

FAMLNWS 2026-18

Family Law Newsletters

May 11, 2026

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

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Amendments to the Ontario *Family Law Act*

It is now much easier to enforce support provisions in arbitration awards in Ontario — welcome news if you are a support recipient, not so great news if you are a support payor.

As of May 1, 2026, the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, was amended to include the following provisions:

59.9 (1) A party who is entitled to the enforcement of a family arbitration award that contains a provision for support or maintenance may file the award with the clerk of the Superior Court of Justice or the Family Court together with the following documentation:

1. A copy of the family arbitration agreement.
2. Copies of the certificates of independent legal advice.

Effect of filing

(2) A provision for support or maintenance contained in an award that is filed in accordance with subsection (1) may be enforced as if it were an order of the court where it is filed.

Right to set aside award not affected

(3) For greater certainty, the filing of an award under subsection (1) does not affect the right of a party to apply to the court under subsection 46 (1) of the *Arbitration Act, 1991* to set aside the award.

This avoids the need for parties looking to enforce support provisions in awards to follow the more involved process set out in s. 59.8 of the *Family Law Act*.

Claude/Harvey — Can You Tell Me How to Waive Privilege?

United States v. Heppner, No 25-CR-503 (JSR), 2026 WL 436479 — Judge Rakoff

UK v. Secretary of State for the Home Department, [2026] UKUT 81 (IAC)

Helmold & Mariya (No 2), [2025] FedCFamC1A 163 — Aldridge, Campton and Christie JJ.

You know that guy — the cool kid in school — that *everyone* wanted to be friends with — only to later find out that being friends with "Mr. Cool" may not have been in your best interests?

Well, we have a new Mr. Cool. And his/her name is Harvey. Or Claude. Or Alexi. Or ChatGPT. Or Co-Pilot. Everyone wants to be best friends with Harvey, Claude and ChatGPT. And we are now coming to understand that being good friends with these large language models might just cause some problems — especially when it comes to privilege.

Decisions addressing AI misuse now span the full spectrum of Canadian courts and tribunals, from the Civil Resolution Tribunal in British Columbia to Courts of Appeal.

Solicitor-client privilege is based on two fundamental pillars: the solicitor-client relationship and confidentiality. If a person voluntarily discloses the substance of privileged communications to a third party, privilege may be found to have been explicitly waived: *Solosky v. The Queen*, 1979 CarswellNat 630 (S.C.C.) at para. 15.

You see where we're going with this.

What happens to privilege when a client — or the client's lawyer — feeds confidential information into a publicly available large-language model AI platform?

There is no Canadian answer yet. But we have some rather concerning answers from the U.S., the U.K. and Australia.

United States v. Heppner, No 25-CR-503 (JSR), 2026 WL 436479 ("*Heppner*") is a recent case from the U.S. District Court for the Southern District of New York. The question before the court in *Heppner* was whether communications between a user and a publicly available AI platform are protected by attorney-client privilege (solicitor-client privilege in Canada) or the work product doctrine (litigation privilege in Canada).

Mr. Heppner was charged with securities and wire fraud with respect to alleged misconduct as an executive of several companies. After learning he was the subject of a federal investigation, Mr. Heppner used Claude (an AI system) to generate a number of documents with legal and factual queries related to the investigation. These queries included "reports that outlined defense strategy" and "what he might argue with respect to the facts and the law."

When the FBI came-a-calling at Mr. Heppner's home — with search warrant in hand — they seized the devices containing these AI-generated documents.

Mr. Heppner argued that the materials were privileged. Mr. Heppner argued that the information Mr. Heppner input into Claude was from counsel. Mr. Heppner argued that he created the documents for the specific purpose of obtaining legal advice from counsel. Mr. Heppner argued that he later shared the AI documents with his counsel. In rejecting those arguments, the presiding judge, Judge Rakoff said, "uh . . . no." The documents were not protected under the equivalents of solicitor-client privilege or litigation privilege.

