

# Money Family Law

Founding Editors: Barry Corbin and Lorne Wolfson

## Digging Deeper

Barry S. Corbin\*

Courtesy of our most recent request under the *Freedom of Information and Protection of Privacy Act (FIPPA)*, we are pleased to provide our readers with a provisional total for the estate administration tax revenues collected by the Province of Ontario during its most recent fiscal period, which ended March 31, 2010. Although the figure will remain provisional until the Public Accounts are published in the fall of this year, in the 14 previous *FIPPA* requests we have submitted, only twice was the final figure different from the provisional one. (Our latest *FIPPA* request was initially rebuffed on the grounds that the information being sought would be published in the Public Accounts within 90 days after our request was made. To our considerable surprise, a telephone plea to the Freedom of Information and Protection of Privacy Office for a reversal of that decision was successful.)

The provisional total for fiscal 2009-2010 is \$107,163,493. That represents a mere 0.37% increase over the total revenue realized in the immediately preceding fiscal period. As we reported to our readers a year ago, at that time the aggregate revenues realized since the rates were tripled in mid-1992 had exceeded by only \$2 million the aggregate revenues that we projected the government would have collected if there

had been no rate hike.<sup>1</sup> Our projected figure for the fiscal year just ended is \$158,044,696, putting Ontario firmly into deficit territory to the tune of nearly \$53 million on an aggregate basis. Let's hope the government does not conclude that it's time for another rate hike.

<sup>1</sup> Our projected revenues were premised on a continuation of the average year-over-year 9.7% increase in annual revenues during the 20-year period preceding the rate hike.

## Dividing Pensions on Marriage Breakdown in Ontario: A Delicate Balancing Act

Jodi Kovitz\*

For years, the family law Bar lobbied the Attorney General to introduce legislation to reform the division of pensions on family breakdown, which has historically been problematic. In May 2009 the Province of Ontario finally passed Bill 133, the

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Pages 57-64

## Contents

57

*Digging Deeper*

57

*Dividing Pensions on Marriage Breakdown in Ontario: A Delicate Balancing Act*

59

*Tort Claims in Family Law – The Frontier (Part I)*

63

*What's New*

\* Corbin Estates Law.

*Family Law Statute Amendment Act*, 2009 S.O. 2009 C.11, which makes amendments to the calculation and distribution of pensions between separating spouses under the *Pension Benefits Act* R.S.O. 1990, c. F2 and the *Family Law Act* R.S.O. 1990, c. F3. However, the provisions of Bill 133 concerning pensions will not be proclaimed in force until the accompanying regulations have been enacted.

In Ontario, the value of property accumulated by spouses during marriage, including any increase in value of property they brought into the marriage, is "equalized" upon the breakdown of the marriage. The process involves an accounting of the value of property of every kind to determine the equalization payment owing by one spouse to the other.

The value of a spouse's entitlement to receive a pension is considered to be "property" under the *Family Law Act* and is therefore subject to the equalization. The value of a defined benefit pension has traditionally been the present value of the probable future income stream (net of taxes), as determined by an actuary. The value of a defined contribution pension has typically been the amount in the fund to the employee's credit at the valuation date.

Where a member spouse has an interest in a plan with a high value, that value is included in calculating his net family property, resulting in a substantial equalization payment. In most cases, the member spouse's benefits are not yet payable because the member spouse has yet to retire. This result is often problematic since a significant disparity can arise between the value of the pension entitlement and its accessibility to satisfy the equalization payment. As a result, plan members have in the past had to borrow money or sell other assets to satisfy the equalization payment; in many cases, they may not have had the ability to do so.

In the alternative, spouses could elect to carve out the pension from the equalization process. This is often referred to as an "if and when" arrangement – the pension is divided between the spouses only if and

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when it is paid. While the Supreme Court of Canada ruled in *Best v. Best*<sup>1</sup> that courts can make an order for an "if and when" division pursuant to s.9(1)(d)(i) of the *Family Law Act*, this option is practically only available if the spouses agree to it. Even if spouses can agree to an "if and when" arrangement or get a court order for one in exceptional circumstances, these arrangements pose a number of difficulties. There are significant risks that the pension will never be equalized with a non-member spouse; possible difficulties in determining the appropriate share to be paid over to the non-employee spouse; variations in the amount that is eventually paid to the non-employee spouse; and there is a risk that such arrangements could be unenforceable.

