

# Money Family Law

Founding Editors: Barry Corbin and Lorne Wolfson

## Play Nice ... Or Else!

Barry S. Corbin\*

A recent Tax Court of Canada decision (brought to our attention by noted tax lawyer, David Sherman) points out the perils for separated marital partners who fail to address, or fail to agree upon, certain tax-related matters in a separation agreement. It also calls into question whether Parliament has not imposed a rather draconian solution on parties who cannot agree.

In *Krashinsky v. R.*,<sup>1</sup> the taxpayer and his wife entered into a separation agreement in which they agreed to joint custody of their son. The taxpayer was required to pay his wife a lump sum amount, but no provision was made for either spousal support or child support. One matter that the separation agreement did not address was the matter of which party would be entitled to the tax credit under paragraph 118(1)(b) of the *Income Tax Act* – the “wholly dependent person” or “equivalent to spouse” credit.

That paragraph allows separated marital partners to agree as to which of them should have the tax credit. (It cannot be shared between the partners in a given taxation year, although there does not appear to be anything preventing the parties from agreeing to alternate use of the tax credit from one taxation year to the

next.) The taxpayer had asked his wife to let him have the tax credit but she had refused.<sup>2</sup> In fact, each of them filed a tax return claiming the tax credit. On assessment, each of them was denied the tax credit, in accordance with the rule set out in paragraph 118(4)(b) which reads:

For the purpose of subsection (1) ... not more than one individual is entitled to a deduction under subsection (1) because of paragraph (b) or (b.1) of the description of B in that subsection for a taxation year in respect of the same person or the same domestic establishment and where two or more individuals otherwise entitled to such a deduction fail to agree as to the individual by whom the deduction may be made, no such deduction for the year shall be allowed to either or any of them. [emphasis added]

While the taxpayer did not dispute the clear meaning of this provision, he argued that this provision was unconstitutionally discriminatory under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*. Justice Diane Campbell was not persuaded by this argument and, since that was the only ground upon which the taxpayer relied, his appeal was dismissed.

Thus, because the couple could not agree on the use of this tax credit, neither of them was permitted to claim it, letting the government win. Given the high degree of animosity that often exists between separated marital partners, it may be

<sup>2</sup> Subsection 118(5) would have denied the taxpayer the right to claim the tax credit if he had been required by the separation agreement to pay child support.

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<sup>1</sup> 2010 CarswellNat 475, 2010 TCC 78, 2010 D.T.C. 3038.

nothing more than spite on one side or the other that underlies the inability to reach an agreement on the use of this tax credit. But it is certainly foolish to throw it away completely.

Justice Campbell also chose to take aim at Parliament:

Mr. Krashinsky, your bringing this case to the Court will hopefully serve two purposes. First, to convey a message to the Family Law bar that this is an issue that should routinely be addressed at the time of the separation agreement, where joint custody is an issue. Second, to convey a message to the legislators that notwithstanding good intentions to provide taxpayer relief, because that is what this credit is to do, the zero sum approach of denying any credit without agreement can, in certain circumstances, create a harsh and unfair result contrary to their intention of providing relief. It may, indeed, be time to create a better mouse trap.

## Tort Claims in Family Law – The Frontier (Part II)

Georgina L. Carson and Michael Stangarone\*

### Damages for Intentional Infliction of Mental Suffering and Emotional Distress – Expanding Tort Remedies to Address Emotional or Financial Abuse

#### Mental Suffering and Emotional Distress

A party may be injured not only by some physical assault upon his or her person but also by conduct which produces nervous shock, mental anguish, or some other emotional injury. The cause of action is not for the physical consequence but for the causing of emotional or mental harm by some direct act on the part of the opposing party.<sup>1</sup> The Ontario Court of Appeal has held that the tort of

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1 The Law of Torts in Canada, vol. 1 at pp. 47 and 48.

