IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bevan v. Husak,*
2023 BCSC 304

Date: 20230302
Docket: S134831
Registry: Kelowna

Between:

Carmen Leslie Bevan

Plaintiff

And

Aaron Walter Husak and Cody Wyatt Stibbard

Defendants

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:	C. K. Wendell
Counsel for the Defendant Husak:	G. Allen
Counsel for the Defendant Stibbard:	J. K. McEwan, KC
Place and Date of Trial/Hearing:	Kelowna, B.C. February 1, 2023
Place and Date of Judgment:	Kelowna, B.C. March 2, 2023

Introduction

[1] This is an application by one of two defendants in this action to have the amended notice of civil claim ("ANOCC") struck out in its entirety, without leave to amend pursuant to R. 9-5(1)(a) of the *Supreme Court Civil Rules* [*Rules*].

[2] The ANOCC seeks damages on the basis of two causes of action: fraudulent misrepresentation and negligent infliction of mental distress.

[3] The facts alleged in support of these claims are atypical. The defendant, Husak, says that the allegations of fact contained within the ANOCC are incapable of supporting either cause of action as against him.

[4] The other defendant, Cody Wyatt Stibbard did not participate in this application.

Background

[5] The original notice of civil claim was filed on August 11, 2022, and the ANOCC on September 29, 2022.

[6] The plaintiff is the mother of KB. The events alleged in the ANOCC occurred on August 13 and 14, 2020. KB died in a motor vehicle accident on May 26, 2021, at the age of 18 years.

[7] A summary of the allegations in the ANOCC is that KB, then 17, had become acquainted with the defendant Husak, then 31 years of age. On August 13, 2020, KB asked the plaintiff if she could attend a friend's residence. The plaintiff insisted on speaking to Husak, who represented himself to be the father of KB's friend who was having people over. He advised that he would monitor the gathering and keep KB safe. On that basis, the plaintiff agreed that KB could attend the residence. Through two more conversations between the plaintiff and the defendant Husak, it was decided that KB would spend the night and the plaintiff would pick her up on the morning of August 14.

[8] The next morning when the plaintiff and her husband attended, KB was not at the residence. After her parents had searched and notified police that KB was missing, KB arrived home. Later that day, KB disclosed that Husak was not a friend's parent, that she had been provided with alcohol to the point of intoxication, that Husak had "had rough sexual intercourse with her multiple times" while intoxicated, and that he had paid a car service to take her home in the morning.

[9] The events had a severe impact on both KB and the plaintiff's emotional health.

[10] Key allegations of fact in the ANOCC are in paras. 19, 26 and 27 as follows:

> 19. Upon discovering that [KB] was not at the Sarsons Residence, Troy contacted the Plaintiff to confirm the address. The Plaintiff immediately drove to the Sarsons Property and confirmed that it was the same location where she had dropped off [KB] the night before. Realizing that their daughter was missing, the Bevans began a frantic search to locate their daughter initially by questioning everyone at the Sarsons Property. It was at the Sarsons Property that the Plaintiff experienced the initial shock of having lost her daughter and the shock of that event remains dominant in the post traumatic stress that she has suffered since [KB's] death.
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> . . .
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> 26. After the incidents noted herein, [KB] fell into a severe depression that included intense anxiety and was diagnosed as having post-traumatic stress disorder. She began to manage her mental health issues, including her inability to sleep despite being prescribed antipsychotic medication, with alcohol. She could no longer attend school due to debilitating anxiety attacks and had to spend her graduation year, until the time of her death, being schooled from home. She engaged with counselling and was prescribed medications to help her cope with her struggles.
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> 27. In the time between the incidents noted herein and [KB's] death, the Plaintiff also went through significant mental health struggles due to what happened to [KB] and as a result of having been taken advantage of by Husak's misrepresentations and Stibbard's breach of his duty of care. She missed work and was unable to sleep. She was also prescribed medication to deal with her anxiety, depression and associated trauma. She became fearful and closed off in otherwise normal social situations. She attended with [KB] at her counselling sessions and worked hard to home school [KB] through her graduating year.