Judge Rakoff found three deficiencies in Mr. Heppner's solicitor-client privilege arguments.

First, Claude is not a lawyer, and absent a solicitor-client relationship, a discussion between two non-lawyers is not protected by solicitor-client privilege. According to Judge Rakoff, all recognized cases of solicitor-client privilege require "a trusting human relationship" with "a licensed professional who owes fiduciary duties and is subject to discipline." No such relationship existed between Mr. Heppner and Claude.

Second, the communications did not originate in confidence and were not, in fact, confidential. Claude's written privacy policy explicitly notes that Claude collects data on both user inputs and its output and that it then uses that data to train Claude. Its policy also reserved the right to disclose such data to government authorities. So *that* does not sound terribly "confidential." Therefore, reasoned the Court, Claude users (and presumably all AI users) do not have substantial privacy interests in their conversations — or, in "Canadian" — there is no reasonable expectation of privacy in those conversations.

Third, Mr. Heppner did *not* communicate with Claude to obtain legal advice — and here is a very important possible distinction for future cases. Although Mr. Heppner claimed to have used Claude for the sole purpose of speaking to counsel, he did so on his own and of his own accord. The court noted that *had* Mr. Heppner's counsel directed him to use Claude, it *might* be successfully argued that Claude could be akin to the lawyer's agent with the associated privilege protections. However, because Mr. Heppner communicated with Claude on his own, the question was whether Mr. Heppner intended to obtain legal advice from Claude — which was not possible — as Claude is not a lawyer. The fact that he later shared the output with his lawyer did not retroactively make the output privileged. Privilege cannot be created retroactively. Sharing non-privileged AI-generated documents with counsel *after the fact* does not cloak those materials with privilege.

Judge Rakoff was similarly not taken with Mr. Heppner's arguments regarding litigation privilege.

Litigation privilege is meant to provide counsel with a "zone of privacy" in which the lawyer can prepare and develop legal theories and strategies without the interference of the adversary process. It offers protection for materials prepared by or at the direction of counsel for the dominant purpose of litigation. But, here, the AI output was not prepared at counsel's direction. The purpose of litigation privilege is not served when a client independently generates materials.

A similar situation played out in the United Kingdom in *UK v. Secretary of State for the Home Department*, [2026] UKUT 81 (IAC). In this case, it came to light that the lawyer had been uploading client emails and Home Office decision letters into ChatGPT to generate summaries for clients.

This practice prompted some blunt language regarding AI use and privilege:

[21] . . . to put client letters and decision letters from the Home Office into an open source AI tool, such as ChatGPT, is to place this information on the internet in the public domain, and thus to breach client confidentiality and **waive legal privilege**. [emphasis added]

A similar situation prompted similar concern from the Federal Circuit and Family Court of Australia in *Helmold & Mariya (No 2)*, [2025] FedCFamC1A 163. There, the court took the opportunity to discuss the possible privilege implications of using AI in family law proceedings. The court observed:

[9] A specific issue arises in the context of family law litigation . . . If a person inputs court documents into an open AI program, we consider that **this may have the potential to fall foul of the provisions which prohibit communication of an account of proceedings to the public** or a section of the public. In a similar vein, input of documents arising out of the proceedings into a generative AI program which stores, collates and replicates data **may waive privilege** or fall foul of the requirements that certain matters be treated as commercial in confidence. **These issues warrant extreme caution**. [emphasis added]

So — while Canadian courts have yet to opine — these decisions warrant a collective Homer Simpson "D'oh!" Given that these decisions all rest on familiar and similar underlying principles with respect to privilege, there is no reason to believe a Canadian court will handle the issue any different from its common law cousins. Confidentiality is the lifeblood of solicitor-client privilege; and as we all know, there's no privacy or confidentiality on the internet. Voluntarily disclosing otherwise privileged information is a very quick way to explicitly waive privilege.

