COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bevan v. Husak,*
2024 BCCA 323

Date: 20240912
Docket: CA48966

2024 BCCA 323 (CanLII)

Between:

Carmen Leslie Bevan

Appellant
(Plaintiff)

And

Aaron Walter Husak and
Cody Wyatt Stibbard

Respondents
(Defendants)

Corrected Judgment: The text of the judgment was corrected at para. 85 on September 18, 2024.

Before: The Honourable Chief Justice Marchand
The Honourable Justice Dickson
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated March 2, 2023 (*Bevan v. Husak*, 2023 BCSC 304, Kelowna Docket S134831).

Counsel for the Appellant:	T-M. Young M.C. Ohama-Darcus
Counsel for the Respondent, Aaron Walter Husak:	G. Allen T. Hoogstraten
Place and Date of Hearing:	Vancouver, British Columbia November 20, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 12, 2024

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler

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Summary:

Appeal from an order striking an amended notice of civil claim under Rule 9-5(1)(a) on the basis that it did not disclose a reasonable claim in fraudulent misrepresentation or negligent infliction of mental distress. Held: Appeal allowed. The judge made a reversible error in holding that a commercial component is an element of the tort of fraudulent misrepresentation and striking the claim on that basis. The judge also erred in striking the claim for negligent infliction of mental distress, which was arguable as pleaded.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This is an appeal from an order striking an amended notice of civil claim ("ANOCC"), without leave to amend, under Rule 9-5(1) of the *Supreme Court Civil Rules*. The appellant, Carmen Bevan, brought claims in fraudulent misrepresentation and negligent infliction of mental distress against the respondent, Aaron Husak, alleging that he lied to her to gain access to her teenaged daughter, Katelin, whom he then victimized sexually. Tragically, Katelin died less than a year after the incidents of alleged deceit and sexual victimization.

[2] The chambers judge granted Mr. Husak's application to strike the ANOCC on the basis that it did not disclose a reasonable claim in fraudulent misrepresentation or negligent infliction of mental distress. Mrs. Bevan's appeal centers on the nature and scope of both torts and the sufficiency of the pleadings given the current state of the law and the applicable test on an application to strike.

[3] For the reasons that follow, I would allow the appeal.

Background

[4] The alleged incidents occurred on August 13 and 14, 2020. Katelin was 17 years old at the time. Mr. Husak was 31 years old.

[5] On May 26, 2021, Katelin died in a motor vehicle accident.

[6] Mrs. Bevan filed the original statement of claim on August 11, 2021, and the ANOCC on September 29, 2022. As noted, she claimed against Mr. Husak in fraudulent misrepresentation and negligent infliction of mental distress. She also claimed in negligence against a co-defendant, Cody Stibbard.

[7] Specifically, Mrs. Bevan pleaded the following alleged facts and claims against Mr. Husak.

Pleaded Factual Allegations

[8] Katelin met Mr. Husak at a restaurant in July 2020. In the weeks that followed, he contacted her repeatedly and sought another meeting. She responded with expressions of discomfort about being alone with him, and concern about his age.

[9] On August 13, 2020, Katelin asked Mrs. Bevan for permission to attend at a friend's residence on Sarsons Road in Kelowna for a barbeque. When Mrs. Bevan asked for the phone number of the friend's parents, Katelin provided Mr. Husak's phone number.

[10] The Sarsons Road residence was, in fact, owned by Mr. Husak's friend, Mr. Stibbard.

[11] Mrs. Bevan brought Katelin to the Sarsons Road residence on the evening of August 13, 2020. Before leaving her there, she called the phone number Katelin had provided and spoke with Mr. Husak. Mr. Husak told Mrs. Bevan that he was the father of Katelin's friend, and stated that his daughter was having friends over for a barbeque. He also told her that he would be at the residence to monitor the children and keep Katelin safe.

[12] Based on Mr. Husak's representations, Mrs. Bevan left Katelin at the Sarsons Road residence.

[13] Later that same evening, Mrs. Bevan called Mr. Husak to check in on Katelin. When they spoke, he identified himself again as the father of Katelin's friend.

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Mrs. Bevan asked Mr. Husak to have Katelin call her back, as she had been trying without success to call her directly. A few minutes later, he called and put Katelin on the phone.

[14] When Katelin spoke with Mrs. Bevan, she asked for permission to spend the night at the Sarsons Road residence. After speaking with Mr. Husak again, Mrs. Bevan agreed. In the course of their conversation, Mr. Husak confirmed that he would monitor the children and keep them safe until Mrs. Bevan picked up Katelin the next morning.

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[15] Mr. Husak did not tell Mrs. Bevan that he did not own the Sarsons Road residence and that he was not Katelin's friend's father. Rather, he "knowingly and deliberately misrepresented himself to [Mrs. Bevan] as being a responsible parent that would look out for Katelin's best interests" (para. 15, ANOCC).

[16] On August 14, 2020 at approximately 9:30 a.m., Mrs. Bevan's husband attended at the Sarsons Road residence to pick up Katelin. Katelin was not at the residence, but two adult males were present in the living room, drinking hard alcohol. They told Mr. Bevan that they did not know who Katelin was and did not know where she might be. Mr. Bevan contacted Mrs. Bevan, who immediately drove to the residence and confirmed that she had dropped Katelin off there the night before.

[17] A frantic search ensued when Mr. and Mrs. Bevan realized that Katelin was missing. It was at the Sarsons Road residence that Mrs. Bevan "experienced the initial shock of having lost her daughter", which "remains dominant in the post traumatic stress that she has suffered since Katelin's death" (para. 19, ANOCC). Mrs. Bevan was unable to reach Katelin by phone and learned that her Snapchat account (which tracked the location of her phone) had been shut down the night before. She was also unable to reach Mr. Husak. In a panic, she called 911.

[18] At approximately 10:53 a.m., Katelin called Mrs. Bevan from the Bevan family home, where she had been taken by a car service paid for by Mr. Husak.

[19] When Mrs. Bevan arrived home, she found Katelin in an intoxicated, disturbed, and upset state.

[20] After Katelin finished work that day, she and Mrs. Bevan went out for dinner to discuss what had taken place.

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[21] At dinner, Katelin told Mrs. Bevan that Mr. Husak was not her friend's father and he did not own the Sarsons Road residence, nor were Katelin's friends with her at the residence. She also told Mrs. Bevan that Mr. Husak: encouraged her to drink alcohol to excess; refused to take her home on her request and had rough intercourse with her multiple times, leaving bruising; transported her to his residence and confiscated her phone; and recorded her dancing naked at his direction, which recording he shared with his friends.