Issues and Analysis

[11] Rule 9-5(1)(a) states:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence, as the case may be,
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> . . .
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> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[12] In *Lavery v. Community Living British Columbia*, 2022 BCSC 739, Justice Punnett summarized its operation as follows:

> [15] The test under Rule 9-5(1)(a) is whether it is "plain and obvious" that the plaintiffs' claims disclose no reasonable cause of action (*Hunt v. Carey*, [1990] 2 S.C.R. 959 at 980).
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> [16] The pleadings are assumed to be true, and no evidence is admissible. However, if allegations in the pleadings are based on assumptions and speculation, they need not be taken to be true (*Hunt* at para. 972; *Edmond v. British Columbia*, 2013 BCSC 1102 at para. 52; *Drummond v. Moore*, 2012 BCSC 496 at para. 18).
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> [17] Pleadings will be struck if they do not establish a cause of action, do not advance a claim known in law, or are without substance because they are groundless and fanciful (*Dempsey et al v. Envision Credit Union et al*., 2006 BCSC 750 at para. 17). As stated in *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, at para. 19:
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> > [19] The power to strike out claims that have no reasonable prospect of success is a valuable house-keeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
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> [18] However, if defective and the defect can be cured the claim will not be struck: *Strohmaier v. British Columbia (Attorney General),* 2015 BCSC 1189 at para.17. Further, if the claim is novel:
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> > ...on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": (*Imperial Tobacco* para. 21).

The Fraudulent Misrepresentation Claim

[13] The parties agree on what is required to establish a claim of fraudulent misrepresentation. The notice of application states the law as follows:

> 17. In order to establish a claim in fraudulent misrepresentation, the plaintiff must prove that:
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> (a) the defendant made a representation of fact to the plaintiff;
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> (b) the representation was, in fact, false;
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> (c) the defendant knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
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> (d) the defendant intended the plaintiff to act on the representation; and
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> (e) the plaintiff relied upon the false representation and thereby suffered a detriment.
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> *Wang v. Shao*, 2018 BCSC 377 at para. 196
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> *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25

[14] The applicant acknowledges that the allegations of fact contained in the ANOCC satisfy the first four requirements for a claim of fraudulent misrepresentation.

[15] With respect to the fifth requirement, there is no dispute that claims in fraudulent misrepresentation are typically connected with economic or pecuniary losses where awards are intended to restore a plaintiff's financial position. Indeed, the fifth requirement is sometimes articulated as requiring a plaintiff to show that the fraudulent misrepresentation induced them to enter into a contract that was the source of the detriment. One is example is in *Wang v. Shao*, 2019 BCCA 130, where the Court of Appeal wrote as follows:

> [24] The trial judge then turned to Ms. Shao's claim of fraudulent misrepresentation. It is trite law that fraudulent misrepresentation involves the following elements that must be proven by the claimant:
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> (a) the wrongdoer must make a representation of fact to the victim;
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> (b) the representation must be false in fact;
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> (c) the party making the representation must have known the representation was false at the time it was made;
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> (d) the misrepresentor must have intended the victim act on the representation; and
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> (e) the victim must have been induced to enter into the contract in reliance upon it.

> (*Derry v. Peek* [1889] UKHL1, 14 App. Cas. 337 (H.L.); see also *Islip v. Coldmatic Refrigeration of Canada Ltd.* 2002 BCCA 255 at para. 11.)

[16] That damages in claims for fraudulent misrepresentation are measured as the difference between the price paid and the actual value received is further indication that the cause of action arises in a commercial context. This is stated in *Beacock v. Moreno*, 2019 BCSC 955, at para. 199, aff'd 2021 BCCA 412, as follows:

> [199] The measure for damages in tort flowing from a fraudulent or negligent misrepresentation is the difference between the price paid and the actual value of the property at the date of the purchase, taking into account the true condition of the property. The Court of Appeal affirmed this principle in *Sorensen v. Kaye Holdings Ltd.* (1979), 14 B.C.L.R. 204 (C.A.) at para. 20:
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> > … The error of substance is, however, the failure to apply the correct measure of damages in an action for fraud, inducing a sale, which is the difference between the price paid and the actual value of the property purchased: *Zorzi v. Baker* (1957), 8 D.L.R. (2d) 164 (B.C.C.A.); *Hepting v. Schaaf*, [1964] S.C.R. 100, 46 W.W.R. 161, 43 D.L.R. (2d) 168; and *Parna v. G. & S. Properties Ltd.,* [1971] S.C.R. 306, 15 D.L.R. (3d) 336.