Once proclaimed, Bill 133 will provide many changes to the *Family*

1 (1999), [1999] S.C.J. No. 40, 1999 CarswellOnt 1995, 1999 CarswellOnt 1996 (S.C.C.).

*Law Act and Pension Benefits Act* of Ontario in respect to defined benefit pension plans. Highlights include:

- the option of dividing the pension in pay between the spouses if the parties separate post-retirement;
- the option of transferring a pre-tax amount from the pension (maximum of 50%) to a pension or retirement savings vehicle or locked-in fund of the non-member if the parties separate prior to retirement;
- unmarried spouses by agreement in a domestic contract may opt into the pension division system; and
- pre-tax "valuation" of the pension performed by pension plan administrators, rather than by actuaries hired by the parties.

Some practitioners have welcomed the changes provided for by Bill 133, saying that they may simplify the process for dealing with pension assets on marriage breakdown and permit the settlement of

equalization claims out of pension interests or out of pensions in pay. On the other hand, critics have argued that the formula for division (not yet known) could prove to be unfair to the spouses of the pension members. There are also concerns that pension plan administrators will not be qualified to assume the new role of valuing pensions for family law purposes and that there will be so many exceptions that the process will be difficult to manage. Much of the effect of the reforms will depend on the regulations currently being drafted.

Family law clients and their counsel have a dilemma in terms of whether to proceed under the current legislation or to wait until Bill 133 is in force. The existing approach is known but not always satisfactory, and the new approach has benefits but is not entirely understood. There are transition provisions that will make the forthcoming changes apply retroactively to unresolved matters, but these rules do not permit pension division under the new law if a statement is set out in a prior order, arbitration award or domestic contract – which means that clients and counsel have to think this choice through very carefully.

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

Georgina L. Carson and Michael Stangarone\*

An uneasy dance continues between equitable remedies and statutory schemes in family law. Gaps remain in the statutory remedies available for litigants whose spouses wilfully harm them emotionally, physically and financially. Tort damages have been awarded in the family law context where one spouse has suffered as a result of assaultive

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behaviour, which has been defined to include assault, sexual assault or confinement. However, the Court has been generally reluctant to impose a fiduciary obligation between spouses to compensate a litigant for losses suffered as a result of emotional or financial distress.

The 2009 trial decision of *McLean v. Danicic*<sup>1</sup> (appeal quashed by the Ontario Court of Appeal in January 2010<sup>2</sup>) bridges this gap. In this case, Justice Harvison Young awarded damages for the intentional infliction of mental suffering and emotional distress in the absence of assaultive behavior. The infliction of distress arose from bullying tactics and harassment meant to intimidate the wife into relinquishing her meritorious case. *McLean* exposes a small, but real and dangerous element of criminal or quasi-criminal behaviour in family law. The case broadcasts the message that consequences will follow strong-arm tactics<sup>3</sup>, and rogue litigants will face sanctions for thumbing their nose at the justice system and their spouse's rightful claims. The case provides a much needed remedy in extreme cases.

## Tort Remedies & Statutory Rights – Filling in the Gaps

### Damages for Assaultive Behaviour

Damages for "assaultive behaviour" have been awarded by the Court as an extraordinary remedy and as an additional award to claims made under the *Family Law Act* upon relationship breakdown.<sup>3</sup> Awards of this nature are relatively new but they appear to be increasing in number. In these cases, a damages award typically follows a criminal

1 (2009), 2009 CarswellOnt 3289 (Ont. S.C.J.) [*McLean*].

2 (2010), [2010] O.J. No. 284, 2010 CarswellOnt 648 (Ont. C.A.). The appeal was quashed as an abuse of process. The Court of Appeal noted that the Appellant's appeal appeared to be vexatious and a continuation of a previous pattern. He had made no effort to bring the appeal forward and sought to again obstruct and increase costs.

3 See *Huismans v. Black* (2000), 2000 CarswellOnt 3137 (Ont. S.C.J.) at para. 17.

conviction for the (physical) assaults alleged, and findings by the trier of fact regarding the circumstances of the assault and its effects on the victim.