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intentional infliction of mental suffering involves the following three elements (i) flagrant or outrageous conduct; (ii) calculated to produce harm; and (iii) resulting in a visible and provable illness.<sup>2</sup>

In *Frame v. Smith*,<sup>3</sup> the Supreme Court of Canada refused to extend the tort of intentional infliction of mental suffering into the realm of family law as the Court believed that such cause of action would have the potential for petty and spiteful litigation, and could be used as a weapon for spouses undergoing a great deal of emotional trauma which they believed was maliciously caused by the other spouse. The Court stated that, "it is not for this court to

fashion an ideal weapon for spouses whose initial, although hopefully short-lived objective, is to injure one another, especially when this will almost inevitably have a detrimental effect on the children."<sup>4</sup>

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

In *MacKay v. Buelow*,<sup>5</sup> the wife brought an action for damages resulting from continued harassment and intimidation by the husband. The husband had called the wife continuously during the day and night for a four month period; he threatened the physical wellbeing and safety of

4 *Frame v. Smith*, *supra* at 128.

5 *MacKay v. Buelow* (1995), 1995 CarswellOnt 89 (Ont. Gen. Div.) at paras. 12, 16-17.

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

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

the wife and child; he stalked the wife on several occasions; he threatened to kill her and he harassed the wife's friends and professional advisers. The Court awarded non-pecuniary general damages of \$25,000 and \$15,000 for aggravated damages for the invasion of privacy, trespass to the person, mental suffering and emotional distress suffered by the wife. The wife was entitled to a further \$15,000 in punitive damages because of the 'calculated, devilishly creative and entirely reprehensible conduct of the husband'. The amount of \$44,000 was awarded to compensate her for necessary future medical and psychiatric care. She was also entitled to recover her pre-trial expenses incurred as a result of the husband's conduct.

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

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

will start again and be much worse, contained in the second package she received."

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

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

### **Expanding the Tort to Cases of Parental Alienation**

The tort of intentional infliction of mental suffering may be useful in the context of parental alienation. A child reaching the age of majority could seek damages for the intentional emotional distress suffered at the hands of the alienating parent as a result of being deprived of a relationship with their other parent. An award of damages in this respect

would act as a deterrent to discourage parents from engaging in parental alienation which invariably results in long lasting emotional damage to children.

In *Attia v. Garanna*,<sup>6</sup> the father sought damages against the mother for abducting the children to Egypt from Ontario. The Court expressly stated that damages can be awarded for the tort of intentional infliction of mental suffering in this context. However, in the *Attia* case, the essential ingredients of the tort were missing. No medical evidence was marshalled to evidence that the father had suffered a provable illness. If counsel intend to pursue damages for mental and emotional suffering, it is imperative that pleadings are properly framed and medical evidence presented to the Court to prove the damages. In *Attia*, while the Court noted that the mother's conduct may have had a severe emotional impact on the father, damages were not recoverable as a separate tort.

### **Extortionate conduct – Tort of Intimidation**

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

The tort of extortion requires the threat to do an illegal act. In *Roman Corp. v. Hudson's Bay Oil & Gas Co.*,<sup>7</sup> the Supreme Court of Canada stated that, "in order to succeed under this head (tort of intimidation), the facts relied upon by the appellants would have to disclose that they had sustained damage by reason of a threat, made by the Respondents, of an unlawful act." In

6 *Attia v. Garanna* (2010), 2010 CarswellOnt 1168 (Ont. S.C.J.), additional reasons at (2010), 2010 CarswellOnt 1953 (Ont. S.C.J.).

7 *Roman Corp. v. Hudson's Bay Oil & Gas Co.* (1973), 36 D.L.R. (3d) 413, 1973 CarswellOnt 228, 1973 CarswellOnt 228F (S.C.C.) at 420 [D.L.R.].

*R v. H.A.*,<sup>8</sup> Justice Doherty of the Ontario Court of Appeal held that, "... Some threats, while not *per se* unlawful (e.g., the threat to disclose some despicable act from one's distant past), will have a much more coercive effect than a threat to do something which is in and of itself unlawful".