[17] Counsel indicated the only decision dealing with or commenting on such claims analogous to these circumstances is in *P.P. v. D.D.*, 2016 ONSC 258, aff'd 2017 ONCA 180. There, the plaintiff sought damages for emotional harm. The Court described the circumstances:

> [2] PP sues DD for having deceived him into having recreational sexual intercourse from which a child was born. Subject to paternity being proven, PP accepts his fatherhood; however, he sues DD just for the non-pathological emotional harm of an unplanned parenthood. He has served a jury notice. He claims $2 million in general damages, $2 million for unspecified special damages and $25,000 in punitive damages. Although his pleading alludes to a civil sexual assault cause of action, which I shall [page178] refer to as "sexual battery", and although he variously refers to his cause of action as fraudulent misrepresentation, deceit or fraud, PP's precisely pleaded cause of action is fraudulent misrepresentation.
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> . . .
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> [39] The argument of DD's challenge to PP's statement of claim brought the clarity of what PP's action is really about. In the guise of a fraudulent misrepresentation cause of action, PP seeks compensation for the non-pathological emotional harm of unplanned fatherhood. PP is not against being a father, but his passionate argument is that by DD's fraudulent misrepresentation, he has been denied the opportunity to be a father at the

> time of his and future beloved's choosing and he suffered non-pathological emotional harm as a consequence.
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> . . .
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> [44] With one substantial qualification and one troublesome matter, PP has successfully pleaded the constituent elements of a fraudulent misrepresentation or deceit cause of action. The qualification is that while PP has pleaded that he suffered damages, the damages are non-pathological emotional harm from unplanned parenthood, which, as far as I can determine, is a novel head of damages for fraudulent misrepresentation.
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> . . .
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> [57] PP's use of fraudulent misrepresentation for an emotional harm claim is what makes PP's action a novel one, because it would expand the scope of fraudulent misrepresentation and take it into new territory. However, I regard it as plain and [page190] obvious as a matter of legal policy that this expansion of the tort of fraudulent misrepresentation is both unnecessary and undesirable.
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> . . .
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> [59] I wish to be clear that I am not saying that it is plain and obvious that fraudulent misrepresentation cannot encompass a claim for emotional harm; rather, my point is that fraudulent misrepresentation does not encompass a claim for the non-pathological emotional harm occasioned by unplanned parenthood. I accept, for example, that a fraudulent misrepresentation claim would cover a case where a defendant fraudulently misrepresented that a product was safe for use and the plaintiff was injured by using the product suffering personal injuries including damages for emotional harm. However, in the immediate case, PP was not physically injured and his emotional injuries do not involve a recognizable psychiatric illness and rather are of the type of damages for which tort law does not normally offer compensation.

[18] The novelty of a claim is not a basis to strike in and of itself. I do note that this claim is not analogous to the hypothetical claim contemplated by Perell J. at para. 59 of *P.P.* That example began with a typical consumer transaction, which would connect the resulting emotional damages to the traditional measure of damages.

[19] In my view, the fraudulent misrepresentation claim articulated in the ANOCC would expand the cause of action so greatly that it would fundamentally transform its availability. The elements of reliance and detriment are fundamentally different between a plaintiff who enters into a contract on the basis of a false misrepresentation and suffers a loss of capital and a plaintiff who relies on a false representation and suffers emotional trauma from that reliance.

[20] In her application response, the plaintiff asserted that requiring the commercial component of a transaction would be unfair:

> 14. The non-commercial or quasi-commercial relationship that exists as between adults who offer and accept a supervision role for children, should also not undermine the claim for fraudulent misrepresentation. By that logic, if Husak had been paid $20.00 by the Plaintiff for babysitting her daughter for the evening, then the simple provision of those funds would somehow materially change the obligations between the parties. The commerciality of the relationship should not govern the applicability of the law of misrepresentation where the care of children is involved as that care is often done on a *quid pro quo* or good faith basis and the consideration is the general understanding that adults in a functioning community will properly attend to the care of children under their supervision.

[21] This, in my view, conflates issues. The commercial component that is absent in this case is an element of the cause of action. To argue it should not be is to argue that the cause of action should be transformed rather than whether the ANOCC discloses a reasonable claim.

