurs in all communities and is the result of various intersecting factors, one of which is financial abuse. Financial abuse comes in various forms, including stealing money, restricting access to one's (or family's) income, intense monitoring of spending and coerced debt.⁸ Economic abuse is widespread in abusive relationships and was present in 102 of 103 women who experienced domestic violence.⁹ Financial abuse is evident in many abusive relationships because, like other forms of abuse, it is often used by the abuser to increase the survivor's dependence on them and create isolation.¹⁰

There is a strong connection between violence against women and economic insecurity. When women are economically marginalised, they are at a higher risk of becoming victimised. Financial illiteracy can play a significant role in domestic violence situations, as it is used as a tool of power and control by abusive partners. Abusive individuals may use their financial knowledge and control over household finances to dominate their victims, making them dependent. This results in further difficulties for victims to leave persistent abuse, as they may lack the financial resources or knowledge to support themselves. For example, in the Ontario case of *Ahluwalia v. Ahluwalia*, 2022¹¹, the long-term pattern of financial abuse was established

⁷ Marta Burczycka, "Section 3: Police-reported intimate partner violence" (17 January 2018), Online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54893/03-eng.htm>.

⁸ Docherty et al, "Hidden in the Everyday" (17 May 2011), online (pdf): *Hidden in the Everyday* <https://womanact.ca/wp-content/uploads/2020/11/WomanACT_Hidden-in-the-everyday_Financial-Abuse-Report-1.pdf>.

⁹ Adrienne E. Adams, "Measuring the Effects of Domestic Violence on Women's Financial Well-Being", online (pdf): *Centre for Financial Security* <<https://centerforfinancialsecurity.files.wordpress.com/2015/04/adams2011.pdf>>.

¹⁰ Docherty et al, *supra* note 8.

¹¹ *Ahluwalia v. Ahluwalia*, 2022 ONSC 1303 at para 27[*Ahluwalia*].

through three specific incidents of physical violence. Economic illiteracy in the modern world goes beyond ‘being bad with numbers and includes the lack of knowledge about taxation, investments, mortgages, lines of credit, loans, cryptocurrency, real estate, and being self-employed. The complication of finances, especially those related to being self-employed are exemplified in the hurdle to establish the family income for spousal and child support proceedings in *Ahluwalia*¹².

How Financial Abuse is Visible within the South Asian Community

The intersectionality of immigration, language barriers, emphasised gender roles and collectivist values exacerbate the risk of abuse, specifically economic abuse. Gender inequality is so deeply entrenched within the South Asian community that intimate partner violence is viewed as a normal aspect of life and looked upon as a private family matter. For example, the notion of an ‘angry man’ is so normalised in South Asian households that it can take many years to recognize and comprehend the abuse taking place.¹³ South Asian women have much less control over their own income, and a large percentage of women have little influence over how their income is used.¹⁴ Consequently, the notion of inequality and abuse is further normalised, resulting in women being far less likely to seek help from external sources.

Extended families are very common within South Asian households, as it is a collectivist culture. South Asian seniors are more likely to live with members of their extended family. For example, in 2001, 25% of South Asians over the age of 65 lived with relatives, which is

¹² *Ibid* at 129-142.

¹³ Amrita Roy Chowdhury Majumdar, “South Asian immigrant women less likely to report domestic violence” (21 July 2022), online: <https://newcanadianmedia.ca/understand-the-challenges-faced-by-south-asian-immigrant-women-suffering-domestic-violencesupport-for-victims-of-ipv-does-not-address-gaps-for-south-asian-immigrant-women/>>.