In *R. v. Royz*,<sup>9</sup> the Ontario Court of Appeal found that the appellant's comments to the complainant that he would make sure that important people in her life found out about the past she wished to keep hidden unless she purchased his distribution rights, and that he would 'ruin her', clearly fell within the broad definition of a "threat" adopted by the Court in *H.(A.)*. Accordingly, the essence of extortion is that an advantage is sought to be obtained by illegitimate pressure, or, as stated by the Court in *R. v. Jansen*, "not by violence, but by inspiring fear".<sup>10</sup>

Based on the above authorities, Justice Veit of the Alberta's Queen Bench concluded in *Scherf v. Nesbitt*<sup>11</sup> that in order to establish either the crime of extortion or a civil claim based on extortion in the family law context, the claimant must only establish improper pressure without reasonable justification or excuse. In that case, the wife successfully applied for distribution of the sale proceeds of a jointly owned property after the breakdown of the parties' common-law relationship. She then sought full recovery costs based on the husband's bullying and abusive e-mails to her after she requested the sale proceeds. The husband threatened to publicize private information about the wife which he knew the wife would not wish to have publicly disclosed. He

also expressed contempt for her lawyer's professional ability and integrity.

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

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

### Damages for Breach of Fiduciary Duty – Family Law's Reluctant Embrace

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

### The Fiduciary Relationship

The Supreme Court of Canada dealt with the nature of fiduciary relationships in *Norberg v. Wynrib*.<sup>12</sup> In *Norberg*, Justice McLachlin (as she then was) relied on the indicia of a fiduciary relationship set out by Justice Wilson in her dissenting judgment in *Frame v. Smith*,<sup>13</sup> which was approved in *International Corona Resources Ltd. v. LAC Minerals Ltd.*<sup>14</sup> In *Frame*, Justice Wilson articulated the indicia required to establish a fiduciary relationship as follows:

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

- 1) The fiduciary has scope for the exercise of some discretion or power.
- 2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- 3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>15</sup>

In *Norberg*, Justice McLachlin stated that the fiduciary must "look after" the interest of the beneficiary. In *M. (K.) v. M. (H.)*,<sup>16</sup> Justice La Forest stated that he would "go further and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary". The Supreme Court adopted Dickson J.'s words (as he then was) in *Guerin v.*

<sup>12</sup> (1992), 92 D.L.R. (4th) 449, 1992 CarswellBC 907, 1992 CarswellBC 155 (S.C.C.), additional reasons at (1992), 1992 CarswellBC 338, 1992 CarswellBC 908 (S.C.C.) [*Norberg*].

<sup>13</sup> *Frame, supra*.

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

<sup>15</sup> *Frame v. Smith supra* at 99 per Wilson J., approved by La Forest J. in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, 1989 CarswellOnt 126, 1989 CarswellOnt 965.

<sup>16</sup> [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 1992 CarswellOnt 841, 1992 CarswellOnt 998 at 324 [D.L.R.].

<sup>8</sup> *R. v. H.A.* (2005), 202 O.A.C. 54, [2005] O.J. No. 3777, (sub nom. *R. v. Blake*) 2005 CarswellOnt 4269 (Ont. C.A.).

<sup>9</sup> *R. v. Royz*, 2008 ONCA 584, [2008] O.J. No. 3129, 2008 CarswellOnt 5423 (Ont. C.A.), affirmed 2009 SCC 13, 2009 CarswellOnt 1608, 2009 CarswellOnt 1609 (S.C.C.).

<sup>10</sup> *R. v. Jansen*, 1959 (1) SA 779 (C).

<sup>11</sup> *Scherf v. Nesbitt* (2009), 2009 CarswellAlta 2162 (Alta. Q.B.).

R.<sup>17</sup> that it is the nature of the relationship, not the specific category of actor involved that gives rise to the duty.

In *Hodgkinson v. Simms*,<sup>18</sup> the Supreme Court of Canada held that there are two types of truly fiduciary relationships. The first type embraces relationships having as their essence discretion, influence over interests, and an inherent vulnerability. For this type, there is a rebuttable presumption that one party has a duty to act in the best interests of the other. The second type occurs when fiduciary obligations arise as a matter of fact from the circumstances. For those, there must be evidence of a mutual understanding that one party has relinquished his or her own self-interest and agreed to act solely on behalf of the other party. For example, in cases where a plaintiff shows loss arising from the defendant's non-disclosure, the defendant has the onus to prove that the plaintiff would have suffered the same loss regardless of the breach. Mere speculation by a defendant is not enough.