[22] As Perell J. did in *P.P.*, I will go no further than to say that the claim in fraudulent misrepresentation cannot succeed on the facts alleged in the ANOCC.

[23] While it is not necessary in light of this finding to address the applicant's other arguments on this component of the claim, I will do so briefly.

[24] The applicant says that the assertions of emotional harm do not constitute a "recognizable psychiatric illness". There are references to "ongoing guilt and anguish", which led to insomnia, anxiety and depression. What constitutes a recognizable psychiatric illness may be imprecisely defined, but in the context of this application, insomnia, anxiety or depression would suffice.

[25] In the notice of application, the applicant also argues that causation cannot be established:

> 24. Moreover, even if the plaintiff's alleged psychiatric harm rises to the level of a visible and provable psychiatric illness, the plaintiff has failed to plead that this harm was caused by the alleged fraudulent misrepresentations. The plaintiff pleads that the alleged fraudulent misrepresentations induced the plaintiff to leave [KB] in the defendants' care. Leaving [KB] in

> the defendants' care did not cause any psychiatric harm to the plaintiff. It is only the alleged actions of the defendants (which the Defendant Husak vehemently denies) while [KB] was in their care which were capable of causing psychiatric harm to the plaintiff.

[26] Causation may be difficult but that is not the test at this stage and would not support the order sought under R. 9-5(1)(a).

The Claim for Negligent Infliction of Mental Distress

[27] In the Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, the Court set out the general requirements for a claim in negligence:

> [3] A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach…..

[28] The Court then elaborated on the first requirement:

> [4] The first question to consider in an action for negligence is whether the defendant owed the plaintiff a duty of care. The question focuses on the relationship between the parties. It asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). **Whether such a relationship exists depends on foreseeability, moderated by policy concerns**: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).
>
> [Emphasis added.]

[29] Certain relationships have been judicially recognized as imposing a duty of care. The relationship between this plaintiff and the defendant Husak is not one of them.

[30] In *Devji v. District of Burnaby*, 1999 BCCA 599, the Court of Appeal noted that the law around claims for damages for nervous shock had been evolving incrementally for some time: para. 2. The Court observed that it is often difficult to predict the cases in which liability will be imposed: para. 3.

[31] The Court in *Devji* stated that a claim for nervous shock must be for actual psychiatric or emotional injury caused by—not just resulting from—the actionable conduct of the defendant: para. 4. This statement is of particular relevance and importance to the determination of the issue before me. Later in *Devji*, the Court stated this principle again with reference to the facts of that case:

> [40] In my view, although mention was made (particularly by Taylor J.A.) of a possible extension of the "aftermath" of an accident to include persons such as the plaintiffs in this case and in *McLoughlin*, *Jaensch* and other cases, it is fair to say that the judgment of this Court in *Rhodes* decides **that damages for nervous shock cannot be recovered without exposure to a "shocking" experience arising from exposure to the defendant's negligence - rather than just to one of its consequences.** The plaintiff's injury from learning about the death of her son in a train crash and from the run-around she experienced was found to be insufficiently connected to the defendant's negligence to be reasonably foreseeable.
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> [41] It must also be considered whether *Rhodes* stands for the proposition that attending almost immediately at the hospital for the purpose of identifying the body of a deceased relative falls outside the "aftermath" of the accident. In my judgment, that question must be answered in the negative. As just stated, *Rhodes* was not a case where the plaintiff experienced a shocking experience at the scene of or immediately after the accident except possibly, with respect to the latter, when she was first informed that her son had been killed. For that reason**, the decision in *Rhodes*, although binding upon us as authority for the proposition that a plaintiff seeking damages for nervous shock must suffer a shocking experience as a consequence of the conduct of the defendant**, is *obiter dicta* on the definition of the "aftermath" of an accident. I shall return to this question in due course.
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> [Bolded emphasis added; underlined emphasis in original.]

[32] After reviewing the evolution of the law and roles of reasonable foreseeability and proximity in the analysis, the Court in *Devji* then stated:

> [67] In this case, we are not required to express a view on the true nature of reasonable foreseeability because we are bound at least in part by *Rhodes*. **It clearly requires not merely foreseeability but also proximity and something more.** I have already said that I do not consider *Rhodes* to require that the alleged psychological injury have occurred at the scene of the accident. **In proper cases the aftermath of the accident may be extended to the hospital immediately after the casualty.**
>
> [Emphasis added.]