¹⁴ Sunita Kishor & Kamla Gupta, “Gender Equality and Women’s Empowerment in India” (June 2005), online (pdf): Ministry of Health and Family Welfare Government of India <<https://dhsprogram.com/pubs/pdf/od57/od57.pdf>>.

substantially greater than all other Canadian seniors, of which only 5% lived with relatives.¹⁵ Accordingly, many South Asian homeowners split the ownership beyond their spouse and include the husband's parents and siblings, which has a drastic effect on the division of property following a divorce. Additionally, the legal owner may not reflect the true beneficial interests, as shown in *Sangha v. Reliance Investment Group Ltd., 2011*.¹⁶ This can be a vital issue with respect to the division of assets and may result in unjust enrichment. In *R. v. Malott, 1998*,¹⁷ the court recognized other systemic barriers to leaving an abusive relationship, including a weak social and financial support system, which are exacerbated when children are involved.

Divorce and the Division of Assets

In British Columbia there are two pieces of legislation that apply when parties are separating: the Divorce Act which is federal and only applies to married people, as well as the BC Family Law Act which sets out the legal framework for the division of assets in a divorce. Under the act, assets acquired during the marriage are considered to be jointly owned, regardless of who holds legal title to the asset.¹⁸ This means that both parties are entitled to an equal share of the assets and debts accumulated during the term of the relationship, unless there are extenuating circumstances that justify an unequal division.

However, in practice, women in the South Asian community may not always receive a fair division of assets due to cultural and societal factors that can disadvantage them. For example, a review published in the *Trauma, Violence, & Abuse* journal found that South Asian women are often hesitant to even seek divorce due to their lack of financial dependence,

¹⁵ Statistics Canada, "The South Asian Community in Canada" (16 July 2007), Online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/pub/89-621-x/89-621-x2007006-eng.htm>>.

¹⁶ *Sangha v. Reliance Investment Group Ltd.*, 2011 BCSC 1324 at para 7 [*Sangha*].

¹⁷ *R. v. Malott*, 1998 SCR 123 at para 42 [*Malott*].

¹⁸ *Family Law Act*, SBC 2011, c 25, s 81.

rejection and blame tactics from their in-laws and husband, and the mere fact that they often earn less than their partners, if they are able to work at all.¹⁹ These factors can make it difficult for women to negotiate a fair settlement and assert their rights in the divorce process. In addition, South Asian families often purchase their biggest assets such as real estate, houses, business, through communal funds often involving the in-laws or parents gifting or loaning them down payment on houses or alternatively, the husband and wife pay bills and when it comes time to divide assets during the divorce, they state that the wife does not own the home.

The Women's UN Report Network wrote an article detailing the struggles of a South Asian woman, Guneet Saini (name changed) fighting a divorce battle in Brampton for over two years. In the six years of her marriage, she unfortunately did not have a joint bank account with her husband and the home that her husband purchased – with the dowry cash from Saini's parents – was under her husband and in-law's name; two facts which did not work in Guneet's favour. She states that she was “always kept in the dark about financial decisions, [her] in-laws and husband controlled everything”.²⁰ Her husband had not allowed her to work during their marriage, forcing her to now look for a minimum wage job to support herself and her daughter, as despite being wealthy, her husband is only paying \$350 per month which “does not even cover the childcare fees of \$970”, and she has moved in with her parents while he continues to live in their marital home.²¹ Saini's situation is unfortunately similar to that of many women going through divorce in the South Asian community, as they are left with little to no assets, and are forced into a strained financial position.

¹⁹ Saumya Tripathi & Sameena Azhar, “A Systematic Review of Intimate Partner Violence Interventions Impacting South Asian Women in the United States” (2022) 23:2 *Trauma, Violence, & Abuse*, at 534.

²⁰ Nandini Kaur, *Canada – Divorce Challenges for South Asian Women* (September 2009), online: Women's UN Report Network.