[22] Following these disclosures, Mrs. Bevan accompanied Katelin to Kelowna General Hospital for a sexual assault assessment. The assessment embarrassed and upset Katelin and caused her pain. It also confirmed that she had engaged in sexual activity the night before.

[23] On August 17, 2020, Mr. Husak was arrested and charged with sexually assaulting Katelin and distributing an intimate image without consent. Crown counsel subsequently decided not to pursue the charges.

Pleaded Claims

[24] In Part 1 of the ANOCC, Mrs. Bevan pleaded that Katelin was a happy, outgoing child before the alleged incidents, but she fell into a severe depression and suffered numerous debilitating effects thereafter (para. 26, ANOCC). She also pleaded that:

> 27. In the time between the incidents noted herein and Katelin's death, [Mrs. Bevan] also went through significant mental health struggles due to what happened to Katelin and as a result of having been taken advantage of by Husak's misrepresentations… 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 Katelin at her counselling sessions and worked hard to home school Katelin through her graduating year.

[25] In Part 3 of the ANOCC, Mrs. Bevan pleaded, among other things, that:

> 8. Husak intended [Mrs. Bevan] to act upon his representations. He intended [Mrs. Bevan] to leave her child in his care. He knew that if he accurately described his intentions with respect to [Mrs. Bevan's] child then she would never let her child attend at the Sarsons Residence. He knew that it was only by misrepresenting both his identity and his intentions that he would be able to have [Mrs. Bevan's] child come into his care, so as to take advantage of [Mrs. Bevan's] child for sexual purposes.
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> …
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> 11. Husak presented himself to [Mrs. Bevan] as an adult caregiver to her child. As such, Husak owed [Mrs. Bevan] 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 [Mrs. Bevan]. 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 [in] emotional suffering to [Mrs. Bevan] as described in detail below. Husak knew or ought to have known that removing [Mrs. Bevan's] child from the Sarsons Residence without notice to [Mrs. Bevan] would cause [Mrs. Bevan] emotional distress. Husak knew or ought to have known that allowing and encouraging [Mrs. Bevan's] child to get debilitatingly intoxicated while she was in his care would cause emotional distress to [Mrs. Bevan]. Husak knew or ought to have known that engaging repeatedly in rough sexual intercourse and other sexual activities with [Mrs. Bevan's] child while [Mrs. Bevan's] child was debilitatingly intoxicated would cause [Mrs. Bevan] emotional distress. Husak knew or ought to have known that causing significant harm to [Mrs. Bevan's] child while she was in his care would cause [Mrs. Bevan] emotional distress.
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> …
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> 20. [Mrs. Bevan] had attended a[t] the Sarsons Residence and had left her child at the premises on the specific basis that her child would be properly cared for while she was Stibbard's guest. [Mrs. Bevan] subsequently returned to the Sarsons Residence to try to locate her child and it was while she was at the Sarsons Residence that she first became aware that her child had been removed from the property to an unknown location. It was while she was at the Sarsons Residence that [Mrs. Bevan] incurred the initial panic of

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> realizing that her daughter was missing, and that initial panic was a fundamental aspect of her subsequent mental suffering.

[26] At para. 23 in Part 3 of the ANOCC, Mrs. Bevan pleaded that she suffered significant losses as a result of Mr. Husak's fraudulent misrepresentations and breach of duty. In particular, she pleaded that she suffered: debilitating and ongoing guilt and anguish over her inability to protect her child which led to insomnia, depression, and anxiety; the deterioration of her relationship with Katelin during her lifetime; loss of income due to both her efforts to assist Katelin with her mental health struggles and from her own inability to attend to and focus on her work; the physiological effects of extreme stress; lack of trust and the perception of threats in otherwise innocuous social situations; and recurring trauma induced by the memory of the initial panic associated with Katelin having gone missing from the Sarsons Road Residence.

[27] In her prayer for relief, Mrs. Bevan claimed general, exemplary, punitive, and special damages, together with costs.

Application to Strike

[28] Mr. Husak applied under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* for an order striking the ANOCC in its entirety, without leave to amend, on the basis that it did not disclose a reasonable cause of action. The co-defendant, Mr. Stibbard, did not participate in the application.

[29] In support of his application to strike the fraudulent misrepresentation claim, Mr. Husak argued that Mrs. Bevan had failed to plead the requisite physical harm, psychiatric illness, and causal connection between the alleged harm and fraudulent misrepresentations. Among other authorities, he relied on Perell J.'s decision in *P.P. v. D.D.*, 2016 ONSC 258, aff'd 2017 ONCA 180. In particular, Mr. Husak stated that, while Perell J. did not find it plain and obvious that fraudulent misrepresentation cannot encompass a claim for emotional harm, "he did conclude that fraudulent misrepresentation was not available to a plaintiff who had suffered no physical harm

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and did not claim that the alleged misrepresentation resulted in a recognizable psychiatric illness".

[30] In support of his application to strike the negligent infliction of mental suffering claim, Mr. Husak argued that Mrs. Bevan had failed to plead sufficient facts to establish a duty of care, that the alleged standard of care and damages were incapable of proof due to Katelin's death, and that for policy reasons the tort should not be expanded as Mrs. Bevan proposed.

[31] In response to Mr. Husak's application, Mrs. Bevan argued that she had pleaded all essential elements of both causes of action sufficiently, factually and legally, in the ANOCC.

[32] Regarding the fraudulent misrepresentation claim, among other things, Mrs. Bevan argued that in *P.P.*, Perell J. found the non-commercial extension of fraudulent misrepresentation in the family law context in question in that case was contrary to public policy. However, she stated, her claim "cannot be impugned for any ulterior or improper purpose and is not contrary to public policy" and "[t]he 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". Moreover, she argued that she was seeking damages for both non-pecuniary <u>and</u> pecuniary loss, and that the assessment of the sufficiency of the alleged harm, loss, and causal connection were matters for trial.

[33] Regarding the negligent infliction of mental distress claim, Mrs. Bevan argued that she had pleaded sufficient facts to establish a duty of care, the alleged standard of care and damages were provable despite Katelin's death, and, insofar as any extension of the law was required, public policy supported such an extension.

[34] After hearing Mr. Husak's application, the judge struck the ANOCC, without leave to amend.