In *Dhaliwal v. Dhaliwal*<sup>4</sup>, the wife was physically assaulted by the husband and subjected to emotional abuse by way of verbal attacks and name calling perpetuated by the husband. He was criminally charged and convicted of assaulting the wife. The wife suffered emotional trauma and believed that her reputation in the Sikh community had been sullied. She attempted suicide and suffered from depression, sleep disturbances, a lessened ability to concentrate and fulfill her employment duties, anxiety and a lack or loss of self-esteem. The Court ordered the husband to pay the wife damages in tort as follows: general damages in the amount of \$5,000 and a further \$5,000 for aggravated and punitive damages. The Court relied on the decision of *Surgeoner v. Surgeoner*<sup>5</sup> in finding that the husband's conviction and punishment in the criminal court system for assaulting the wife did not deter the making of an award for damages in the family court system. In making the damages award, Justice Métivier stated that the award was meant to "indicate society's outrage at this conduct and to compensate the wife for the loss she has suffered".

In *Harris v. Cohen*,<sup>6</sup> the wife claimed damages for alleged assaults or trespasses upon her person. The wife's evidence was that the husband behaved in an unruly and overbearing way after the parties were married. He repeatedly barged into the wife's son's bedroom, past his closed door, when he knew the child did not want him to come in. As well,

4 (1997), 1997 CarswellOnt 5774 (Ont. Gen. Div.) at para. 58-64 [*Dhaliwal*].

5 (1993), 1993 CarswellOnt 4419 (Ont. Gen. Div.) [*Surgeoner*]. In this case, the Court awarded a total of \$8,000 for the husband's assault on his wife. He kneed her in the groin and she suffered headaches and a sore back for approximately three weeks. No medical treatment was sought.

6 *Harris v. Cohen* (1994), 1994 CarswellOnt 2001 (Ont. Gen. Div.) at para. 143-149 [*Harris*].

he once barged into the wife's bathroom where she was naked and pulled her into her son's view and made derogatory comments about her in his presence. The Court found that the husband's actions constituted an assault for which the redress of aggravated damages was appropriate. The husband's actions were an "unjustifiable and willful affront to the wife's feelings and dignity". The Court assessed aggravated, compensatory damages in the amount of \$10,000. The wife did not seek punitive damages. Had punitive damages been claimed, the Court would have awarded them because of the 'arrogance, high-handedness and cruelty of the defendant [husband]'s actions'.

### Aggravated Damages – General Principles

Aggravated damages, like general or special damages, are compensatory in nature. They are those additional damages which will compensate the plaintiff for the additional personal suffering, humiliation and continuing trauma suffered because of the manner in which the injuries were inflicted. In *Hill v. Church of Scientology of Toronto*,<sup>7</sup> the Supreme Court of Canada held that aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety. An award of aggravated damages recognizes a real injury suffered by the plaintiff and requires the person who caused the injury to pay compensation for it. An assessment of aggravated damages requires consideration of the entire conduct of the defendant, including his or her conduct in the court action, and the damages will give expression to the natural indignation of right-thinking people.

7 [1995] 2 S.C.R. 1130, 1995 CarswellOnt 396, 1995 CarswellOnt 534.

### Awarding Punitive Damages for Domestic Abuse – Exception to General Rule

Punitive or exemplary damages, on the other hand, go beyond compensation to the plaintiff for the damages actually sustained. An award of punitive damages is a penalty imposed on the defendant for outrageous conduct, and may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high handed that it offends the court's sense of decency. Unlike aggravated damages, punitive damages bear no relation to what the plaintiff should receive by way of compensation. In *Hill v. Church of Scientology of Toronto*, *supra*, the Supreme Court of Canada held that punitive damages are not to compensate the plaintiff but rather to punish and deter the defendant and others from acting in a malicious and oppressive manner. Punitive damages will only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

The Court in *C. (M.) v. M. (F.)*<sup>8</sup> held that, as a general rule, punitive or exemplary damages are not awarded when the defendant has already been prosecuted in the criminal courts and punished for the same conduct. However, a line of cases has developed holding that domestic violence cases are an exception to the general rule mentioned above. In *P. (S.) v. K. (F.)*,<sup>9</sup> Justice Barclay referred to the Ontario Law Reform Commission Report on Exemplary Damages (1991) which recommended that awards for punitive damages should not be limited because the defendant had been convicted of the same acts which founded the civil claim. In *Surgeoner, supra*, the Court stated the following:

I find it difficult to conclude that, simply because R.S. has been convicted of this assault, I cannot award punitive damages in this action, which is an action between

8 (1990), 46 C.P.C. (2d) 254, 1990 CarswellOnt 427 (Ont. Gen. Div.).