²¹ *Ibid.*

In *Judge v Judge*, the husband, Manjit, and wife, Kuldip, were married for 20 years before separating, and were left with several properties acquired not only by the two of them, but by the husband's parents as well.²² A major issue in this British Columbia divorce case was the division of properties as the wife sought judicial reapportionment of the family assets in her favour. The Court concluded that the husband "controlled the finances of the extended family" and the wife was subservient to her husband and "unaware of the manner in which he was structuring the financial affairs of the extended family unit".²³ The Court found that the husband's parents made financial contributions to the properties but also contributed by way of childcare, however the wife also made substantial contributions to acquiring the various properties, and she contributed through management of the household and child rearing. The Court ultimately found that the properties were family assets acquired jointly and should be reapportioned in the wife's favour. South Asian women often facing similar situations wherein they are not in control of the finances or have few assets directly in their name can claim assets acquired by joint family ventures where the facts allow the court to consider each parties' contribution when determining each party's interest in property.

The cases of Guneet Saini and Kuldip Judge illustrate the challenges that women in the South Asian community can face when it comes to the division of assets in a divorce. Traditional gender roles and cultural norms can disadvantage women and make it difficult for them to assert their rights and receive a fair settlement. It is important for women in the South Asian community to be aware of their rights from a young age - such as claiming assets acquired by joint family ventures - and to seek legal advice if they are considering a divorce in order to ensure that they receive a fair and just settlement.

²² *Judge v Judge*, 2015 BCSC 1764 [*Judge*].

²³ *Ibid*, at para 7.

The Tort of Family Violence: The Legal Test

In Canada, the tort of family violence is a legal remedy that is available to victims of GBV as an alternative to criminal charges. This tort allows victims to seek compensation for the physical, emotional, and financial harm that they have suffered because of GBV. The tort of family violence is based on the idea that an individual has a duty to refrain from causing harm to their family members, and that this duty is breached when GBV occurs. In paragraph 52 of *Ahluwalia*, the Court sets out the test for finding family violence. The plaintiff must prove on a balance of probabilities:

“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 safety or that of another person”.²⁴

Under the first mode of liability, the plaintiff is required to establish that the defendant had an intention to commit violent or threatening acts. Under the second mode of liability, the plaintiff is required to establish that the defendant engaged in behaviour that was calculated and coercive towards the plaintiff. Under the third mode of liability, the plaintiff is required to establish that the defendant knowingly engaged in conduct that would instil fear in the plaintiff. The type of violence and fear referred to here should be consistent with recognized torts of assault, battery, and emotional distress.

If these elements are established on the balance of probabilities, the victim may be entitled to damages for the harm they have suffered, including compensation for any physical injuries,

²⁴ *Ahluwalia*, *supra* note 11 at para 52.

emotional distress, lost wages, and other losses.²⁵ The Court justifies the need for the tort of family violence by considering the complex dynamic of violence within family relationships, where the feelings of terror and control are often created through years of “psychological abuse punctuated with relatively few acts of serious physical violence”.²⁶ The recognition of the tort of family violence is “consistent with the overarching imperative to remove the economic barriers facing survivors that try to leave violent relationships and access justice”.²⁷ The Court continues to explain that a narrow focus on specific incidents risks minimising the overall pattern of violence that often defines the entirety of one’s relationship.

Civil or Criminal Matter?

In Canada, the tort of family violence is a legal remedy that is available to victims of domestic violence, in addition to criminal charges. This tort allows victims to seek compensation for the physical, emotional, and financial harm that they have suffered because of domestic violence. The tort of family violence is based on the idea that an individual has a duty to refrain from causing harm to their family members, and that this duty is breached when domestic violence occurs. In order to succeed in a claim for family violence, the victim must prove the following: that there was a relationship of some permanence between the victim and the perpetrator (such as marriage, common-law partnership, or a relationship of dependency), the perpetrator engaged in a pattern of abusive or controlling behaviour towards the victim, and that the victim suffered harm as a result of the perpetrator's actions.²⁸

²⁵ *Ibid.*

²⁶ *Ibid* at para 59.

²⁷ *Ibid* at para 67.

²⁸ *Ahluwalia*, *Supra* note 11 at para 55.

If these elements are established, the victim may be entitled to damages for the harm they have suffered, including compensation for any physical injuries, emotional distress, lost wages, and other losses.