We also do not yet know if the same result would have been obtained were the client to have used a segregated or "sandboxed" AI system such that the inputs and outputs were not generally available.

Until we have a home-grown answer to all of this: Think first. Query second.

Pay No Attention to that Evidence Behind the Green Curtain

***Sethi v. Kaur* (2025), 21 R.F.L. (9th) 133 (Ont. S.C.J.) — S. Jain J.**

Family law has been flirting increasingly regularly with tort claims, and not always comfortably. In recent years, courts have grappled with traditional claims for assault and intentional infliction of emotional suffering/distress [*Lo v. Lo* (2009), 70 R.F.L. (6th) 309 (Ont. S.C.J.); *Kiska v. Moore*, 2017 CarswellOnt 18059 (S.C.J.); *Danie v. MacLean* (2009), 69 R.F.L. (6th) 367 (Ont. S.C.J.); *Costantini v. Constantini* (2013), 28 R.F.L. (7th) 356 (Ont. S.C.J.); *Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.); *Tyner v. Tyner* (2015), 61 R.F.L. (7th) 149 (Ont. S.C.J.); *Jeerh v. Jeerh*, 2014 CarswellBC 2796 (S.C.); *Fan v. Zhang*, 2015 CarswellBC 3667 (S.C.)], emerging internet-based torts [*Caplan v. Atas*, 2021 CarswellOnt 1107 (S.C.J.); *M.S. v. T.V.*, 2022 CarswellMan 437 (K.B.); *Racki v. Racki* (2021), 52 R.F.L. (8th) 1 (N.S. S.C.); *Jane Doe 72511 v. N.M.*, 2018 CarswellOnt 18310 (S.C.J.); *Candelora v. Feser*, 2019 CarswellNS 905 (S.C.); *Candelora v. Feser*, 2020 CarswellNS 383 (S.C.); *ES v. Shillington*, 2021 CarswellAlta 2211 (Q.B.); *LDS v. SCA*, 2021 CarswellAlta 2576 (Q.B.)] and the unresolved question of whether there is — or should be — a standalone tort of family violence [*Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.)] and if so, what its test ought to be.

There is an undertone of "uneasiness" running through these cases: is this proliferation of tort claims — and the corresponding move back toward a conduct- and fault-based model (that family law has eschewed for decades) — a good thing? Or is it actually a move in the wrong direction? Parenting, support, and property regimes are generally forward-looking, child-focused, and no-fault. Tort claims are the opposite. They look backward — "what happened" as opposed to "what should happen." They require courts to reconstruct past conduct and to assess and assign blame. Encouraging litigants to focus on historic conduct tends to harden positions and entrench conflict in a situation that is already full of conflict.

Analysis of, and assigning blame for, past conduct also makes cases harder to settle. Tort claims are sometimes used as leverage in negotiations of the usual family law issues. Allegations of serious misconduct, even where unproven, distort bargaining positions and inject uncertainty into files that should otherwise be relatively predictable, at least within some range.

That uncertainty runs counter to what governments and courts have been trying to do for years. For decades, family law has moved toward formula-driven and principled regimes: property division under provincial statutes, child support under the *Child Support Guidelines*, spousal support guided by the *Spousal Support Advisory Guidelines*, and — now — parenting increasingly informed by the various provincial AFCC Parenting Plan Guides and Templates. Those frameworks were designed to *reduce* discretion, to *improve* predictability, to *reduce* litigation and to *promote* settlement. But the growing incidence of tort claims pulls in the opposite direction — toward more discretionary and less predictable outcomes.

At the same time, there is no question that intimate partner violence is a serious problem. And if it can be discouraged and reduced, and victims fairly compensated through the civil justice system, it is hard to argue why they should be precluded from seeking recourse as part of their family law claims.

Point — counterpoint. Both entirely valid.