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Reasons for Judgment: 2023 BCSC 304

[35] After describing the nature of the application, the causes of action, and Mr. Husak's position, the judge summarized the factual allegations. He identified the key allegations of fact as those set out in paras. 19, 26, and 27 of Part 1 of the ANOCC: at para. 10. He also summarized the principles that govern a Rule 9-5(1)(a) application, quoting from *Lavery v. Community Living British Columbia*, 2022 BCSC 739: at para. 12. Then he turned to Mrs. Bevan's claim for fraudulent misrepresentation.

Claim for Fraudulent Misrepresentation

[36] The judge outlined the requirements for establishing a claim of fraudulent misrepresentation: i) the defendant made a representation of fact to the plaintiff; ii) the representation was, in fact, false; iii) 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; iv) the defendant intended the plaintiff to act on the representation; and v) the plaintiff relied upon the false representation and thereby suffered a detriment: at para. 13, citing *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25. After noting that Mr. Husak conceded the facts alleged in the ANOCC met the first four requirements, he considered the fifth, namely, reliance and detriment.

[37] The judge observed that fraudulent misrepresentation claims typically involve economic losses and a contractual relationship:

> [15] …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 example is in *Wang v. Shao*, 2019 BCCA 130, where the Court of Appeal wrote as follows:
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>> [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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>>> …
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>>> e) the victim must have been induced to enter into the contract in reliance upon it.

[38] The judge also commented "[t]hat 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": at para. 16. In support of this proposition, he quoted from *Beacock v. Moreno*, 2019 BCSC 955, aff'd 2021 BCCA 412, a case involving the sale of a property. In particular, he noted that in *Beacock* the court stated the measure for damages flowing from a fraudulent 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": at para. 16.

[39] The judge went on to say that counsel indicated the only decision dealing with fraudulent misrepresentation claims in analogous circumstances was *P.P.*, where the plaintiff sought damages for the "non-pathological emotional harm" of unplanned parenthood allegedly suffered because the defendant "deceived him into having recreational sexual intercourse": at para. 17. Then he quoted at length from Perell J.'s reasons in *P.P.*, including, among others, these passages:

> [39] … 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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> [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 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

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> 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.

[40] Next, the judge observed that the novelty of a claim is not a basis upon which to strike it. However, he found Mrs. Bevan's claim was not analogous to the claim contemplated at para. 59 of *P.P.*, that is, a claim that "began with a typical consumer transaction, which would connect the resulting emotional damages to the traditional measure of damages": at para. 18. In the judge's view, the fraudulent misrepresentation Mrs. Bevan alleged "would expand the cause of action so greatly that it would fundamentally transform its availability", and "[t]he 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": at para. 19.

[41] According to the judge, Mrs. Bevan was asserting "that requiring the commercial component of a transaction would be unfair": at para. 20. After quoting her submission in her application response that "[t]he 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 … [and] … [t]he commerciality of the relationship should not govern the applicability of the law of misrepresentation where the care of children is involved", he said this:

> [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.
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> [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.

[42] Finally, the judge rejected Mr. Husak's arguments that Mrs. Bevan's assertions of emotional harm did not constitute a "recognizable psychiatric illness" and that causation could not be established: at paras. 23–26.

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Claim for Negligent Infliction of Mental Distress

[43] The judge began this part of his analysis by outlining the general requirements for establishing a claim for negligent infliction of mental distress: i) the defendant owed the plaintiff a duty of care; ii) the defendant's behaviour breached the standard of care; iii) the plaintiff sustained damage; and iv) the damage was caused, in fact and in law, by the defendant's breach: at paras. 27–28, citing *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27. He noted that while certain relationships have been judicially recognized as imposing a duty of care, the relationship between Mrs. Bevan and Mr. Husak was not one of them: at para. 29. Then he reviewed the evolution of the law around claims for damages for nervous shock discussed in *Devji v. District of Burnaby et al*, 1999 BCCA 599; *Rhodes Estate v. Canadian National Railway* (1990), 50 B.C.L.R. (2d) 273, 1990 CanLII 5401 (C.A.); *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47; and *Ulmer v. Weidmann*, 2011 BCSC 130.

[44] The judge emphasized this Court's statement in *Devji* "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": at para. 31. He also emphasized the statement in *Rhodes* that a plaintiff's "analogous" feeling of uncertainty around the fate of her child after hearing about a fatal rail crash "did not amount to the fright, horror or terror required to make out the cause of action": at paras. 33–35. He observed that Mrs. Bevan must establish a duty of care based on her relationship to Mr. Husak, and thus must establish "that her injury was foreseeable based on the relational, locational, and temporal proximity of her harm to the impugned conduct". Moreover, he stated, that harm "must arise from exposure to the defendants' negligence, not from consequences that resulted from that negligence": at para. 41, citing *Devji*.

[45] The judge stated further that Mrs. Bevan "attributes her emotional reaction and psychological injury to her initial discovery that [Katelin] was missing … and to 'what happened to [Katelin]', the misrepresentations and the defendant 'Stibbard's breach of his duty of care'": at para. 42. After noting he had already addressed the

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allegation that fraudulent misrepresentation caused Mrs. Bevan's injuries and the claim against Mr. Stibbard was not at issue, he set out paras. 11–14 of Part 3 of the ANOCC. Then he dealt with relational, temporal, and locational proximity.

[46] Regarding relational proximity, the judge stated:

> [45] The conduct of Husak referenced in support of the claim is sending [Katelin] home with a ride share, encouraging or facilitating her intoxication, and engaging in sexual activity with her.
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> [46] As [Katelin's] mother, there is no question [Mrs. Bevan] had a close relational proximity to [Katelin].

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[47] The judge considered temporal proximity difficult to assess based on the factual allegations pleaded in the ANOCC: at para. 47. He noted that in para. 19 of the ANOCC Mrs. Bevan referred to the "initial shock of having lost her daughter", which "remains dominant in the post traumatic stress that she has suffered since [Katelin's] death", and stated "[t]his places the post traumatic stress that arose after [Katelin's] death": at para. 48. He also noted that para. 27 of the ANOCC referred to temporal proximity with the words, "[i]n the time between the incidents and [Katelin's] death": at para. 49.

[48] Turning to locational proximity, the judge noted that the authorities referred to "exposure to or being at the scene of a shocking event and observing it or observing its immediate aftermath", used terms such as "shocking", "horrifying" and "frightening" to characterize the event, and involved the presence of the plaintiff: at para. 50. As to the factual allegations in this case, he asked whether "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?": at para. 51. Standing alone, he concluded, it could not: at para. 52.