[33] The reference to *Rhodes* is to *Rhodes v. Canadian National Railway* (1990), 50 B.C.L.R. (2d) 273, 1990 CanLII 5401 (C.A.) a decision of a five-member panel. There, the plaintiff's son died in a rail crash in Alberta. The plaintiff lived on Vancouver Island at the time. In dismissing the claim, Justice Wallace described the relevant facts:

> In the present case, Mrs. Rhodes was not at the scene of the accident and did not observe the conduct of the defendants. She heard of the train crash on the radio, was uncertain for some period of time as to whether her son was indeed a victim of that crash. She did not arrive at the scene until some eight days after the accident. There were other post-accident incidents which regrettably contributed to Mrs. Rhodes's distress but they were not acts attributable to the defendants. It is clear that the relationship between Mrs. Rhodes and her son was an exceptionally strong one, but this factor by itself is not, in my view, sufficient to establish the required proximity relationship necessary to conclude that Mrs. Rhodes's psychiatric injury was a reasonably foreseeable, direct consequence of the defendants' conduct. Accordingly, I do not consider in the circumstances that prevailed that the defendants were under a duty of care to Mrs. Rhodes to avoid causing the injury she sustained.

[34] Justice Macfarlane approved of Justice Wallace's review of case law dealing with mental shock. She noted that none of those cases "support the proposition that a tortfeasor is liable for injury to someone who hears about the death of a loved one from a third party, and who does not experience the shock of the event which caused the death."

[35] Justice Southin also expressly found that the plaintiff's analogous feeling of uncertainty around the fate of her child in *Rhodes* did not amount to the fright, horror or terror required to make out the cause of action:

> There is no express plea of "fright", "horror" or "terror" and the particulars given do not fall within the concept of the authorities save possibly in one respect, i.e. her mental disturbance from the time she heard on the radio of the crash until she knew her son was dead. <u>But, in my view, that disturbing, dreadful, uncertainty does not qualify. It is on the wrong side of the line.</u> The subsequent events detailed by her were not, on her particulars, acts of the Railway but of Via Rail. Even if in law they are acts contributing to her present condition for which the Railway is liable in law - which I do not decide - such insensitive acts cannot be said to be acts inducing fright, terror or horror in the victim.
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> [Emphasis added.]

[36] The Court of Appeal has recently stated (albeit *in obiter*) that *Rhodes* and *Devji* remain the leading cases in British Columbia on this cause of action, and in particular on the relevant issue of proximity: *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47 at paras. 59–63. In *E.B*., the Court of Appeal held that the application judge under R. 9-5(1) applied the correct law by using *Rhodes* and *Devji*.

[37] The *E.B.* decision includes these comments:

> [61] The material facts pleaded in this case did not lay a foundation from which to find sufficient proximity. As such, the chambers judge concluded there was "no basis" on which the appellants could recover damages for the alleged mistreatment of P.B. (at para. 82).
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> . . .
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> [63] I do not consider it necessary to decide whether the chambers judge wrongly considered himself bound by *Rhodes Estate* and *Devji*, on the basis that those cases have been overtaken by *Saadati* or otherwise. That is a question best left to another day. This is because I am satisfied the chambers judge was correct to strike the claim on the ground that it failed to plead material facts. (In passing, I note that *Saadati* was not a case in which a family member claimed damages for mental injury. Rather, the plaintiff alleged mental injury as a direct result of his personal involvement in a negligent collision. As such, proximity in the context of a claim brought by a family member was not before the Court. Second, even if *Saadati* does offer a possible basis on which to re-visit and overrule this Court's rulings in *Rhodes Estate* and *Devji*, the appellants did not seek a five-member division for that purpose.)