Striking the appropriate balance is not easy. It is telling that even the Supreme Court of Canada continues to wrestle with where the lines should be drawn. *Ahluwalia* has now been under reserve since February 12, 2025, more than a year, suggesting that even those on our highest court may be having some difficulty reaching consensus.

Against that broader backdrop, while we have in past issues discussed a number of different torts in the family law context, what has largely been missing from that conversation are cases dealing with malicious prosecution. Such claims are uncommon, and those that are made rarely get to trial. The only family case in recent memory in which a malicious prosecution claim was successful is Justice Kraft's decision in *Ramezani v. Najafi*, 2021 CarswellOnt 20291 (S.C.J.), where the court found that the wife's allegations of sexual assault were made without reasonable and probable cause and in an effort to gain exclusive possession of the matrimonial home and a tactical advantage in the family law proceedings. The court awarded the husband \$40,000 in general damages and \$10,000 in punitive damages.

We can now add *Sethi v. Kaur* to that very short list. *Sethi* is another rare family law case where a claim for malicious prosecution was pursued to trial and succeeded, albeit with a very modest damages award of only \$3,000.

Sethi v. Kaur arose out of a high-conflict family proceeding following the breakdown of a short marriage. The parties married in 2019. They separated in November 2021. The one child, born in 2020, was later diagnosed with significant developmental and medical needs.

By the time of trial, the litigation had expanded well beyond parenting. Justice Jain had to determine issues relating to parenting and decision-making, child support and section 7 expenses (including retroactive claims), equalization and other post-separation financial adjustments, tort claims arising from alleged family violence, and the father's claim for malicious prosecution. While there was nothing particularly novel in how Justice Jain dealt with the usual family law issues, the malicious prosecution analysis is what is of interest to us. And it is a bit unusual.

The trial spanned eight days in mid-2025. By the time it began, the mother was self-represented. The evidentiary record was extensive, including police and CAS materials, supervised access notes, significant financial disclosure — and video footage of a parenting exchange that ended up driving much of what followed.

The Mother's Tort Claims — And Why They Failed

The mother advanced tort claims of assault, battery, and intentional infliction of emotional distress. She alleged a pattern of physical and emotional abuse and relied on those allegations to support damages claims and restrictive parenting relief.

She testified in support of her claims and called two witnesses. One described seeing bruises on the mother and hearing the mother attribute them to the father. The other described the father as angry during attempts to mediate the conflict.

Justice Jain accepted that both witnesses were honest about what they observed and what they were told. But that did not carry the case very far. Neither witness actually *observed* anything, to say nothing of an assault (or a battery), and their evidence did not corroborate the broader narrative of family violence or establish that the father committed the alleged torts.

The mother's own evidence was even worse. Justice Jain identified repeated inconsistencies between her testimony and the documentary record. Communications had been selectively produced. Events were exaggerated. And allegations were maintained in the face of clear contrary evidence.

In the end, the court was not satisfied that family violence had been proven. The mother's tort claims failed not because such claims are unavailable in family law, but because the evidence did not support them. The tort claims against the father were therefore dismissed.

Enter the Father's Claim for Malicious Prosecution

Justice Jain started at the beginning — by reviewing the test for malicious prosecution from *Nelles v. Ontario*, 1989 CarswellOnt 963 (S.C.C.) and *Miazga v. Kvello Estate*, 2009 CarswellSask 717 (S.C.C.) at paras. 53-56, where the Supreme Court of Canada explained that to succeed on a claim for malicious prosecution, the claimant must establish that:

1. The proceedings were **initiated** by the defendant;
2. The proceedings were **terminated** in favour of the plaintiff;
3. The **absence** of reasonable and probable cause; and
4. **Malice**, or a primary purpose other than that of carrying the law into effect.

Subsequent cases confirm that the threshold for establishing malicious prosecution is high, particularly where the defendant is a private individual rather than a state actor: *D'Addario v. Smith*, 2018 CarswellOnt 2374 (C.A.) at para. 24 and *Curley v. Taaffe*, 2019 CarswellOnt 6859 (C.A.) at para. 20.