Accordingly, the essence of a fiduciary relationship is that one party exercises power on behalf of another and either expressly or impliedly pledges to act in the other's best interest. The ability to exercise that power in a damaging way is what makes the imposition of a fiduciary duty necessary. However, a situation must first exist where the fiduciary looks after the interests of the beneficiary in order to establish a relationship.<sup>19</sup>

17 [1984] 6 W.W.R. 481, 1984 CarswellNat 693, 1984 CarswellNat 813 (S.C.C.).

18 (1994), 1994 CarswellBC 438, 1994 CarswellBC 1245 (S.C.C.).

19 *Louie v. Lastman* (2001), 2001 CarswellOnt 1736 (Ont. S.C.J.), affirmed (2002), 2002 CarswellOnt 2975 (Ont. C.A.), leave to appeal refused (2003), 2003 CarswellOnt 3105, 2003 CarswellOnt 3106 (S.C.C.).

### Imposing a Fiduciary Duty

In *Gregoric v. Gregoric*,<sup>20</sup> the court expanded the fiduciary duty as between husband and wife. Justice Granger was satisfied that there was a common understanding that the husband held property in his name by way of resulting trust for himself and his wife. As a result of this trust, the husband became a trustee of the wife's interest. As a trustee, the husband owed a fiduciary duty to his wife. The relationship between the parties indicated that the husband was the dominant party in the relationship and that the wife placed her trust in him to make both business decisions and deal with the financial management of the family unit. Accordingly, as a result of the fiduciary relationship, the husband was required to act in the wife's interest, selflessly with undivided loyalty. The Court was satisfied that this obligation would have required that financial disclosure be made to the wife. While Justice Granger did not go as far as to hold that spouses are always under a fiduciary duty toward each other, he was satisfied that, in one-sided relationships where one spouse holds knowledge and power, the law should strive to prevent the abuse of that power.

In the twenty years since *Gregoric*, courts have been reluctant to expressly find a fiduciary obligation existing between spouses where there is a family law statutory scheme in place. The courts have been reluctant to step outside statutory schemes and award significant awards to resolve all issues arising from relationship breakdown. In *Frame v. Smith*, *supra*, Justice La Forest, in specifically rejecting an action for breach of fiduciary duty commenced by a father against his former spouse for damages arising out of her interference with access to his children, stated that the legislature had intended to devise a comprehensive scheme for dealing with access issues. Had civil action been contemplated

20 *Gregoric v. Gregoric* (1990), 1990 CarswellOnt 296 (Ont. Gen. Div.), additional reasons at (1991), 1991 CarswellOnt 3151 (Ont. Gen. Div.) [*Gregoric*].

as an additional remedy, the legislature would have provided for this, and, "Any other course would allow the courts to choose, in no predictable fashion, to grant a civil remedy for a statutory breach whenever they saw fit".

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

The annotation by the late Professor McLeod following the Supreme Court of Canada's decision of *B. (G.) v. G. (L.)*<sup>21</sup> suggests that the court may be implicitly imposing a fiduciary-like relationship between spouses upon marital breakdown. McLeod stated the following:

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

In *Ignagni v. Ignagni*,<sup>22</sup> Justice Conant held that the Court should scrutinize transactions between husbands and wives in a manner otherwise than in a normal contractual setting. Irrespective of whether or not a fiduciary obligation exists between a husband and a wife in any particular commercial setting, the Court should create situations which

21 (1995), 1995 CarswellQue 23, 1995 CarswellQue 120 (S.C.C.).

22 (1990), 1990 CarswellOnt 1312 (Ont. Gen. Div.).

suggest strongly that husbands and wives should treat each other in a commercial transaction with fairness, complete financial disclosure and so as not to prejudice the other.