[38] Both *Rhodes* and *E.B.* involved applications to strike pleadings. *Devji* was a summary trial application pursuant to the former Rule 18A

[39] The plaintiff refers to *Ulmer v. Weidmann*, 2011 BCSC 130, for its articulation of the elements of negligent infliction of mental distress:

> [98] In his judgment Joyce J. recites passages from two decisions of our Court of Appeal, being *Devji v. Burnaby (District)*, 1999 BCCA 599, 180 D.L.R. (4th) 205, and *Rhodes Estate v. C.N.R.* (1990), 50 B.C.L.R. (2d) 273. In addition he also recites passages from the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114.
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> [99] From the reasoning in these cases and other cases cited therein the following elements of the cause of action for nervous shock have been established:

> (a) the defendant must take reasonable care not to injure those persons who are so closely and directly affected by his/her actions that he/she ought reasonably to have them in contemplation as being so affected;
>
> (b) proximity factors inform the foreseeability analysis for claims of psychiatric injury where there is no physical injury;
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> (c) the relevant proximity factors are the relational proximity (the closeness of the relationship between the claimant and the victim of the defendant's conduct), locational proximity (being at the scene of a shocking event and observing it or observing its immediate aftermath), and temporal proximity (the relation between the time of the event and the onset of the psychiatric illness);
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> (d) the claim must be for actual psychiatric injury caused by the actionable conduct of the defendant;
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> (e) it must be concluded as a matter of law that a reasonable person should foresee that his/her conduct is such that for it could create a risk of direct psychiatric injury to a person of normal fortitude and thereby give rise to a duty of care to avoid such a result;
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> (f) a claimant must prove not just psychological disturbance or upset as a result of the defendant's negligence but also that his/her psychological disturbance rises to the level of a recognizable psychiatric illness. Mere grief or sorrow caused by a person's death is not sufficient to support any compensation. The law does not recognize upset, discord, anxiety, agitation or other mental states that fall short of a recognizable psychiatric illness.

[40] That case was of the kind where such claims more typically arise. The plaintiff attended at the scene of a motorcycle collision involving her husband. She saw him lying on the ground and undergoing treatment by paramedics. The Court found that the plaintiff had established relational, locational and temporal proximity:

> [110] Ms. Ulmer was the wife of the victim Mr. Ulmer, and she was at the scene very shortly after the accident occurred where she saw her husband lying on the roadway with blood pouring out of his mouth. Relational proximity, locational proximity and temporal proximity have all been established.

[41] In order to establish a claim in negligent infliction of mental distress, the plaintiff must establish a duty of care on the basis of her relationship to the defendant Husak. To do so she must establish that her injury was foreseeable based on the relational, locational, and temporal proximity of her harm to the impugned

conduct. As stated in *Devji*, the plaintiff's harm must arise from exposure to the defendants' negligence, not from consequences that resulted from that negligence.

[42] In the statement of facts of the ANOCC, the plaintiff attributes her emotional reaction and psychological injury to her initial discovery that KB was missing: para. 19; and to "what happened to KB", the misrepresentations and the defendant "Stibbard's breach of his duty of care": para. 27.

[43] I have addressed the allegation that fraudulent misrepresentation caused the plaintiff's injuries already. The claim as against the defendant Stibbard is not at issue in this application.

[44] In the "Legal Basis" section of the ANOCC, the plaintiff includes the following in support of the claim:

> 11. Husak presented himself to the Plaintiff as an adult caregiver to her child. As such, Husak owed the Plaintiff a duty of care to protect her child as he indicated that he would, and as any other reasonable adult would in accepting responsibility for the care of a child.
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> 12. The standard of care for an adult caregiver to a child requires that adult to protect the child from harm and in particular from becoming intoxicated, from being sexually exploited and from being removed from the location where the caregiver agreed to oversee the child.
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> 13. Husak's actions fell far below the standard of care for a caregiver to a child and represent egregious breaches of his duty of care to the Plaintiff. The duty of care in instances of child care extend beyond the duties owed directly to the child and include the duties owed to the child's parents (guardians) who are legally responsible for, and emotionally contingent on the wellbeing of their child.
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> 14. Husak's negligence resulted emotional suffering to the Plaintiff as described in detail below. Husak knew or ought to have known that removing the Plaintiff's child from the Sarsons Residence without notice to the Plaintiff would cause the Plaintiff emotional distress. Husak knew or ought to have known that allowing and encouraging the Plaintiff's child to get debilitatingly intoxicated while she was in his care would cause emotional distress to the Plaintiff. Husak knew or ought to have known that engaging repeatedly in rough sexual intercourse and other sexual activities with the Plaintiff's child while the Plaintiff's child was debilitatingly intoxicated would cause the Plaintiff emotional distress. Husak knew or ought to have known that causing significant harm to the Plaintiff's child while she was in his care would cause the Plaintiff emotional distress.