There are several advantages to pursuing a civil claim as opposed to criminal charges. For example, civil claims are generally easier to prove than criminal charges, as the standard of proof is lower. This means that it may be easier for a victim to succeed in a claim for family violence than to secure a criminal conviction against their abuser. We see this in a British Columbia case, *Schuetze v Pyper*²⁹, where the woman was assaulted by her husband and was awarded \$800k in a civil lawsuit, but her husband consequently had all charges dropped in the criminal case. Civil claims can provide a more comprehensive remedy for victims, as they can seek damages for a wider range of harms (including emotional and financial harms) than may be available through criminal charges. The most profound distinction between the Family Tort of Law and Criminal Law is the party being focused on. Inherently a criminal case's focus is on the offender and the prosecution of the accused is done by the Crown. The Case is put forth by the Crown because the violence is seen as an offence against society as a whole.³⁰ Though this approach may be ideal for some, others may not see it as a sufficient outcome to an offence because with a criminal prosecution, the survivor acquires no compensation, while the offender, if found guilty, receives punishment. Family tort of violence on the other hand, has created another option for survivors of GBV and provides them with the opportunity to receive monetary compensation.

²⁹ *Schuetze v. Pyper*, 2021 BCSC 2209 [Schuetze]

³⁰ Government of Canada, "Civil and criminal cases" (01 August 2021), online: *Government of Canada* <www.justice.gc.ca/eng/csjsjc/just/08.html>.

Furthermore, another vital distinction between a criminal and civil matter is the extent of allowed background information. This is essential in relation to GBV, especially to those with survivors who have intersecting barriers. For example, in *Schuetze v Pyper*³¹ the civil decision consisted of a 117-page document that provided details of the relationship dating back to 2018 to showcase the full extent of the abuse. The criminal sentence, on the other hand, only had six pages and summarised the assault within four paragraphs and solely focuses on the accused³². The criminal court fails to take into account the impact the violence had on the survivor and at the most include a victim impact statement. The background information is essential to establish, on a balance of probabilities, the extent of the long-term abusive behaviour and its impact on the children who may witness the regular abuse.

In addition to having the opportunity to provide extensive background information, pursuing a civil case also provides survivors with more control over evidence presented to the judge, as opposed to a criminal case.³³ Since criminal law matters are inherently brought forth by the Crown, the survivor is often left out of the process. Within matters of criminal law plaintiff's often feel like they have no control over the matter, while in a civil matter survivors have more control through their lawyers, who can advise, as they are their lawyers rather than representatives of the Crown.³⁴

Overall, the tort of family violence can be a valuable resource for survivors of GBV in Canada, when going through the process of a relationship breakdown, by providing a means of actively seeking justice and compensation for the harm suffered.

³¹ *Schuetze*, *supra* note 28.

³² Eva Uguen-Csenge, "Woman assaulted by husband awarded \$800K in civil lawsuit. He received an absolute discharge in criminal case" (28 January 2022), online: *CBC* <www.cbc.ca/news/canada/british-columbia/civil-lawsuit-criminal-case-intimate-partner-violence-1.6325951>.

³³ *Ibid.*

³⁴ Mark Gollom, "Her voice is heard: Why some accusers pursue civil rather than criminal justice in harassment cases" (5 January 2018), online: *CBC* <www.cbc.ca/news/canada/albert-schultz-soulpepper-civil-lawsuit-1.4472933>.

Civil Court Decision on Family Violence: Providing the Right Evidence

Schuetze is a case from British Columbia in which the plaintiff alleged that the defendant had committed the tort of family violence against her.³⁵ The court found that Pyper, the defendant, had engaged in a pattern of behaviour that included physical and emotional abuse, as well as controlling and manipulative behaviour. The court also found that this behaviour had caused Schuetze to reasonably fear for her safety, and that she had suffered significant psychological and emotional harm as a result. Based on this, the court awarded Schuetze damages for the harm that she had suffered.