9 (1996), [1997] 3 W.W.R. 161, 1996 CarswellSask 756 (Sask. Q.B.).

husband and wife, where a special relationship exists. What does D.S. gain by that conviction? The answer is nothing. I am of the opinion that cases such as this, commonly referred to as domestic violence cases arising because of the special relationship that is created by marriage, and based upon trust, should be an exception to the general principle surrounding the award of punitive damages notwithstanding that such may result in "double jeopardy". I see no reason to attempt to punish under this heading by making reference to such terms as "aggravated damages" or delineating between the wrongs and identifying those that were punished in the criminal justice system and those that were not. I think it is necessary in this age of enlightenment in dealing with claims of this nature which are, in essence, abuse claims that an exception should be made allowing for an award of punitive damages just as it could be made if R.S. had not been convicted because the effect of such will be to deter this anti-social behaviour. Accordingly, I award general damages in the amount of \$4,000 and punitive damages in the amount of \$4,000.

The question in these cases is whether in light of the full compensatory award, a need remains for the court to mark its disapproval of the defendant's conduct by an exemplary imposition.<sup>10</sup> Compensatory damages should themselves operate as punishment and deterrence. If they adequately satisfy the goal sought to be achieved by exemplary damages, then there may be no reason for additional exemplary damages. To do so may "over compensate" the plaintiff and provide him or her with duplicate monetary recovery. The kind of conduct that attracts exemplary damages has been described as "malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal...evil, outrageous, callous, disgraceful, wilful, [and] wanton..."<sup>11</sup>

### Quantum of Damages

When an analysis of the damages has been completed by the Court, the Court must fix the amount of the award. The difficulty is that the Court must attempt to quantify the exquisitely subjective effects of often intangible and future consequences. Damages must be measured in light

10 *Flachs v. Flachs* (2002), 2002 CarswellOnt 1285 (Ont. S.C.J.), affirmed (2003), 2003 CarswellOnt 755 (Ont. C.A.).

11 Professor Waddams in *The Law of Damages* at p. 998.

of the harm that has been inflicted and with regard for the ranges of damages awarded in similar cases.<sup>12</sup> The Court must ensure that the amount fairly represents a sum which is appropriate compensation for the injury, and that it meets that purpose without being extravagant, as further explained below. On the other hand, damages must not be so frugally measured as to trivialize the victim's injury. The assessment involves an examination of the victim's complaints and a separation of the problems which may be quickly resolved from the long-term or permanent emotional damage.<sup>13</sup>

### Cases Where Punitive Damages Awarded

In *Farkas v. Kovacs*,<sup>14</sup> the wife sought damages arising from alleged assaults and the husband's mental cruelty. The husband had assaulted the wife on three occasions. He took advantage of her small stature and the fact that she was recuperating from surgery. The husband engaged in conduct aimed at harassing her, including calling her names and wishing that she would die of cancer. The Court stated that the wife appeared to have suffered no serious physical harm, but the emotional and mental aspects of the assaults ought not to be diminished. In the circumstances, the Court awarded general damages of \$10,000. Of the total award, \$2,500 was characterized as punitive damages, as the husband was aware of the wife's particular vulnerabilities.

In making the damages award, the Court noted that a pecuniary award of damages can be symbolic only inasmuch as there is no formula for arriving at any precise award which adequately compensates. The circumstances are somewhat complicated by the fact that the dynamics of a marital relationship are such that the equities are seldom all on one side. The Court stated that while

it is important that any assessment of damages be mindful of that fact, it is also important that individuals such as the husband in that case must be disabused of any perception that domestic relationships provide a license for assaultive behaviour.

In *Valenti v. Valenti*,<sup>15</sup> the wife sought civil damages arising from an assault. The court awarded the sum of \$10,000 for pain, suffering and loss of enjoyment of life, \$2,500 as aggravated damages and a further \$2,500 as punitive damages. Justice Métivier described the circumstances in *Valenti* as follows:

On 2<sup>nd</sup> December, 1991, the husband became very abusive towards the wife. As a result, he became violent, punching his wife in the face and head area, and forcing her head into the walls of the hallway. It is also noted that she was kicked and forced to sit on the couch with instructions not to move.

