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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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"Collaboration" and Hostage-Taking in Alberta

Alberta just put the administration of justice on the bargaining table.

In our 2025 year-end edition, we wrote about the almost 40 unfilled judicial vacancies across Canada — three of them in Alberta — and about a family justice system held together by sheer determination and dental floss while the "parents" (governments) act as if "all is fine — nothing to see here."

One of those parents just made things worse. Such is the moral suasion our little Newsletter carries.

On January 23, 2026, Alberta Premier Danielle Smith sent a letter to Prime Minister Mark Carney announcing that Alberta *"will not agree to provide the necessary funding to support any new judicial positions in the province"* unless Ottawa gives the province a formal role in appointing federally appointed judges and relaxes bilingualism requirements. The letter calls this "meaningful engagement and collaboration." Removing the Newspeak: it's an unveiled threat to keep Alberta Court of King's Bench seats empty unless the federal government concedes on an entirely different constitutional issue. It seems Premier Smith has taken the Alberta Court of King's Bench hostage.

We've spent years writing about chronic delay, underfunding, and hearings cancelled because there are not enough judges. Now a provincial government is openly choosing to make that problem worse — as a bargaining tactic.

Premier Smith proposes a "Special Advisory Committee" with two Alberta appointees and two federal appointees, to make joint recommendations to both Ministers of Justice. She also asks Ottawa to relax bilingualism requirements, claiming they entrench systemic barriers and alienation for Western Canadians.

Alberta certainly *may* have legitimate grievances about how federally appointed judges are selected. There is a reasonable debate about whether provinces should have a greater role in superior-court appointments. The letter is right that in the U.S. and Australia, state governments appoint state-level superior-court judges. Canada's constitutional structure is different, but the federal process is not beyond critique — and neither are bilingualism requirements.

None of that requires or justifies turning unfilled judicial seats into bargaining chips. None of that requires taking the Alberta Court of King's Bench hostage. The only people hurt are Albertans.

Those three vacancies at the Alberta Court of King's Bench are not mere abstractions. There are consequences. There are trials that will not proceed, motions that will not be heard, and families who will wait . . . and wait . . . and wait for decisions. Family law is the part of the justice system most Canadians actually encounter. It decides where children live, how they're supported,

and how families move forward. Fewer funded positions mean fewer judges, fewer hearing days, and longer queues. Calling that collateral damage doesn't make the impact any less real. And it is punishing the people the government is in the business of protecting.

Four days after the Premier's letter, all three Alberta Chief Justices — from the Court of King's Bench of Alberta, the Court of Appeal of Alberta, and the Alberta Court of Justice — issued a rare joint public statement. The tone is restrained, but the warning is unmistakable:

> Independence of the judicial branch protects the public. It ensures judges can make decisions based solely on the law and evidence presented. It frees judges from pressure or influence from external sources including the governments that appoint us.

They added a pointed reminder that each branch of government must "respect and support the independence of the others."

When every Chief Justice in a province feels compelled to speak publicly about separation of powers, something has gone very wrong.

According to the Canadian Press, Federal Justice Minister Sean Fraser says Ottawa is planning to maintain the process we have in place and notes that other countries have shown nowhere is safe from democratic backsliding. But the line that matters for Alberta families is this: if the province withdraws funding for new judicial positions, the federal government will not fill the gap. "The pain that will be felt will be uniquely felt by their constituents."

So we now have a provincial government threatening to choke off court funding, and a federal government signaling it will not meet Premier Smith's demands. Caught in between? The Albertan families who need judges to hear their cases.

If this is what "collaboration" looks like, what does conflict look like?

All of this is happening at a time when Canada is facing serious threats abroad, when stable institutions and steady leadership matter more, not less. We should expect more leadership, and less gamesmanship, from the people who govern us. We would not accept this kind of brinkmanship from our children; we should not accept it from our politicians either. Demand discussion. Engage in debate. But the justice system is not a bargaining chip.

Saved by the Bench

Sethi v. Sethi **(2025), 19 R.F.L. (9th) 299 (Ont. S.C.J.) — McGee J.**

Sethi v. Sethi is primarily about tort claims arising from family violence brought within family law proceedings, but it is also a case about how far a court can — or should — go to rescue a meritorious claim from deficient pleadings and an imperfect record.