In *Verdina v. Verdina*,<sup>23</sup> the Court dealt with the wife's allegation that the husband owed a fiduciary duty to her in respect of their participation in purchasing a Country Style Donuts franchise then owned by the husband. The Court found that the third aspect of the test in *Lac Minerals*, that of dependency or vulnerability, was indispensable, and it was on this aspect that the Court in *Verdina* found that there was a fiduciary obligation on the part of the husband to the wife in respect of the business transaction. The Court awarded the wife damages of \$45,000 as a result of the manner in which she was treated in the transaction. She was economically vulnerable to her husband in the transaction.

In *Parmigiani v. Parmigiani*,<sup>24</sup> the husband spent approximately \$165,000 in the months leading up to the parties' separation, resulting in the parties' only debt existing on valuation date. He testified that he lost \$145,000 while gambling after the marriage breakdown. He stopped gambling after reaching the limit on joint lines of credit and credit cards. He acknowledged using a female friend to impersonate his wife in an attempt to obtain another credit card for use at the casino. Justice Gordon of the Ontario Superior Court found that the husband's actions in handling the large amounts of money mentioned above were deliberate and premeditated. The husband's actions were intentional, reckless, and in bad faith. While not expressly finding that the husband owed a fiduciary duty to the wife, Justice Gordon stated in *Parmigiani* that each party was a trustee for the other when handling funds in light of the jointly held assets and debts. By his conduct, the husband violated

that trust and an unequal division was accordingly ordered.

In *Klassen v. Klassen*,<sup>25</sup> the British Columbia Court of Appeal held that a fiduciary relationship existed between the husband and the wife respecting shares which were trust property. The Court found that the husband had breached that fiduciary relationship by underpaying the wife pursuant to a 1994 agreement and not disclosing the true value of the shares. The husband stood in a fiduciary position to the wife in any dealings in respect of the shares. The husband, as fiduciary, had a duty to make full disclosure to the wife in negotiating the share purchase agreement. The husband had taken advantage of the wife's lack of knowledge to extract a grossly unfair agreement. The agreement was voidable as an unconscionable transaction. As a fiduciary, the husband was in breach of his duty to make full disclosure, which also made the contract voidable for non-disclosure.

#### Cases Finding No Fiduciary Duty Imposed Between Spouses

In *Rosen v. Rosen*,<sup>26</sup> the Ontario Court of Appeal failed to follow *Gregoric* and failed to find that the husband owed a fiduciary duty to the wife. The Court of Appeal distinguished *Gregoric* as a case involving control of a business in which his wife had an interest. In the Court's view, it was only for that reason that a fiduciary duty was held to arise. In *Luton v. Luton*,<sup>27</sup> the Ontario Superior Court distinguished *Gregoric* and found no specific obligation between married people which results in the same fiduciary relationship as that of a parent and child or a trustee.

In *Van Bork v. Van Bork*,<sup>28</sup> the Court refused to impose a fiduciary obligation on the husband towards the wife for his adverse behaviour during the litigation process. In the period between 1984 and the conclusion of the trial, there had been protracted and vigorous litigation. There were ten orders made by masters, fifteen by judges, various attendances before registrars to settle orders, three orders at the appellate level, and four motions brought by the husband which were adjourned to trial. The husband even brought a contempt motion against the wife's counsel personally, which was dismissed. Notwithstanding the husband's egregious litigation conduct, the Court awarded no damages for breach of fiduciary duty. Justice MacDonald made clear that her finding was not to be seen as encouraging future litigants to conduct themselves as the husband did. The Court held that the wife could be compensated through costs and prejudgment interest. By holding that no punitive damages should be awarded, the Court did not wish to suggest that the husband's behaviour was in any way tolerable.

In *Murray v. Murray*,<sup>29</sup> the Alberta Court of Appeal refused to impose a fiduciary duty between the spouses. The Court highlighted Professor McLeod's concerns regarding imposing a fiduciary obligation in his annotation to *Gregoric*: "The problem with imposing a fiduciary relationship is that it fundamentally alters inter-spousal bargaining. By imposing a fiduciary duty, a party must not only bargain in good faith, it must also look out for the other's interests." The Court of Appeal further stated that it was not realistic to expect both spouses to scrupulously ensure the other's interests in all cases — voluntarily and notwithstanding parity of bargaining power

23 (1992), 1992 CarswellOnt 1677 (Ont. Gen. Div.).