The husband then forced his wife to the vehicle and as they drove, the accused struck his wife in the face as well as hitting her with the car phone. At one point she became terrified and attempted to leave the vehicle. At this point the accused assumed control of the truck and after driving around for a short period of time returned to the residence.

Justice Métivier described the injuries to the wife as a bruised and swollen face. She also had a sore nose and a large bruise on the left lower back near her hip with swelling over a number of days. The wife suffered from symptoms of Post-traumatic Stress Disorder. Justice Métivier awarded aggravated damages "for inflicting injury in a climate that can only have been one of terror." In awarding punitive damages, Justice Métivier stated that, "the deterrence of this kind of conduct can only occur when such abuse is treated with the outrage it deserves."

In *S. (L.N.) v. K. (W.M.)*,<sup>16</sup> the wife sought general damages of \$50,000 and punitive damages of

\$25,000 for physical, psychological and emotional injuries as a result of the husband's assaults on her. Justice Perras awarded general damages of \$15,000 stating the following:

Given the length of time over which the verbal and physical assaults transpired in this case and given the injuries, bruises, bumps, bangs, etc. and the mental anguish that Ms. W.M.K. suffered from 1978 to 1996, I am satisfied that the pain, suffering, distress and humiliation were of an aggravated nature and hence I award \$15,000 for general damages.

The Court further awarded punitive damages of \$4,000 after finding that the husband's conduct towards the wife was "reprehensible and malicious and severely offends a reasonable view of common decency". The damages amounts were offset against the husband's unjust enrichment property claim.

In *Flachs v. Flachs*,<sup>17</sup> the wife and daughter sought tort damages for assault, battery, sexual assault and the intentional infliction of mental suffering. The evidence painted a picture of constant physical and emotional abuse of the wife by the husband over a period of 38 years during their marriage and of a life of fear and physical abuse inflicted upon his daughter from early in her childhood until she left home at age 19. In assessing compensatory damages, the Court's task was to attempt to quantify 38 years of abuse and physical and mental suffering endured by the wife and a lost childhood and the long-term effects of abuse endured by the daughter.

The Court was satisfied that the wife endured years of mental suffering consisting of humiliation, embarrassment and degradation as the result of being physically abused by the husband in front of others. The wife suffered from Post-traumatic Stress Disorder, anxiety and depression. The parties' daughter's psychiatrist diagnosed her with suffering from psychiatric difficulties as a consequence of witnessing the husband's assaults on her mother and being assaulted herself by her father. The Court awarded general damages to

17 (2002), 2002 CarswellOnt 1285 (Ont. S.C.J.), affirmed (2003), 2003 CarswellOnt 755 (Ont. C.A.).

12 *Wandich v. Viele* (2002), 2002 CarswellOnt 6 (Ont. S.C.J.) at para. 88.

13 *C. (M.) v. M. (F.)*, *supra* at 36.

14 *Farkas v. Kovacs* (1989), 1989 CarswellOnt 1275 (Ont. Dist. Ct.) at para. 12-14.

15 (1996), [1996] O.J. No. 522, 1996 CarswellOnt 514 (Ont. Gen. Div.) at para. 70, affirmed (1998), 1998 CarswellOnt 2275 (Ont. C.A.).

16 (1999), 1999 CarswellAlta 582 (Alta. Q.B.) at para. 40, additional reasons at (1999), 1999 CarswellAlta 945 (Alta. Q.B.).

the daughter in the amount of \$75,000, and general damages to the wife of \$125,000. In addition to general damages, the Court awarded aggravated damages of \$25,000 each to compensate the parties for the additional personal suffering, humiliation and continuing trauma suffered because of the manner in which the injuries were inflicted. The Court concluded that an award of punitive damages was appropriate in the amount of \$25,000 each in light of the husband's outrageous conduct. These damages were awarded separately and above criminal sanctions for assaults on the wife and daughter.