The father's malicious prosecution claim arose from a specific incident in August 2023. During a parenting exchange, the mother contacted police and alleged that the father assaulted her by grabbing her arm, pushing her, and slamming a door on her. Criminal charges followed, but they were later withdrawn after the Crown reviewed video footage of the exchange, which clearly showed no assault. Accordingly, the first two parts of the test for malicious prosecution were easily met.

That is not what made the case unusual. In the domestic context, charges are initiated and subsequently withdrawn all the time and for all sorts of reasons. But this case was different, because even once the video was before the court, the mother continued to insist that the assault occurred. She offered no explanation for how that position could be reconciled with what the footage actually showed. It was sort of a Wizard of Oz, "pay no attention to the actual evidence behind the green curtain" situation.

The existence of video footage of the parenting exchange was key. It was admitted on consent, and it played a decisive role at the trial. The reasons do not identify who recorded the exchange or the circumstances under which the recording was made. However, Justice Jain admitted the video while commenting that she did not condone surreptitious recordings — strongly suggesting that the footage was created by one party without the other's knowledge.

Family courts have long expressed discomfort with recording post-separation interactions, and for good reason. It can escalate conflict and invite one-sided performative behaviour. But this case illustrates the other side of that tension. As we put it in "Hey Siri — Please Delete All My Incriminating Text Messages' — Part Two" in the November 4, 2024 (2024-42) edition of *TWFL*, "[g]enerally, despite initial judicial protestations every time the issue arises, it does seem that good evidence will be excluded as dangerous, odious or repugnant; but great evidence will be admitted."

In *Sethi*, however, the court did not really have to grapple with admissibility. Neither party challenged the accuracy of the recording and, in fact, both relied on it, with the mother attempting to reframe the interaction as emotionally abusive.

Based on this evidence, Justice Jain's finding on the third part of the test — the absence of reasonable and probable cause — was rather blunt: "I find, however, that she falsely accused the father of assault . . . based on the video evidence." This was not a case of differing perceptions. It was not an instance of imperfect memory. It was a finding that the allegation itself was false and, accordingly, there were no reasonable grounds for the prosecution and that the allegation had been falsified.

The fourth element of the tort requires proof that the defendant was motivated by malice, meaning a primary purpose other than carrying the law into effect. As the Supreme Court explained in *Miazga*, malice in this context is equivalent to an improper purpose.

Justice Jain reviewed the authorities confirming that a lower threshold applies where malicious prosecution is alleged against a private individual, rather than the Crown. Malice does not require proof of spite, ill will, or a desire for vengeance (although some — or all — of that is often present in the typical family law case). It includes any improper use of the criminal justice system to obtain a collateral advantage. As the Court of Appeal explained in *Oniel v. Marks*, 2001 CarswellOnt 63 (C.A.) at para. 42, the question is whether the prosecution was pursued to secure the ends of justice, or for some other purpose.

Justice Jain also emphasized that malice must be established by more than mere recklessness or negligence. However, it may be inferred where the circumstances demonstrate that the prosecution can only be explained by imputing an improper motive to the complainant, particularly where the allegations are not believed to be true, or are actually known to be false.

Applying those principles, Justice Jain found clear and cogent evidence of malice. On the evidence, the mother either *intended* to have the father criminally charged or *intended* to use the criminal process to stop him from exercising unsupervised parenting time. In either scenario, the prosecution was pursued to achieve an outcome unrelated to the proper purpose of criminal charges.

Even giving the mother the benefit of the doubt (and based on the video evidence, there was not much reason to do that), Justice Jain found that intentionally providing false information to police in order to subvert a court order could not be condoned and was sufficient to establish malicious behaviour.