[49] The judge went on to comment on the "larger factual matrix", including Katelin's disclosures and attendance at the hospital: at para. 53. After observing that Mrs. Bevan was not at the scene to see Mr. Husak's alleged conduct, he found that

her claim was for injury *resulting* from Mr. Husak's conduct, not for injury *caused* by actionable conduct:

> [55] What [Mrs. Bevan] was exposed to was [Katelin's] emotional state and the information [Katelin] provided [Mrs. Bevan] 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.
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> [56] Simply concluding that it would be foreseeable that [Katelin] would disclose what happened to [Mrs. Bevan] is not sufficient. Foreseeability in this context is informed by the proximity analysis.
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> [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.

[50] The judge held that Mrs. Bevan was asserting her "psychiatric response" resulted from Mr. Husak's alleged conduct, which could not support a claim for negligent infliction of mental distress:

> [58] The ANOCC effectively asserts that [Mrs. Bevan'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 [Mrs. Bevan] and Mr. Husak. [Katelin] suffered emotionally and [Mrs. Bevan's] response was to that suffering. This circumstance is not akin to coming upon or seeing an accident caused by Husak in which [Katelin] was injured or its aftermath.
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> [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

[51] Based on the foregoing analysis, the judge granted Mr. Husak's application and struck both claims.

On Appeal

[52] Mrs. Bevan contends that the judge incorrectly imported a commercial component into the tort of fraudulent misrepresentation and erroneously concluded the claim could not succeed on the facts alleged. In addition, she says, he incorrectly

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found insufficient proximity between the parties to establish an arguable claim for the tort of negligent infliction of mental distress. Mrs. Bean argues that in light of these two errors, the judge erred in striking the claim.

[53] Mr. Husak concedes the judge incorrectly referred to a commercial component as a necessary element of a fraudulent misrepresentation claim, but says this was not a reversible error. He submits that despite this error, the judge was correct in finding the pleadings do not disclose a reasonable cause of action for fraudulent misrepresentation given the lack of a pecuniary aspect to the claim or a provable causal link between the alleged misrepresentation and resulting harm. He was also correct, Mr. Husak contends, in finding that Mrs. Bevan failed to plead the requisite type of harm and sufficient proximity between the parties to support a claim for negligent infliction of mental distress.

[54] The overarching issues for determination are:

a) Does the ANOCC disclose a reasonable claim for fraudulent misrepresentation?

b) Does the ANOCC disclose a reasonable claim for negligent infliction of mental distress?

Discussion

Application to Strike Pleadings

[55] Rule 9-5(1) of the *Supreme Court Civil Rules* provides:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole of 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,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
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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.

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[56] The test on an application to strike a pleading on the basis that it discloses no reasonable claim is well-known and uncontroversial. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90, Justice Wilson stated the test this way:

> … [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? … [I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect … should the relevant portions of a plaintiff's statement of claim be struck out …

[57] The power to strike out claims with no reasonable prospect of success is a valuable tool that contributes to fair and effective litigation by weeding out hopeless claims and ensuring that those which may succeed go to trial: *R. v. Imperial Tobacco Ltd.*, 2011 SCC 42 at paras. 19–20. However, it is a tool to be employed with considerable caution. This is particularly so with respect to novel claims "that may not yet be embedded in existing legal rules, lest it stunt the growth of the law": *Levy v. British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36 at para. 32.

[58] In *Imperial Tobacco*, Chief Justice McLachlin emphasized that the law is not static and unchanging. Moreover, she stated, new developments in the law often surface first on applications to strike pleadings or similar preliminary motions. For this reason:

> [21] … 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.

[59] The court must read an impugned pleading "as generously as possible" on a Rule 9-5(1)(a) application, and "accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies": *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 451. In doing so, the court must take the facts pleaded to be true, unless they are manifestly incapable of being proven: *Imperial*

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Tobacco at para. 22. As Justice Dickson, as he then was, explained in *Operation Dismantle* at 455:

> … The rule that the material facts in a statement of claim must be taken as true for the purposes of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[60] Ultimately, the question on an application to strike a claim under Rule 9-5(1)(a) is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of success: *Imperial Tobacco* at para. 25.

Standard of Review

[61] The question of whether a claim discloses a reasonable cause of action is a question of law. Accordingly, a decision to strike a claim on the basis that it does not disclose a reasonable cause of action is reviewed on a correctness standard: *Kamoto Holdings Ltd. v. Central Kootenay (Regional District)*, 2022 BCCA 282 at para. 37.

Does the ANOCC disclose a reasonable claim for fraudulent misrepresentation?

Legal Framework

[62] The tort of deceit is based on the idea that "to lie or deceive are morally wrong acts which merit legal sanction, when they result in harm suffered by the victim": G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2010) at 707. Sometimes referred to as civil fraud or fraudulent misrepresentation, the tort entails a defendant's deliberate distortion of the truth with intent that the plaintiff act upon it, and a direct causal link between the untruth and the plaintiff's contemplated behaviour that leads to the detrimental occurrence: *The Law of Torts in Canada* at 709. The cause of action requires both fraud and actual damage, which must flow in the ordinary course of events or specific circumstances of the case as a direct and natural consequence of the misrepresentation being

believed and acted upon: *Graham v. Saville*, [1945] O.R. 301 at 309, 1945 CanLII 79 (C.A.).

[63] In *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, Justice Karakatsanis outlined the history and essential elements of the tort of deceit:

> [18] The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Derry v. Peek* (1889), 14 App. Cas. 337, where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:
>
>> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. . . . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.
>
> [19] This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 319-20, that tort law requires proof that "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".
>
> [20] Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330, "fraud without damage gives . . . no cause of action" (p. 340).
>
> [21] From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[64] Claims for deceit typically arise in commercial contexts and often involve economic losses. However, a commercial component is not an essential element of the tort, nor is potential recovery of damages limited to pure economic loss: *Hryniak* at para. 21; *Graham* at 309. Once the elements of deceit are established, the measure of damages is the actual loss attributable to the deceit in question: *The Law of Torts in Canada* at 718. In other words, the measure of damages is the loss

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directly flowing from the plaintiff's reliance on the deceit: a sum that, to the extent possible, puts the plaintiff in the same position they would have been in had they not relied on the misrepresentation: *Clerk and Lindsell on Torts*, 22nd ed., (London: Sweet and Maxwell, 2018) at 18–40 and 18–41.