### Cases Where No Punitive Damages Awarded

In *C. (N.) v. B. (W.R.)*,<sup>18</sup> the plaintiff brought an action for damages for sexual assault and battery and assault and battery. The Court concluded that the plaintiff did in fact suffer physical and verbal abuse on a daily basis and sexual assaults as frequently as five times a week during her six and a half year relationship with the defendant. As a result of the abuse, the plaintiff suffered from symptoms of Post-traumatic Stress Disorder such as depression, anxiety and anger, as well as nightmares and disrupted sleeping patterns. In awarding aggravated damages, the Court recognized the immeasurable impact of the injuries suffered by the victim which were exacerbated by the way in which the injuries were inflicted. Given the intimate domestic relationship between the parties, the frequency of the physical and sexual assaults, the nature of the brutal assaults and their impact on the plaintiff, the Court awarded \$65,000 in general damages and \$25,000 in aggravated damages. Notwithstanding the brutality, damages were not specifically earmarked as exemplary or punitive. However, the general and aggravated awards were relatively high in comparison with other cases. This case, like all damage awards in family law cases, emphasizes the highly discretionary

18 (1999), 1999 CarswellOnt 3036 (Ont. S.C.J.).

nature of this inherently equitable remedy.

In *C. (M.) v. M. (F.)*, *supra*, the plaintiff sought damages for sexual assault against her former common-law partner. The parties had lived together for more than two years. The events in question took place after the parties stopped cohabiting. The defendant broke into the plaintiff's house, forcibly confined her and subjected her to an all-night series of brutal physical and sexual assaults. The defendant was acquitted of sexual assault at the criminal trial, but convicted of assault. The Court assessed the plaintiff's damages solely on non-pecuniary damages for pain and suffering and the loss of enjoyment of life caused by the emotional scarring of the incidents. Included in those damages was an award of aggravated damages. The court fixed those damages at \$40,000. In making its award, the Court considered the plaintiff's shock and physical hurt as a result of the sexual assault, the humiliation and degradation endured, and the plaintiff's ongoing emotional problems which required treatment. Justice Keenan acknowledged that the defendant's criminal acquittal on the sexual assault charges did not preclude the court from finding him liable for the commission of those acts based on the civil standard of proof. Nonetheless, punitive damages were not awarded because compensatory damages could be fixed at a level that would include exemplary considerations.

In *Wandich v. Viele*,<sup>19</sup> the wife sought damages in tort for personal injury. Justice Paisley concluded that the husband had assaulted the wife during the course of their relationship. He had earlier pleaded guilty to criminal assault. His Honour described the wife's allegations as follows:

Ms. Viele testified that there had been from seven to nine incidents during their relationship in which she had been assaulted... she described incidents in which Mr. Wandich had threatened her with a knife, choked her, caused her nose to bleed, punched her and poked her in the eye. She testified that during the incident which

19 (2002), 2002 CarswellOnt 6 (Ont. S.C.J.) at paras. 81-82.

resulted in the criminal charge, Mr. Wandich had pushed, kicked and punched her, pulled her hair, threatened to poke her in the eye, broke a framed picture on her head and pushed her against the wall. He then picked up a bathroom plunger and said that he was going to hit and bloody her. She ran into the kitchen to call 911. He took the phone out of her hand, put his fingers towards her eye and said, "don't you call anybody", then he dialled 911 and complained he had been assaulted. When the police arrived, Mr. Wandich was charged and taken away in handcuffs.

Justice Paisley awarded the wife \$5,000 in compensatory damages. In assessing the appropriate award for compensatory damages, the Court took into account the nature of the assault and the bruising suffered, but considered that her pain and suffering did not establish that the assault was near the high end of the range in similar cases. The Court did not find that an award of punitive or exemplary damages was appropriate. Justice Paisley stated that the stigma imposed on him by the finding of guilt in criminal court, and the fact that the wife was compensated by an award of compensatory damages served as an adequate penalty or deterrent in that case.

In *White v. White*,<sup>20</sup> a decision of the British Columbia Supreme Court, the wife sought damages as a result of her husband's savage assaults. The husband's attempt to raise the defence of provocation in final argument was rejected. The most serious assault consisted of the husband pulling the wife to a standing position by her hair, dragging her across a coffee table, pushing her in a bedroom, causing bruises to her legs and abdomen and tearing loose at least two pieces of her hair. This left her with a bloody, exposed scalp in at least two places. The Court concluded that the second assault aggravated her pre-existing personality disorder. The Court awarded the wife the sum of \$10,000 for non-pecuniary general damages for the assaults committed on her by the husband in the circumstances.