Justice McGee plainly wanted to do justice between the parties. The facts were stark: decades of serious family violence, including assaults, threats, and profound financial and psychological harm. The husband chose not to participate. The harm was real and longstanding. But the decision also makes clear that a judge could easily have concluded that, while there may have been merit to the claim, it was not properly pleaded, not properly framed in law, and not properly put before the court, and dismissed it on that basis.

Instead, Justice McGee applied a sensitive, principled and practical approach to reach a just result. That willingness ultimately saved the claim. But the reasons make equally clear that this was an exercise of discretion, not an entitlement, and one that depended heavily on the particular facts, the uncontested record, and the seriousness of the alleged family violence.

The result in *Sethi* — a $100,000 damages award — reads like a judicial salvage operation. Properly understood, even though the claim was successful in this case, the decision is a lesson in how not to litigate tort claims in family court, even where the underlying claim is compelling.

The parties were married for about 30 years and separated in September 2023. They have two adult sons. In July 2024, the wife started a family law application seeking a divorce, equalization (later withdrawn), and $100,000 in damages for what she pleaded as "intentional infliction of mental, emotional and physical abuse" by the husband, language that echoes several recognized torts, such as intentional infliction of emotional distress and assault, but does not itself actually describe a tort known to law.

The husband never filed an answer despite proper service and repeated notice. The matter proceeded to an uncontested trial.

The evidentiary record described decades of abuse. The wife gave credible and compelling evidence of emotional and physical abuse over many years, including multiple physical assaults and at least two sexual assaults, one of which occurred shortly after surgery and resulted in lasting harm. One of the parties' adult sons testified, corroborating a long-standing pattern of abuse over many years. It was an unsettling narrative.

The background also included the loss of the matrimonial home through power of sale and an estate dispute following the death of the husband's mother. Minutes of Settlement in the estate matter resulted in the husband's share of estate proceeds — approximately $112,000 — being held in trust pending the outcome of the family law proceeding.

Justice McGee began by emphasizing that an uncontested trial is still . . . well . . . a trial. While the Ontario *Family Law Rules*, O. Reg. 114/99 permit an applicant to proceed on an uncontested basis where a respondent fails to file an Answer, the Applicant continues to bear the burden of proof on a balance of probabilities. It ain't a free ride.

The court relied on *Irons v. Irons*, 2020 CarswellOnt 7629 (S.C.J.), for the proposition that an Applicant proceeding on an uncontested trial owes a very high duty of full and frank disclosure, including disclosure of facts that do not assist their case. As Justice Madsen (as she then was) explained in *Irons*:

- **Very high duty of disclosure:** "There is a 'very high duty' on the applicant to make 'full and frank disclosure' to the court, and a 'positive duty' to at least 'alert the court' to material facts required to make a just determination[.]"

- **Duty of candour comparable to *ex parte* relief:** " . . . the 'duty of candour' on a party seeking default judgment is akin to the duty on a party seeking an order on a motion without notice[.]"

- **No sliding scale of disclosure obligations:** "While the duty is at its highest on an *ex parte* emergency motion where the court is typically asked to make decisions very quickly, and perhaps somewhat attenuated where a respondent party is in 'flagrant violation' of court orders, in my view there is no 'sliding scale' when it comes to the obligation to disclose material facts to the court."

- **Struck pleadings do not reduce disclosure duties:** "The fact that a party's pleadings have been struck does *not* open the door to permit the moving party to make less than full disclosure of material facts."

- **Disclosure requirements on without-notice motions:** "Relevant and material facts relied upon when proceeding without notice, in particular on an *ex parte* urgent motion, should be specifically referred to in the body of the affidavit[.]"

- **Disclosure requirements for default or uncontested hearings:** " . . . on a default hearing or uncontested trial, where the court is not under similar time constraints, a court may be taken to be aware of the contents of exhibits filed as evidence in the hearing[.]"

- **Intent is irrelevant to the breach:** "The lack of intention to mislead is not a defence to the failure to make full and frank disclosure. The issue is whether the court was in fact mislead[.]"

- **Duty does not require proving the respondent's case:** " . . . the positive duty referred to above does *not* extend so far as to prove the respondent's case for him. . . . Counsel's obligation was to be open, honest, trustworthy, reliable, and candid, but there is no obligation to put the other party's claims or allegations before the court or argue the other party's case."