The evidence that Schuetze presented to the Court in order to prove the tort of family violence included testimony from herself as well as other witnesses regarding the pattern of behaviour that Pyper had engaged in, particularly detailing the physical and emotional abuse, as well as controlling and manipulative behaviour. Additionally, Schuetze presented medical and psychological reports detailing the harm she had suffered as a result of Pyper's abuse, and testimonies from experts in the field of GBV.³⁶ She also presented police reports as further proof of the fear she had for her safety.³⁷

While it is worth noting that evidence in every case varies depending on the specific facts and circumstances, this case helps provide a basic guideline of what type of evidence can help victims prove their cases in court. Women in similar situations may find the following types of evidence to be helpful in a family tort case in Canada: eyewitness testimony of the defendant's conduct, medical records and expert testimony proving the extent of harm suffered by the victim or victims, and financial records proving damages including medical expenses and loss of income.

³⁵ *Schuetze*, *supra* note 28.

³⁶ *Ibid* at para 234.

³⁷ *Ibid* at para 321.

Damages Awarded for Family Violence

Damages that are awarded for intentional torts in the context of a domestic relationship often incorporate aggravating damages. Aggravating damages include general pain and suffering. Additionally, there are punitive damages which are a form of clear punishment for the defendant, while special damages cover any out-of-pocket expenses resulting from the defendant's actions (or lack of).³⁸

Over the course of the past 25 years in Canadian law, damages awarded in family litigation for batteries has been progressively increasing. Additionally judges also award aggravated damages in such incidents, as the breaking of the trust within a spousal relationship makes the battery more humiliating, hence taking into account the psychological component in addition to the physical.³⁹

Resources to Protect Women and Children from Family Violence

Previous research has shown that immigrant women in comparison to non-immigrant women are less likely to seek help formally or informally (e.g. looking to friends and family members for support, using social support services) for intimate partner violence.⁴⁰ Despite younger South Asian women victims of GBV being more likely to seek formal or informal help, the cultural differences between many of these service providers and the victims creates a large gap in the support system. The nuanced South Asian culture requires a model of service and support that mainstream social services may not be equipped to provide. In Surrey, British Columbia, the Surrey Women's Centre works to protect and empower women and girls escaping various forms of GBV.

³⁸ Mary Jo Maur, "Torts and Family Law" (July 2022) at 6, Online(pdf): *Family law Quarterly* <[https://nextcanada.westlaw.com/Document/Ieb377013b3317410e0540010e03eefe0/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://nextcanada.westlaw.com/Document/Ieb377013b3317410e0540010e03eefe0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)>.

³⁹ Mary Jo Maur, *supra* note 31 at 7

⁴⁰ Hyman et al, "Help-Seeking Rates for Intimate Partner Violence (IPV) Among Canadian Immigrant Women" (2006) 27:682 *Health Care for Women International*, at 689.

The BC Children's Hospital released a guide to supporting children exposed to GBV, it details how witnessing or experiencing violence can impact them at various stages of development and provides suggestions on how to mitigate difficult relationships from taking legal action to managing stress through self-care. The guide emphasises the importance of talking to children about the violence they witness and as their mother, letting them know that their safety is of utmost importance. By placing an emphasis on the child's need for stability, guidance, and positivity, the guide provides methods for parents to ensure their child still grows up in an environment that allows them to flourish and feel protected despite the violence they may witness or face.⁴¹

The tort of family violence serves to empower victims of GBV, and for South Asian victims, this tort allows for the various nuances of their trauma to be analyzed when assessing damages. The uniqueness of multi-generational families and various other factors can be taken into account if a civil claim is pursued. We encourage victims of GBV to seek support for themselves and their children, as living in a home with domestic violence is an adverse childhood experience that can have long-lasting negative effects on children. It is of utmost importance that women facing GBV protect themselves and their families, and there are several resources available for support both specific to the South Asian community and beyond.

⁴¹ Penfold et al, *Helping My Child: A Guide to Supporting Children Exposed to Domestic Violence* (2005), online: BC Children's Hospital Mental Health Programs.