20 (2003), 2003 CarswellBC 750 (B.C. S.C.).

In *Megeval v. Megeval*,<sup>21</sup> Justice Kirkpatrick dealt with an assault causing serious permanent injury to the wife's right wrist. The injury caused Ms. Megeval prolonged serious disability. Her Honour awarded a global figure for non-pecuniary and aggravated damages of \$45,000. The fact that the assault took place in the context of a marriage, and from a husband of substantially greater stature and strength than his wife, supported a claim for aggravated damages.

In *Rezel v. Rezel*,<sup>22</sup> the wife claimed damages for an assault she suffered during an altercation at the end of the marriage. The husband admitted to two occasions of assault, although he testified that he could not recall

21 (1997), 1997 CarswellBC 2344 (B.C. S.C.) at para. 59.

22 (2007), 2007 CarswellOnt 2313 (Ont. S.C.J.).

the details. The wife testified that during one of these incidents her husband had "socked" her in the mouth and left her with a black eye. She was forced to take a few days off work as a result. Justice Harvison Young of the Ontario Superior Court set the quantum of general damages payable to the wife by the husband for the assaults at \$7,500. While the marriage was a turbulent one, the Court did not find that there was a lengthy history of physical violence. While unacceptable, and constituting clear instances of assault, these incidents did not result in lasting injury to the wife and the husband was contrite.

In *Van Dusen v. Van Dusen*,<sup>23</sup> the wife sought leave to claim tort damages for assault. She sought general damages in the amount of \$10,000,

23 (2010), 2010 CarswellOnt 398 (Ont. S.C.J.).

aggravated damages in the amount of \$5,000 and punitive damages in the amount of \$5,000 against the husband for the physical assault he committed upon her on the date of separation. The husband tormented and physically assaulted the wife throughout the marriage, even in the presence of the children. The last assault was witnessed by the children, which caused the wife physical and emotional harm and pain. The husband was charged and later convicted of assault. After considering the level of violence and pain inflicted upon the wife and the demeaning nature of the assault, the Court awarded \$15,000 in general and aggravated damages. The Court declined to make an Order of punitive damages.

(Part II of this article will appear in the 25-9 September issue of *Money & Family Law*)

## What's New?

Rachel Nusinoff\*

### Material Change – Spousal Support

In *Pustai v. Pustai*<sup>1</sup>, the father sought to reduce his spousal support obligation based on a material change in circumstances after the one child who resided with the mother moved to reside with him on a full-time basis. The father already had three children of the marriage living with him. He also argued that his income had been reduced since the prior order was made.

The parties had previously entered into a consent order which provided that one of the children would reside with the mother while the other three children lived with the father. Pursuant to the consent order, the father was to pay spousal support to

the mother in the sum of \$3,000 per month. The order specifically provided that either party could seek a review of the quantum of support upon a material change in circumstances.

The Ontario Court of Appeal, upholding the trial judge's decision, held that the child's move was not a material change in circumstances. The court considered that the child had changed residences previously, so it determined that the move was foreseeable at the time of the consent order.

Additionally, the court did not accept the father's argument that his income had been reduced, and went so far as to find that the father's income had increased since the parties' entered into the consent order.

Although the Court rejected the husband's application to vary spousal support, the court did hold that he would no longer have an obligation to pay child support for the fourth child now living with him.

### Income Determination

In *Chapman v. Summer*<sup>2</sup>, the court considered whether the trial judge erred in the determination of the husband's income for spousal and child support purposes.

The husband was a part-owner of a closely held corporation, a cattle ranch and trucking business, which he operated with his three brothers. Each of the brothers took a minimal salary and draws to cover their expenses, which were dealt with through shareholder loans paid out at the end of each year. In order to settle the property issues with the wife, the husband drew significant funds from the business, specifically \$319,000 in 2006 and \$312,000 in 2007, for which he paid her \$156,000 in 2006 and \$183,000 in 2007, respectively.

The husband argued that his income was less than what he had drawn from the company. The wife, on the other hand, argued that the

2 (2010), 2010 CarswellBC 1209 (B.C. C.A.).