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[65] Claims for non-pecuniary loss caused by deceit have been advanced in non-commercial contexts in a handful of Canadian cases. In addition to *Graham*, where the defendant's misrepresentation of his marital status led to a bigamous marriage, these include *Beaulne v. Ricketts* (1979), 17 A.R. 534, 1979 CanLII 1159 (S.C.), *Raju v. Kumar*, 2006 BCSC 439, and *Nitsopoulos v. Wong* (2008), 298 D.L.R. (4th) 265, 2008 CanLII 45407 (Ont. S.C.).

[66] The plaintiff in *Beaulne* recovered general damages for deceit grounded in the defendant's misrepresentation of his marital status, which, as in *Graham*, led to a bigamous marriage. In *Raju*, the plaintiff recovered general damages for deceit based on the defendant's misrepresentation that he intended to enter into a valid marriage with her when he actually intended to use the marriage to obtain immigration status. In *Nitsopoulos*, the court declined to strike the plaintiffs' claim in deceit where the personal defendant allegedly misrepresented herself as a maid rather than a journalist to gain access to the plaintiffs' home and details about their lives, which allegedly caused harm to the plaintiffs' dignity, personal autonomy, and mental well-being.

[67] In *P.P.*, Perell J. struck the plaintiff's claim for having deceived him into having recreational sexual intercourse, leading to "non-pathological emotional harm" occasioned by "involuntary parenthood". Although he acknowledged it was not "plain and obvious that fraudulent misrepresentation cannot encompass a claim for emotional harm", given the family law context and the harm alleged, he considered it plain and obvious as a matter of legal policy that expansion of the tort as the plaintiff proposed was both "unnecessary and undesirable": at paras. 57, 59. In reaching this conclusion, Perell J. applied a stricter standard than normal to the question of whether a viable cause of action had been pleaded "given the overriding importance

of ensuring that litigation involving children is in the best interests of the children": at para. 38. His order was upheld on appeal on the basis that, as a policy matter, "the appellant has not made out a viable claim for recoverable damages": *P.P. v. D.D.*, 2017 ONCA 180 at para. 43.

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[68] The nature and scope of the tort of deceit has been the subject of limited, though spirited, academic discussion. In "Misleading Appearances in the Tort of Deceit" (2016) 75 Cambridge L.J. 301, John Murphy described deceit as a peculiar but important tort that "has nothing especially to do with the protection of economic interests despite widely being regarded as one of the economic torts". In his view, deceit "is better seen as being concerned with the protection of individual decision-making autonomy" and "it is a mistake to regard harm (still less, economic harm) as its gist". Rather, he wrote, the gist of deceit is "an interference with the victim's decision-making autonomy that occurs by virtue of one of the established types of misinformation (laid down in *Derry v. Peek*) and which results in a recognized form of harm". According to Professor Murphy, such harm includes physical and mental injuries as well as pecuniary losses, which is appropriate "given that bodily and mental integrity are generally thought more worthy of protection by tort law than purely economic interests": at 301–302, 321–322.

Positions of the Parties

Appellant

[69] Mrs. Bevan contends the judge incorrectly imported a "commercial component" into the tort of fraudulent misrepresentation. However, she says, the caselaw clearly shows that a commercial component is not an essential element of the cause of action. Nor, she says, is a contractual relationship required to measure damages appropriately, as the judge seemingly suggested when quoting from *Wang v. Shao*, 2019 BCCA 130 and *Beacock* in his reasons. Rather, she submits, deceit is a flexible tort that can apply in a range of contexts and covers both pecuniary and non-pecuniary loss.

[70] According to Mrs. Bevan, the ANOCC sets out every element of a fraudulent misrepresentation claim, including that she relied on Mr. Husak's false representation and thereby suffered a detriment. In particular, she says that she pleaded the necessary causal link between Mr. Husak's false representation and her detrimental reliance on that representation at paras. 11 and 27 of the ANOCC. She also says that her claim is grounded in tragic and uncommon facts, but it does not engage a novel application of the tort, nor does it expand or transform its availability. Moreover, she says, even if her claim could fairly be characterized as novel, novelty alone is not a proper basis upon which to strike it, and policy considerations weigh heavily in favour of allowing the claim to proceed.

Respondent

[71] Mr. Husak concedes the judge erroneously referred to a "commercial component" as "an element of the cause of action". Nevertheless, he says that considered in the context of the reasons as a whole, this was not a reversible error. He emphasizes that, although the judge misspoke, he also quoted accurately from *P.P.*, where Perell J. recognized that a commercial component is not an element of a fraudulent misrepresentation claim, and submits he simply concluded there was no reasonable cause of action given the factual allegations. In other words, according to Mr. Husak, despite his misstatement, like Perell J. did in *P.P.*, the judge exercised his gatekeeper role correctly by striking the fraudulent misrepresentation claim based on the facts alleged.

[72] In support of his submission, Mr. Husak notes that every case turns on its own facts, and applications to strike must be approached accordingly. He also notes he did not argue that a commercial component is an element of a fraudulent misrepresentation claim. However, he says, the overwhelming majority of such claims involve economic loss resulting from a direct transaction between the parties, and the judge correctly found that this claim "would expand the cause of action so greatly that it would fundamentally transform its availability".

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[73] According to Mr. Husak, the caselaw shows that courts take care to apply the tort of deceit in non-commercial contexts sparingly to guard against the risk that any lie resulting in emotional harm could become actionable, leading to an unwieldy and unwelcome expansion of claims for fraudulent misrepresentation. In particular, he says, as a matter of policy, courts have confined fraudulent misrepresentation claims with an emotional harm component to those with a pecuniary aspect which anchors the concepts of reliance and detriment to a similar analysis as would apply in a commercial context, namely, an analysis focused on restoring the plaintiff's financial position. In his submission, Mrs. Bevan's was plainly not such a claim.

[74] Moreover, Mr. Husak submits, even if the judge committed reversible error in referring to a commercial component as an element of a fraudulent misrepresentation claim, the claim should be struck because Mrs. Bevan cannot prove causation on the facts alleged in the impugned pleading. Citing *Operation Dismantle*, he says that, properly scrutinized, the ANOCC reveals that Mrs. Bevan has no reasonable prospect of connecting his alleged misconduct to Katelin's subsequent mental health struggles, which she pleads caused her own alleged harm. In particular, Mr. Husak argues, due to her tragic death there is no direct evidence available regarding the effect of his alleged misconduct on Katelin's mental health, and therefore the pleadings on this key point are speculative. In addition, he says, Mrs. Bevan does not connect his alleged misrepresentations with the harm caused by her discovery that Katelin was not at the Sarsons residence, which harm was fleeting and inextricable from the harm she suffered due to Katelin's death.