[45] The conduct of Husak referenced in support of the claim is sending KB home with a ride share, encouraging or facilitating her intoxication, and engaging in sexual activity with her.

[46] As KB's mother, there is no question the plaintiff had a close relational proximity to KB.

[47] It is somewhat difficult from the facts asserted in the ANOCC to assess temporal proximity, i.e. the relation in time between the conduct of the defendant Husak and the onset of the psychiatric illness. The utility of this factor in assessing foreseeability is that it evidences the connection between the conduct and the injury, keeping in mind that the injury must arise from exposure to the defendant's negligence, not from consequences that resulted from that negligence.

[48] Paragraph 19 of the ANOCC (see para. 10 above) refers to the "initial shock of having lost her daughter and the shock of that event remains dominant in the post traumatic stress that she has suffered since [KB's] death." This places the post traumatic stress that arose after KB's death.

[49] Paragraph 27 refers to temporal proximity with the words, "[i]n the time between the incidents and [KB's] death".

[50] The nature of this claim makes locational proximity the most difficult to assess. The authorities above reference exposure to or being at the scene of a shocking event and observing it or observing its immediate aftermath. In *Rhodes,* Southin J.A. used the terms "fright", "horror" or "terror" to describe the nature of events that may support such claims. Other cases use the terms "horrifying" and "frightening". There are really two features to this. The first is the shocking, horrifying or frightening character of the event. The second is the plaintiff's presence.

[51] The ANOCC states that the discovery that KB was not at the Sarsons Residence and was instead missing occurred at 9:30 a.m. on August 14, 2020 (para. 18). KB called the plaintiff from home at 10:53 a.m. (para. 21). Can it be said that a parent's discovery that their 17-year-old daughter was not at the residence

where she had been left is a shocking, horrifying or frightening experience, when that same parent receives a call from their child at the family home less than an hour later?

[52] Standing alone, it is my conclusion that it cannot.

[53] That circumstance is, however, part of the larger factual matrix that includes KB's later disclosure regarding the events that occurred at the Sarsons Residence and her subsequent attendance at the hospital with the plaintiff. At dinner sometime in the evening of August 14, KB disclosed what had occurred, after which the plaintiff and KB attended at Kelowna General Hospital: ANOCC at para. 23.

[54] The plaintiff was not at the scene to see the conduct attributed to Husak.

[55] What the plaintiff was exposed to was KB's emotional state and the information KB provided the plaintiff as to what had occurred. I cannot say that the claim is for actual psychiatric or emotional injury caused by actionable conduct of the defendant but rather is for injury resulting from his conduct.

[56] Simply concluding that it would be foreseeable that KB would disclose what happened to the plaintiff is not sufficient. Foreseeability in this context is informed by the proximity analysis.

[57] The authorities, including *Devji*, state that the plaintiff in a cause of action for nervous shock must witness the defendant's conduct or its aftermath. That aftermath may include attending almost immediately at the hospital for the purpose of identifying the body of deceased relative. However, what falls within the scope of aftermath is limited. Sufficient temporal and locational proximity must be present. The harm to the plaintiff must be caused by the defendant's conduct, rather than resulting from it.

[58] The ANOCC effectively asserts that the plaintiff's psychiatric response resulted from Husak's alleged conduct as opposed to being caused by it. *Devji* makes it clear this cannot support this cause of action. There is insufficient proximity

to establish a duty of care between the plaintiff and Mr. Husak. KB suffered emotionally and the plaintiff's response was to that suffering. This circumstance is not akin to coming upon or seeing an accident caused by Husak in which KB was injured or its aftermath.

[59] In this application pursuant to Rule 9-5(1), it is my conclusion that the ANOCC fails to disclose a reasonable claim for negligent infliction of mental distress.

Conclusion

[60] For the reasons set out above, the application of the defendant Husak is granted. The claims against him in the ANOCC are struck.

[61] In the ordinary course costs should follow the event. If however either party seeks to make submissions as to costs they are at liberty to do so. If that is the case they should notify Trial Scheduling within 21 days of release of these reasons.

"Betton J."