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1 (2010), 2010 CarswellOnt 1960 (Ont. C.A.).

husband was able to take what he wanted from the business, and that the 2006 and 2007 draws demonstrated that he had access to a higher income.

The Court of Appeal held that the husband's income for support purposes should not be limited to those amounts that he drew from the company since the company had significant additional funds which were available to him. The court commented that there was no evidence presented that the companies were required to have a certain level of retained earnings to meet their expenses. In determining his income, the court considered his average income in the preceding years and the funds available to him and held that his income for support purposes was \$300,000.

Interestingly, the court did not address the fact that the husband was a minority shareholder, and that his brothers were majority shareholders, and did not raise the issue of how much control the husband actually had over the company's earnings and assets.

#### Spousal Support Variation – Voluntary Retirement of the Payor

In *Hoar v. Toner*<sup>3</sup>, the New Brunswick Court of Queen's Bench was faced with the decision of whether to permit a variation of spousal support on the grounds of the husband's voluntary retirement. The husband worked at the same difficult job for 35 years. At the time of the motion, the husband was 55 years old, and wanted to retire. He argued that in his employment, it was typical to retire at this age.

The parties had been married for 25 years, and the wife earned very little income. During the marriage the wife had remained at home and raised the parties' children. The wife

had a clear compensatory support claim. The husband on consent was paying to the wife spousal support of \$1,400 per month. He sought to reduce support to \$300 per month. At the time of the consent order, the parties had not contemplated that the husband may retire early.

Justice Walsh considered the New Brunswick Court of Appeal's decision in *LeMoine v. LeMoine*<sup>4</sup>, in which the court considered whether retirement was an act of bad faith in the circumstances. It should be noted that this is not the test in other provinces, most of which consider whether retirement is reasonable in the circumstances.

In *Hoar v. Toner*, the court, bound by the decision in *LeMoine v. LeMoine*, held that the husband's retirement was a material change in circumstances sufficient to warrant a variation of support. The court did, however, examine all of the circumstances, including that if support was terminated the wife would have no means to support herself after a long-term marriage. Accordingly, in fixing support, the court ordered that the husband pay support in the sum of \$1,050 per month.

#### Spousal Support Variation – Voluntary Retirement of the Payor

*Szczerbaniwicz v. Szczerbaniwicz*<sup>5</sup> offers a good contrast to the New Brunswick case *Hoar v. Toner*, which is set out above.

The parties had been married for 31 years before separating in 2006. The wife's primary role during the marriage was to manage the household and care for the parties' two children. In 2007, the parties entered into a consent order whereby the husband was to pay support to the wife in the sum of \$3,300 per month.

The husband now sought to reduce or terminate spousal support on the basis of early retirement. He was 52 years old. The husband argued that he wanted to complete a part-time PhD program, and that it was too difficult to complete the program while working. He further argued that he had contributed 30 years toward his pension, which would not increase significantly if he continued in his employment.

The husband had earned \$118,000 in 2008, prior to his retirement. In contrast, the wife earned \$31,000 that year. She indicated that she did not intend to retire prior to age 65. She argued that the husband had the capacity to continue earning the same high income as he had prior to retirement, and that support should continue based on an income of \$118,000.

The court set out the principle that:

Therefore, if the court finds that a party's retirement was motivated by the desire to avoid a maintenance obligation, it will most likely impute income. Even if the party's motivation was not to avoid maintenance, the court will likely impute income so long as the party has the ability to earn an income.

On this basis, the court held that the husband's decision to retire was "purely personal" and did not alleviate him of his obligation to pay spousal support to the wife. In determining what income to impute to him for support purposes, the court considered that his pension income was approximately \$38,000 per annum but that it was unlikely that he could again earn \$118,000 per annum. The court held that a reasonable income would be \$90,000 per annum if he worked to capacity, and imputed this income to him.

The court ordered spousal support to the wife in the sum of \$2,300 per month, which was slightly more than the mid-range of the Spousal Support Advisory Guidelines, with a review of support when the husband turns 60 years old.

3 (2010), 2010 CarswellNB 220 (N.B. Q.B.).

4 (1991), 1997 CarswellNB 21 (N.B. C.A.).

5 (2010), 2010 CarswellBC 759 (B.C. S.C.).