Pleadings: Flexibility but with Limits

A significant portion of the decision addresses the role of pleadings in family law cases. It is a helpful read. Justice McGee confirmed that pleadings frame the litigation, provide notice of the case to be met, define the scope of relevant evidence, and protect procedural fairness. Defective pleadings risk "chaotic litigation", echoing the warning in *Provenzano v. Thunder Bay (City)*, 2008 CarswellOnt 2679 (S.C.J.) at para. 7.

Further, as a general rule, courts cannot grant relief that has not been pleaded and, as we discussed in "No Mooo-lah for Mooo-tual Mooo-sings" in the September 8, 2025 (2025-32) edition of *TWFL*, the authorities are clear that "it is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings." See also *Rodaro v. Royal Bank*, 2002 CarswellOnt 1047 (C.A.) at para. 60.

That said, the rule against granting unpleaded relief is not absolute, particularly in the wild world of family law. *Rodaro* concerned a situation in which the trial judge decided the case on a novel theory of liability that had not been advanced by either party. Here, by contrast, the husband was clearly on notice that serious allegations of family violence had been made against him and that significant damages were being sought.

Additionally, the caselaw supports a more flexible approach to pleadings in family law. For example, in *Frick v. Frick* (2016), 91 R.F.L. (7th) 129 (Ont. C.A.), the Ontario Court of Appeal declined to strike a claim for unequal division under s. 5(6) of the *Family Law Act* despite the absence of an explicit pleading. The Court of Appeal emphasized that the legislative structure of equalization itself contemplates unequal division and that the responding party was aware of the case to be met. As Justice Benotto explained, the *Family Law Rules* embody a philosophy "peculiar to a lawsuit that involves a family", and strict civil pleading rules cannot always be "parachuted" into family litigation.

However, Justice McGee was careful to emphasize the limits of this flexibility. This was not a case involving children, and it was not a case where both parties were self-represented. The wife had the benefit of counsel throughout both the family law proceeding and the related estate litigation. In those circumstances, the rationale for forgiving pleading deficiencies was weaker.

Therefore, Justice McGee had to determine how best to balance the requirement that pleadings define the case against the more flexible, justice-oriented philosophy of family litigation in deciding whether the tort claim, as drafted, could properly be considered.

Applying that framework, Justice McGee concluded that this was one of the limited cases where it was appropriate to permit the claim to proceed notwithstanding its defective pleading. Unlike cases where material facts are missing or where relief is sought on a theory never put to the opposing party, the difficulty here was not the absence of pleaded facts, but the imprecise labeling of the cause of action.

The application pleaded detailed allegations of family violence and intentional harm, the damages sought were stated with precision, and the supporting affidavit evidence expanded on those allegations in a manner consistent with the relief claimed. Taken together, the pleadings and evidence clearly put the husband on notice of the nature of the claim and its potential consequences. In those circumstances, and given the seriousness of the alleged family violence, Justice McGee was satisfied that a practical and principled approach justified treating the claim as one for intentional infliction of emotional distress rather than dismissing it on technical pleading grounds.

Intentional Infliction of Emotional Distress

Having determined that it was appropriate to treat the claim as one for intentional infliction of emotional distress, Justice McGee turned to the merits. Relying on the Ontario Court of Appeal's summary of the test for intentional infliction in *Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.), Justice McGee confirmed that this tort has three essential elements:

(i) the defendant's conduct must be flagrant and outrageous;

(ii) the conduct must be calculated to cause harm; and

(iii) the conduct must cause the plaintiff to suffer a visible and provable illness.

Furthermore, as *Ahluwalia* explains:

• The requirement that the conduct be "calculated" to cause harm is satisfied where the defendant either intended the consequences of their conduct or knew that the harm was substantially certain to result; and

• The requirement of a visible and provable illness does not demand expert medical evidence; it is met where the conduct results in conditions such as depression or other physical or psychological illness. (This also aligns with *Saadati v. Moorhead*, 2017 CarswellBC 1447 (S.C.C.)).

Applying that framework, Justice McGee found that all three elements of the tort were established on the evidence. The wife's testimony, corroborated by her adult son, described a significant pattern of abuse over many years. The intentionality of the husband's conduct was evident both from the nature of the acts themselves and from the pattern of behaviour over time; the harm caused was not incidental but deliberate, or at least substantially certain to occur. Furthermore, although no expert medical evidence was called, the court accepted that the wife's ongoing anxiety and lasting health consequences fell squarely within the scope of harm contemplated by the tort. In these circumstances, the claim succeeded on its merits.