Analysis

[75] In my view, the judge's incorrect statement that a commercial component is an element of a fraudulent misrepresentation claim reflects reversible legal error. Contrary to Mr. Husak's submission, it was not a mere misstatement untethered to his conclusion that the ANOCC did not disclose a reasonable cause of action. Rather, it was central to the reasoning underlying his decision to strike the fraudulent misrepresentation claim on the basis that it was novel and would expand and fundamentally transform the cause of action.

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[76] To repeat, the judge stated that: fraudulent misrepresentation claims are typically connected with pecuniary losses where awards are intended to restore a plaintiff's financial position (para. 15); the measure of damages described in *Beacock* indicated "the cause of action arises in a commercial context" (para. 16); and the example of a claim that could encompass emotional harm suggested by Perell J. in *P.P.* was not analogous to this claim because it "began with a typical consumer transaction, which would connect the resulting emotional damages to the traditional measure of damages" (para. 18). He went on to find that this claim "would expand the cause of action so greatly that it would fundamentally transform its availability" (para. 19). He also described Mrs. Bevan's argument that the non-commercial relationship should not undermine the claim or application of misrepresentation law as an assertion "that requiring the commercial component of a transaction would be unfair" (para. 20). Then he stated:

> [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.

[77] Reading the reasons as a whole, I am left with the impression that the judge misinterpreted the parties' arguments. Contrary to his apparent understanding, neither party suggested that a commercial component was an element of a fraudulent misrepresentation claim, or that, in the interests of fairness, the cause of action should be expanded or transformed. Rather, Mr. Husak argued that Mrs. Bevan had failed to plead the requisite physical harm, psychiatric illness, and causal connection, and relied on *P.P.* to support his arguments on physical harm and psychiatric illness. For her part, Mrs. Bevan argued that, unlike those in *P.P.*, the non-commercial context and factual allegations in this case did not undermine the claim or compromise its viability for policy reasons.

[78] Based on his mistaken view that a commercial component is an element of the cause of action, the judge concluded that Mrs. Bevan's claim was novel as it lacked the requisite commercial component, and thus would transform the cause of action. In my view, this was a clear legal error that was material to the judge's

reasoning. As the cases I have noted illustrate, deceit is a flexible tort that can apply in both commercial and non-commercial contexts. It can also cover both pecuniary and compensable non-pecuniary loss.

[79] I see no reason in principle, precedent, or policy to confine fraudulent misrepresentation claims to those with a pecuniary aspect that would anchor the concepts of reliance and detriment to an analysis focused on restoring the plaintiff's financial position, as Mr. Husak proposes. As discussed, the cause of action requires only that a plaintiff prove fraud and actual damage which flows as a direct and natural consequence of the misrepresentation being believed and acted upon; in other words, that the false representation caused the plaintiff to act and that their actions resulted in a loss: *Graham* at 309; *Hryniak* at para. 21. The appropriate measure of damages will depend on the nature of the plaintiff's consequential loss flowing from the deceit.

[80] Despite the tragic and uncommon nature of the factual allegations, Mrs. Bevan's fraudulent misrepresentation claim does not expand or fundamentally transform the cause of action. Unlike the plaintiff in *P.P.*, she does not claim to have suffered a novel form of compensable loss such as "non-pathological emotional harm" due to "involuntary parenthood" occasioned by deceit. Rather, she claims that, as he intended, she relied on Mr. Husak's misrepresentations by leaving Katelin at the Sarsons residence, and, as a result of that act, suffered loss, including insomnia, anxiety, and depression, together with loss of income, which are all well-recognized forms of recoverable loss.

[81] As to Mr. Husak's submission that Mrs. Bevan cannot prove causation on the facts alleged, I am unpersuaded. This is not a case like *Operation Dismantle*, in which the impugned factual allegations were inherently speculative. In particular, the principal allegation in *Operation Dismantle* was that the testing of cruise missiles in Canada increased the risk of nuclear conflict and thus violated the plaintiffs' s. 7 *Charter* rights. However, the Court held that foreign policy decisions of sovereign nations are not capable of prediction based on evidence to any degree of probability,

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and therefore their reactions to such testing could only be a matter of speculation. That being so, the claim was struck because the allegations could not possibly be proven to be true by way of evidence. For that reason, it would be improper to accept them as true for purposes of an application to strike.

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[82] In contrast, the allegations that Mr. Husak sexually victimized Katelin when Mrs. Bevan left her in his care, and thus caused emotional harm to both Katelin and Mrs. Bevan, are not inherently speculative. Nor are they disconnected from Mr. Husak's alleged misrepresentations that he would keep Katelin safe. Although Katelin's death has rendered proof of the allegations more challenging than it might have been otherwise, there are possible means of adducing evidence to do so. For example, Katelin's statements to others, including Mrs. Bevan and her counsellors, might be admitted under the principled approach to the admission of hearsay evidence, reasonable inferences based on her apparent emotional state before and after the incidents might be drawn, and salient admissions might be made.

[83] For all of the foregoing reasons, in my view the ANOCC discloses a reasonable claim in fraudulent misrepresentation and the judge erred in finding otherwise.

Does the ANOCC disclose a reasonable claim for negligent infliction of mental distress?

Legal Framework

[84] The Supreme Court of Canada outlined the general requirements of a negligence claim in *Mustapha*. To establish liability for negligence, the plaintiff must demonstrate that: i) the defendant owed them a duty of care; ii) the defendant's behaviour breached the standard of care; iii) the plaintiff sustained damage; and iv) the damage was caused by the defendant's breach, in fact and in law: *Mustapha* at para. 3. The primary issues on this ground of appeal concern the first requirement, namely, whether on the facts alleged in the ANOCC it is arguable that Mr. Husak owed Mrs. Bevan a duty of care to avoid the kind of loss alleged.

[85] Since *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), the duty of care analysis focusses on whether the parties' relationship is so "close and direct" that one may reasonably be said to owe the other a duty to take care not to injure them: *Saadati v. Moorhead*, 2017 SCC 28 at para. 24, citing *Cooper v. Hobart*, 2001 SCC 79 at para. 32. As Chief Justice McLachlin explained in *Mustapha*, whether such a relationship exists depends on foreseeability, moderated by policy concerns: *Mustapha* at para. 4. Where the type of relationship in issue has not been judicially recognized as giving rise to a duty of care, it must be tested by applying the so-called *Anns* formula: *Mustapha* at para. 5; *Cooper* at paras. 35–36. In *Saadati*, Justice Brown affirmed that the ordinary duty of care analysis formulated in *Mustapha* applies to claims for negligently caused mental injury: *Saadati* at para. 24.