24 (2006), 2006 CarswellOnt 1894 (Ont. S.C.J.), additional reasons at (2006), 2006 CarswellOnt 3209 (Ont. S.C.J.).

25 (2001), 2001 CarswellBC 1378 (B.C. C.A.).

26 (1994), 1994 CarswellOnt 390 (Ont. C.A.), leave to appeal refused (1995), 10 R.F.L. (4th) 121 (note) (S.C.C.).

27 (1995), 1995 CarswellOnt 1978 (Ont. Gen. Div.), affirmed (1996), 1996 CarswellOnt 1563 (Ont. C.A.).

28 (1993), 1993 CarswellOnt 4375 (Ont. Gen. Div.), additional reasons at (1994), 1994 CarswellOnt 2532 (Ont. Gen. Div.), further additional reasons at (1994), 1994 CarswellOnt 559 (Ont. Gen. Div.).

29 (1994), 1994 CarswellAlta 361 (Alta. C.A.).

and the fairness of their eventual agreement.

In *Leopold v. Leopold*,<sup>30</sup> Justice Wilson of the Ontario Superior Court concluded that expanding the role of fiduciary to include all separating couples would serve to only 'muddy the waters'. The Court referred to *Frame v. Smith*, in stating that there is no advantage to opening the arsenal of tort law to separating couples. Justice Wilson suggested that the unique and important aspects of a matrimonial relationship may be recognized by imposing the standard of good faith upon separating couples negotiating their financial arrangements to ensure that there is an appropriate judicial supervisory role for domestic contracts.

In *Montreuil v. Montreuil*,<sup>31</sup> the Court refused to impose on the husband a fiduciary duty to the wife. The husband had the power to operate a Marina without any input from the wife. Her entitlement to a division of marital property, spousal support and child support upon marriage breakdown could be affected through his exercise of that discretion or power. However, the wife was not peculiarly vulnerable to the husband or at his mercy. She worked full-time outside the home and was her spouse's equal in most senses within the relationship. The most that could be said is that she expected him to act in good faith in his dealings with her. A fiduciary duty was not imposed.

### **Fiduciary Duty as Between Parent and Child**

Justice La Forest considered the fiduciary nature of the parent-child relationship in *M. (K.) v. M. (H.)*, which involved an action by a daughter against her father for damages for incest. His Honour stated that it was "intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a

grievous breach of the obligations arising from that relationship"<sup>32</sup>. The essence of the fiduciary breach is thus the trust relationship's damage. Cases dealing with the sexual abuse of a child by a "father figure" are accordingly based on breach of fiduciary duty.<sup>33</sup>

In *Louie v. Lastman*,<sup>34</sup> Justice Benotto of the Ontario Superior Court dismissed the plaintiffs' claims for breach of fiduciary duty against their father for ignoring them emotionally and financially for 30 years as not disclosing a cause of action. The plaintiffs' damages flowed from the alleged breach of a statutory support obligation. The Court found no fiduciary relationship existed as the defendant had never acted in a position of trust or control over the plaintiffs' lives. Further, the Court concluded that the legislative schemes in place for child support and for the resolution of family disputes would be compromised if damages were awarded in the circumstances of this case.

In *Cho v. Cho*,<sup>35</sup> two adult children commenced an action against their mother for breach of fiduciary duty, aggravated damages, and punitive damages as a result of alleged child abuse during their childhood, more than six years after the abuse ended. The Court found that they were victims of horrific emotional and physical abuse at her hands. They sought damages for breach of fiduciary duty, aggravated damages and punitive damages. They proved the abuse in fact and it amounted to a breach of duty in law. The children suffered from, among other things, post-traumatic anxiety, depression, insomnia, nightmares, headaches and difficulties concentrating. The children testified that the beatings at the hands of their mother were a virtual daily occurrence from as early

as they could remember. The abuse included choking, eye gouging, slamming heads into walls, holding heads under water, forcing J-cloths down throats until they wretched, scalding, finger twisting, and near drowning. The Court concluded that the wife's treatment of the children was precisely the kind of wanton, random and vicious cruelty that could be expected to produce the psychological damage which the experts diagnosed both children as suffering from.