Damages and Costs: Success Despite, Not Because of, the Litigation

Justice McGee awarded $100,000 in general damages to compensate the wife for the intangible effects of the husband's conduct, including anxiety, exhaustion, financial distress, the emotional harm flowing from the sexual assaults, and a loss of enjoyment of life. The amount sought was uncontested and was found to be fair and reasonable. The award was ordered to be paid forthwith from the husband's share of estate funds held in trust, together with prejudgment interest.

That outcome should not obscure an important lesson. Claims for tort damages arising from family violence are inherently difficult to quantify, and courts are entitled to expect more than an asserted figure untethered from principle or precedent. Tort damages require counsel to explain not only why compensation is warranted, but why a particular amount is appropriate.

That caution is canvassed in Samantha Eisen's article, Damages for Spousal Violence - Why are They So Low? (43 C.F.L.Q. 181). The article includes a chart summarizing 65 reported Canadian decisions between January 2007 and January 2024 involving final determinations of damages claims arising from spousal violence, whether brought in family or civil court. The review concludes that, overall: (a) damage awards for spousal violence claims advanced in family court as part of broader proceedings arising from relationship breakdown (such as property, support, or parenting disputes) have been substantially lower than awards in cases where spousal violence claims were brought in civil court as stand-alone actions; and (b) damages awarded for spousal violence have also been significantly lower than damages awarded for violence between non-related parties.

In *Zando v. Ali*, 2018 CarswellOnt 13022 (C.A.), the Ontario Court of Appeal also helpfully discusses the range of non-pecuniary/general damages for adult-on-adult sexual assault of $144,000 to $290,000 in 2017 dollars.

There are also some notable exceptions where damages awards have been more significant: *Shaw v. Brunelle* (2012), 9 R.F.L. (7th) 359 (Ont. S.C.J.) ($65,000); *Tzeng v. Tzeng*, 2007 CarswellOnt 3098 (S.C.J.) ($275,000); *J.K.G. v. T.S.G.*, 2005 CarswellBC 213 (S.C.) ($225,000); *Schuetze v. Pyper*, 2021 CarswellBC 3860 (S.C.) ($100,000 general and $800,000 total); *Zunnurain v. Chowdhury* (2024), 10 R.F.L. (9th) 124 (Ont. S.C.J.) ($200,000 in damages for assault, battery, and intentional infliction of mental suffering).

While there may be multiple explanations for these disparities, one contributing factor may be that tort claims for family violence are still relatively unfamiliar terrain for many family law practitioners. Without careful research, comparative jurisprudence, and a principled damages framework, counsel may struggle to marshal the evidence and submissions necessary to maximize the prospects of a well-reasoned award.

But courts should not be asked to pluck a figure from the air. Given that damages analysis of this kind often falls outside the day-to-day expertise of family law practice, it is prudent to seek advice from counsel experienced in civil sexual assault or personal injury litigation at the pleading stage and throughout the case as it progresses.

Notably, despite the wife's success on the merits, Justice McGee declined to award any costs. The Bill of Costs was deficient, and the court treated both that deficiency and the uncareful manner in which the tort claim had been advanced as unreasonable conduct warranting sanction under Rule 24(7) of the *Family Law Rules* where a successful party can be denied costs. Emphasizing that an uncontested trial does not excuse a lack of diligence, Justice McGee stressed that courts "promote what they permit." Properly understood, the costs outcome underscores the central lesson of *Sethi*: even where a claim succeeds, how it is advanced matters — and had the claim been properly pleaded and supported, this is a case in which a successful applicant could reasonably have expected a costs award.

Sethi is not authority for relaxed tort pleading. It is a case about a court stepping in to salvage a meritorious claim. Justice McGee was prepared to do the heavy lifting necessary to reach a just result, but the reasons make clear that this should not be mistaken for a model of good practice.

The case reinforces three lessons. Tort claims for family violence are serious civil claims and must be pleaded and proved with care. *Ahluwalia* does not relieve counsel of the obligation to select and articulate recognized causes of action. And while courts may occasionally rescue deserving litigants, they are increasingly unwilling to reward defective litigation with costs.

In short, *Sethi* shows that while a judge may sometimes manage to fashion a silk purse, it is a mistake to hand the court a sow's ear and ask it to do so.

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