[86] The second question for consideration in a negligence analysis is whether the defendant's conduct breached the standard of care by creating an unreasonable risk of harm: *Mustapha* at para. 7. The third is whether the plaintiff sustained compensable injury: *Mustapha* at para. 9.

[87] Historically, the common law adopted a posture of suspicion toward claims for negligently caused mental injury. As Justice Brown explained in *Saadati*, even after the bar to recovery for mental injury absent physical injury was lifted, further obstacles were imposed. For example, he noted that in *McLoughlin v. O'Brian*, [1983] 1 A.C. 410 (H.L.), Lord Wilberforce posited three considerations that could limit the boundaries of compensable "nervous shock", namely, relational, locational, and temporal proximity. He also noted that in *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310 (H.L), the House of Lords drew a distinction between mental injury claims arising out of sudden traumatic events brought by a "primary victim" (who was directly involved as a participant) and a "secondary victim" (who witnessed physical injuries caused to others): *Saadati* at para. 16.

[88] In *Saadati*, Justice Brown stated that the Supreme Court of Canada has not adopted "either the primary/secondary victim distinction, or *McLoughlin v. O'Brian*'s disaggregated proximity analysis". Rather, he explained, recoverability of damages

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for mental injury depends on satisfying the criteria for any successful negligence action. He went on to observe that each essential element of a negligence claim can pose a significant hurdle to establishing liability. For example, he noted, “not all claimants alleging mental injury will be in a relationship of proximity with the defendants necessary to ground a duty of care” and “not all mental injury is caused, in fact or in law, by the defendant’s negligent conduct”: *Saadati* at para. 19.

[89] After noting that the claim in *Mustapha* failed to overcome the final hurdle because the claimant’s damage was too remote from the defendant’s breach, Justice Brown said this:

> [21] It follows that this Court sees the elements of the cause of action of negligence as furnishing principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury. The view that courts should require something more is founded not on legal principle, but on policy – more particularly, on a collection of concerns regarding claims for mental injury … founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is “subjective” or otherwise easily feigned or exaggerated; and that the law should not provide compensation for “trivial matters” but should foster the growth of “tough hides not easily pierced by emotional responses” …
>
> [22] Where, therefore, genuine factual uncertainty arises regarding the worthiness of a claim, this can and should be addressed by robust application of those elements by a trier of fact, rather than by tipping the scales via arbitrary mechanisms …
>
> [23] I add this. As to the first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the Court’s decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and this cause of action protects a right to be free from negligent interference with one’s mental health …
>
> [24] It is also implicit in *Mustapha* that the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury. With great respect to courts that have expressed contrary views, it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity, as was done in *McLoughlin v. O’Brian*. Certainly, “temporal”, “geographic” and “relational” considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the “close and direct” relationship which is the hallmark of the common law duty of care …
>
> [Emphasis added.]

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[90] The fourth and final question for consideration is whether the breach caused the mental injury, in fact and in law. The inquiry with respect to the latter is concerned with whether the injury is too remote to warrant recovery. In *Mustapha*, Chief Justice McLachlin stated that, in judging whether a mental injury was foreseeable, the salient question is what a person of ordinary fortitude would suffer, citing *Devji*. However, she noted, where the defendant has actual knowledge of a plaintiff's particular sensibilities, the "ordinary fortitude" requirement need not be strictly applied: *Mustapha* at paras. 11–17.

[91] Decided by this Court in 1999, *Devji* involved claims for nervous shock brought by family members of a traffic accident victim. At the outset of his reasons, Chief Justice McEachern stated that the law had been evolving incrementally with respect to such claims, which pose difficult questions related to the duty of care and proximity: *Devji* at para. 2. He went on to state that nervous shock claims must be for actual mental injury caused by — not just resulting from — the defendant's actionable conduct: *Devji* at para. 4. In other words, he said, "damages for nervous shock cannot be recovered without exposure to a 'shocking' experience arising from exposure to the defendant's <u>negligence</u> — rather than just to one of its consequences": *Devji* at para. 40 (emphasis in original).

[92] Chief Justice McEachern conducted a detailed review of the evolution of the law in cases involving witnesses to tragic accidents and other traumatic events up to the point when *Devji* was decided. Among other things, he observed that in *McLoughlin* Lord Wilberforce considered it necessary to limit liability for foreseeable nervous shock claims based on policy-driven "control mechanisms" regarding "the class of persons whose claims should recognised; the proximity of such persons to the accident; and the means by which the shock is caused": *Devji* at para. 27, quoting from *McLoughlin* at 304. In addition, he stated, in *White and Others v. Chief Constable of South Yorkshire and Others*, [1999] 1 All E.R. 1 (H.L.), the companion case to *Alcock*, the House of Lords held that the plaintiff must have been present at the traumatic event or its immediate aftermath: *Devji* at para. 4, quoting from *White* at 41. He went on to find that this Court imposed similar policy-driven control

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mechanisms in *Rhodes*, which authority was binding. In particular, he stated that in *Rhodes* this Court imposed policy-driven control mechanisms similar to those articulated in *McLoughlin* and *Alcock* by requiring exposure "to some experience of alarming, horrifying, shocking or frightening nature" for damages to be recoverable in nervous shock claims: *Devji* at paras. 17, 37, 66, 71, 75–76.

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[93] Importantly for present purposes, the law with respect to negligently caused mental injury has continued to evolve since 1999, when this Court decided *Devji*. For example, the Supreme Court of Canada decided *Mustapha* in 2008 and *Saadati* in 2017. As I have explained, in *Saadati*, Justice Brown expressly stated that the Court had not adopted either the *McLoughlin* "disaggregated proximity analysis" or the primary/secondary victim distinction articulated in *Alcock* and *White*, which was the approach adopted in *Rhodes* and *Devji*. He also held that the recoverability of mental injury depends on satisfying the criteria for any successful negligence action, and rejected the view that additional policy-driven control mechanisms are required to limit negligently caused mental injury claims: *Saadati* at paras. 19, 21.

Positions of the Parties

Appellant

[94] Mrs. Bevan contends the judge erred in his characterization of her claim for negligent infliction of mental distress and related proximity analysis. In her submission, her claim had two distinct aspects: the first, grounded in her direct experience of harm; the second, as a so-called "secondary victim" of Katelin's sexual victimization. However, she says, the judge failed to recognize that distinction, erroneously imported the parameters of liability in tragic accident witness cases such as *Devji*, and incorrectly characterized her claim as limited to her exposure to Katelin suffering the consequences of Mr. Husak's negligence.