Whatever the mother's subjective justification, she deliberately used the criminal justice system to achieve a collateral family law objective. That improper use of the process satisfied the fourth element of the tort.

Justice Jain therefore concluded that all four elements of malicious prosecution had been established.

To be clear, the decision is careful and fact-specific. It does *not* suggest that failed criminal complaints in family cases will always attract liability. But it does confirm that the family law background does not offer safe harbour for knowingly false allegations.

So What About Damages?

Having found that the mother committed the tort of malicious prosecution, the court turned to the question of damages.

In *Sethi*, the father sought \$10,000 in damages for legal fees, humiliation, and lost parenting time flowing from the false allegation. Justice Jain accepted that being falsely accused and criminally charged is inherently stressful and damaging. The court was not prepared, however, to attribute the broader consequences of the family breakdown to the malicious prosecution itself.

In particular, the court found that the father's extended absence from the child's life was not caused by the criminal charge alone, but by his own decision to disengage from parenting rather than pursue supervised access or court-assisted remedies. That decision, while understandable on a human level, broke the chain of causation. Justice Jain also accepted that embarrassment and humiliation naturally flow from being criminally charged, but found that those consequences, without further evidence, were insufficient to justify an award of damages.

As a result, the court declined to award general damages for humiliation, emotional distress, or lost parenting time. Instead, the damages award was confined to actual, proven loss directly attributable to the tort: the father's criminal defence costs. The mother was ordered to pay \$3,000 in damages, reflecting what the father could establish he had paid.

That modest award stands in contrast to *Ramezani v. Najafi*, where the court awarded \$40,000 in general damages and \$10,000 in punitive damages. The difference is likely explained by the far more severe consequences that flowed directly from the false allegations in *Ramezani*. There, the prosecution resulted in the father being jailed, removed from the matrimonial home, losing his employment, suffering significant reputational harm, losing parenting time as a result of bail conditions, experiencing physical and emotional distress requiring medical treatment, and having to take steps to have his criminal records destroyed. In *Ramezani*, Justice Kraft also found that punitive damages were required to denounce the deliberate misuse of the criminal justice system to gain a civil advantage — an argument that does not appear to have been pursued by the father in *Sethi*. But, to be clear, if that argument had been made in *Sethi*, the damages award should have been higher. In a family case where one party has provably, and with malice, concocted false allegations and tried to use the criminal process to their advantage — in our view, damages simply must carry a significant denunciation component.

The comparison underscores two points. First, even where malicious prosecution is established in a family law case — something that remains rare — damages will turn on proof and causation. Second, *Sethi* does not signal an expansion of tort remedies in family law. If anything, it reflects continued judicial restraint. We worry that modest level of damages awarded by Justice Jain will not discourage family law litigants from "giving it a shot."

Ultimately, *Sethi* does not resolve the broader debate about the role of tort law in family proceedings. Nor does it meaningfully expand it. Instead, it illustrates just how narrow the path remains. Justice Jain was prepared to find malicious prosecution on unusually stark facts, including a finding that the allegation itself was knowingly false and pursued for an improper purpose. But the modest damages award may underscore the court's continued reluctance to allow tort claims to reshape family litigation or displace the forward-looking, largely no-fault frameworks that govern parenting, support, and property.

In that sense, *Sethi* fits with the unease that runs through much of the recent tort jurisprudence. The line was crossed, and the conduct was condemned - but only just, and only to the extent necessary. The result is unlikely to incentivize many family law litigants to pursue malicious prosecution claims, even where the circumstances might justify doing so.

What *Sethi* ultimately confirms is not an appetite for expansion, but a boundary. Family law may tolerate tort claims at the margins, but it remains cautious about letting fault-based remedies take centre stage. Unless the Supreme Court of Canada says otherwise in *Ahluwalia*, the message from *Sethi* appears to be one of restraint: tort claims in the family law context remain exceptional and the core of family law will continue to be governed by forward-looking, largely no-fault principles.

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