The Court found that the mother owed a fiduciary duty to her children and that her assaults upon them constituted breaches of that fiduciary duty. The cause of action was framed in equity rather than tort as breach of fiduciary duty to avoid the two year limitation period associated with tort claims. There is no fixed limitation in respect of actions for breach of fiduciary duty, whether explicitly or by analogy.<sup>36</sup> Since the action for breach of fiduciary duty was based in equity, it was subject to the defence of laches. However, that defence was not established as the children's delay in commencing the action was not excessive and did not constitute acquiescence. The Court stated that the result would have been the same if the plaintiffs had sued their mother in tort, rather than for breach of fiduciary duty. The children were accordingly entitled to damages in tort. The decision may be instructive with respect to extending mental suffering damages to cases involving parental alienation.

In their statement of claim, the plaintiffs claimed compensation for breach of fiduciary duty in the amount of \$500,000 each. However, the Court went further and awarded damages of \$975,000 for each plaintiff for permanent physical injuries and psychiatric disorders as a result of their mother's physical and emotional abuse. The Court referred to the Supreme Court of Canada decision of *M. (K.) v. M. (H.)*<sup>37</sup> for the proposition that equitable compensation is available to redress equitable wrongs such as breach of fiduciary

32 *M. (K.) v. M. (H.)*, *supra* at 58.

33 *Ibid.*, at 67.

34 (2001), 2001 CarswellOnt 1736 (Ont. S.C.J.), affirmed (2002), 2002 CarswellOnt 2975 (Ont. C.A.), leave to appeal refused (2003), 2003 CarswellOnt 3105, 2003 CarswellOnt 3106 (S.C.C.).

35 (2003), 2003 CarswellOnt 708 (Ont. S.C.J.).

36 *M. (K.) v. M. (H.)*, *supra* at 328-333.

37 *Ibid.*, at 334-336.

30 (2000), 2000 CarswellOnt 4707 (Ont. S.C.J.).

31 (1999), 1999 CarswellOnt 3853 (Ont. S.C.J.), additional reasons at (2000), 2000 CarswellOnt 3566 (Ont. S.C.J.), affirmed (2001), 2001 CarswellOnt 3464 (Ont. C.A.).

duty on much the same basis as compensatory and punitive damages would be available in a tort case. The Court merged the principles of law and equity to achieve a just result in this case.

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

### Conclusion

It is increasingly clear that courts will not ignore wilful and unconscionable behaviour or misconduct and obstructionist tactics in family law. Tort remedies have been expanded to address physical, emotional and financial abuse suffered as a result of bullying tactics employed by a spouse. While the Court has been slow to follow *Gregoric* and expressly find a fiduciary obligation between spouses to compensate a spouse for losses suffered, the case law provides consequences for spouses who do not act in good faith towards one another and the court system.<sup>38</sup> The interests

<sup>38</sup> The Court of Appeal in *LeVan v. LeVan* (2008), 2008 CarswellOnt 2738 (Ont. C.A.), additional reasons at (2008), 2008 CarswellOnt 3713 (Ont. C.A.), leave to appeal refused (2008), 2008 CarswellOnt 6207, 2008 CarswellOnt 6208 (S.C.C.) made clear that full disclosure must be exchanged and valuations completed when negotiating a domestic contract.

of the administration of justice in family law are further protected by imposing statutory obligations upon litigants to treat the court system and one another with good faith.

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

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

Some may argue that the above obligations impose a duty tantamount to a fiduciary duty. Ostensibly, the definition of fiduciary duty appears particularly suited to the spousal relationship. However, the attempt to impose a "one size fits all" equitable remedy may be increasingly obsolete as family law becomes subject to an increasingly specific and streamlined set of substantive

and procedural laws. As the statutory schemes for the resolution of family law matters become progressively more comprehensive, the need for reliance on equitable remedies may recede.

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

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

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