[95] With respect to the direct experience aspect of her claim, Mrs. Bevan submits the usual elements of negligence law apply, unmodified by the policy concerns associated with tragic accident witness or secondary victimization cases, citing *Saadati*. Assuming the pleaded facts are true, she says, it is arguable that Mr. Husak

owed her a duty of care in connection with his advice that he would keep Katelin safe at the Sarsons Road residence and breached his duty by removing her, thus foreseeably causing her mental injury when she discovered Katelin was missing, unknown to those present at the residence, and unreachable by phone. In other words, Mrs. Bevan says, the ANOCC pleads all the essential elements of a claim for negligently caused mental injury, including a direct causal connection between Mr. Husak's negligence, on the one hand, and herself and the mental harm she suffered, on the other.

[96] Moreover, Mrs. Bevan contends, insofar as her claim includes the broader harm she suffered from the immediate aftermath of Mr. Husak's sexual victimization of Katelin, it is arguable that, with careful limits, the law can and should be extended to provide relief to the parents of sexually victimized children as so-called secondary victims. She acknowledges that this broader view is novel, but argues it is not plain and obvious that her claim for mental injury arising from the immediate aftermath of Katelin's sexual victimization could not succeed. This is particularly so, she says, given the unique form of harm occasioned by sexual assault.

[97] According to Mrs. Bevan, the duty of care owed by Mr. Husak on the facts alleged in the ANOCC differs significantly from the duty of care owed by a defendant in a tragic accident case, as articulated in *Devji*. In her submission, Mr. Husak's duty to her should be viewed through a different lens. In particular, she says, in light of the unique facts in issue in this case, a careful and nuanced analysis of proximity based on a full factual foundation is required to permit the law to develop appropriately. It follows, she says, that the judge erred by striking her claim at the pleadings stage.

Respondent

[98] Mr. Husak contends Mrs. Bevan has failed to establish any error in the judge's reasons for striking her claim for negligent infliction of mental distress. In his submission, the judge: correctly considered the governing authorities by which he was bound, including *Devji* and *Rhodes*; correctly concluded her claim was for

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emotional injury resulting from his alleged conduct, not caused by that conduct; and, correctly identified the absence of proximity required to establish a duty of care. Nor, he says, has Mrs. Bevan provided any authority in support of her argument for extending the tort of negligent infliction of mental distress to provide relief to secondary victims of child sexual abuse, which, if accepted, would fundamentally alter its availability.

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[99] In Mr. Husak's submission, the proposed expansion of the law is inconsistent with its development, which narrowly limits the availability of claims for negligent infliction of mental distress to address significant concerns of indeterminate liability. In particular, he says, the policy-based control mechanisms on liability imposed in *Rhodes* and *Devji* are binding in this province and apply to this claim. According to Mr. Husak, Mrs. Bevan is asking this Court to revisit its conclusions in *Devji* and *Rhodes*. However, he says, while it may be possible in theory for this Court to overturn those decisions, as Justice DeWitt-Van Oosten observed in *E.B.* at para. 63, doing so would require a five-member division, which was neither sought nor convened on this appeal.

[100] Further, Mr. Husak says, the unique context of sexual assault does not require a complete factual foundation for a proper proximity analysis to be conducted. In his submission, the law is clear: a plaintiff must establish exposure to a "shocking" experience arising from exposure to the defendant's negligence, and no missing fact is necessary to determine whether that test has been met. According to Mr. Husak, a trial would not add any factual foundation that would alter the fundamental nature of the claim, which, as pleaded, is based on Mrs. Bevan's observations of Katelin's emotional injuries, and does not include Katelin's report of his alleged misconduct. Given the nature of the pleadings, the importance of judicial economy, consistency, and finality, and the unavailability of direct evidence concerning Katelin's injuries, he submits the judge's decision to strike the claim was correct.

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Analysis

[101] In my view, the judge erred in striking the ANOCC on both aspects of Mrs. Bevan's claim. As she submits, he incorrectly characterized her claim as limited to her exposure to Katelin's emotional suffering and her own response to that suffering, when it was also for harm caused to her directly by Mr. Husak's actionable conduct. In addition, he failed to adopt an appropriately generous approach to the pleadings and the claim's prospect of success, including its novel aspects, which are arguable and should be decided based on a full factual foundation.

[102] I agree with Mrs. Bevan that, read generously, the ANOCC includes an arguable claim for negligently caused mental injury grounded in her direct experience of Mr. Husak's conduct and the harm it caused her when she discovered Katelin was missing from the Sarsons Road residence. As I understand the pleadings, Mrs. Bevan claims that given their unique relationship, as informed by Mr. Husak's assurances that he would keep Katelin safe at the residence and her manifest sensibilities in that regard, Mr. Husak owed her a duty of care not to cause her mental injury by failing to do so. However, she alleges, he breached his duty by removing Katelin from the residence, which directly caused her foreseeable mental injury when she discovered the next morning that Katelin was missing and unreachable. While the pleadings might benefit from some amendment, that is the substance of this aspect of her claim.

[103] I also agree that Mrs. Bevan's claim could arguably extend more broadly to her mental injury arising from her exposure to the aftermath of Mr. Husak's sexual assault of Katelin. In my view, it is at least arguable that, having left a child with a trusted adult, a parent could foreseeably suffer mental injury upon discovering shortly thereafter that they had unwittingly facilitated the sexual abuse of their child and witnessing their child's suffering as a result. While novel, given the evolving state of the law and widely-known harm associated with sexual assault, in my view, it cannot be said that a claim of this sort has no prospect of success whatsoever. Nor can it be said that the form of proximity analysis mandated in *Devji* for tragic

accident cases necessarily applies on the facts alleged, whether or not *Devji* remains good law in light of *Saadati*.

[104] As Justice Brown explained in *Saadati*, Canadian negligence law now clearly recognizes the existence of a common law duty to take reasonable care to avoid causing foreseeable mental injury to sufficiently proximate others. Whether Mr. Husak owed such a duty to Mrs. Bevan, whether he breached that duty, and whether he caused her foreseeable mental injury as a result requires an investigation of the full facts, followed by a thorough, nuanced, and context-sensitive analysis of each essential element of the claim.

[105] For these reasons, I conclude the judge erred in striking the claim for negligent infliction of mental distress.

<u>Conclusion</u>

[106] I would allow the appeal and set aside the order striking the claims.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Butler"

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