

CANADA / JUDGMENT

Mutch v. John Doe

2025 BCSC 560

COURT

Supreme Court of British Columbia

DECIDED

26 March 2025

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2025 BCSC 560 Mutch v. Jone Doe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mutch v. Jone Doe,

2025 BCSC 560

Date: 20250326

Docket: S164595

Registry: Victoria

Between:

Marney Mutch

Plaintiff

And

John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5,

John Doe 6, John Doe 7 and The City of Victoria

Defendants

Before: Associate Judge Harper

Reasons for Judgment

The Plaintiff, represented by counsel and appearing in person:

P. Harrison

(May 30, 2024 only)

M. Mutch

Counsel for the Defendant, The City of Victoria:

A. Srivastava

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.

May 30, September 25, October 29, and December 18, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 26, 2025

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Introduction

- [1] On November 1, 2014, Marney Mutch's only child, Rhett Mutch, was shot and killed by a member of the Victoria City Police Department ("VicPD").
- [2] Ms. Mutch filed a brief notice of civil claim on November 1, 2016 (the "original NOCC") with the assistance of pro bono legal counsel. In the original NOCC, Ms. Mutch seeks to advance claims against the City of Victoria (the "City") and seven unnamed police officers arising from Rhett's death. She alleges that the officers responded to a call regarding Rhett, and confronted him at Ms. Mutch's home, resulting in the shooting death. Ms. Mutch alleges that the actions of the officers were in violation of Rhett's rights under s. 7 of the Canadian Charter of Rights and Freedoms, and in violation of use-of-force law laid out in s. 25 of the Criminal Code of Canada, R.S.C. 1985, c. C-46. She claims vicarious liability against the City for the actions of the police officers. She seeks damages for wrongful death in accordance with the Family Compensation Act, R.S.B.C. 1996, c. 126, Charter damages and exemplary

and punitive damages.

- [3] The City filed its response to civil claim on November 15, 2016. The City concedes that, pursuant to s. 20 of the Police Act, R.S.B.C. 1996, c. 367, it is jointly and severally liable for torts committed by members of VicPD in the performance of their duties. The City admits the basic facts of the death. However, the City pleads that the use of deadly force was legally justified because the officers had reasonable grounds to believe that it was necessary to protect themselves or each other from death or grievous bodily harm. It denies that the officers were negligent and that any s. 7 Charter rights were violated. It also denies that Ms. Mutch has suffered any loss or damage, and says that if loss or damage occurred, it was caused or contributed to by the "unlawful acts and/or faults and/or negligence of the plaintiff and Rhett Mutch". The City pleads and relies on the Negligence Act, R.S.B.C. 1996, c. 333.
- [4] The Independent Investigations Office of BC (the "IIO") is responsible for conducting investigations into all officer-related incidents that result in death or serious harm. The IIO conducted an investigation into Rhett's death. The Chief Civilian Director of the IIO (the "CCD") delivered his report on June 7, 2016. The CCD's decision was that he did "not consider that any police officer may have committed an offence under any enactment and therefore the matter will not be referred to Crown counsel for consideration of charges".
- [5] A coroners inquest took place from May 15 to 19, 2017. The coroners jury made a finding that Rhett died by suicide. Pursuant to the requirements of the Coroners Act, S.B.C. 2007, c. 15, the jury must not make conclusions of law or determine who is responsible for the death.
- [6] The legal and factual issues in this case are complex. Ms. Mutch is self-represented, although she has had assistance from counsel from time to time.
- [7] The litigation has not moved forward in the sense that Ms. Mutch has not delivered a list of documents (the City delivered its list of documents in December 2017), no examinations for discovery have been held, and no trial date has been set.

The Applications

- [8] In February, 2023, counsel for the City wrote to Ms. Mutch, inviting her to consent to a dismissal of the action. Ms. Mutch declined the invitation.
- [9] The City filed a notice of application on October 12, 2023 seeking an order that the proceeding be dismissed for want of prosecution. To put the City's application in context, the City did not apply to strike the original NOCC for any reason related to the quality of the pleading, such as failing to disclose a cause of action. In fact, the City has conceded that the original NOCC, while brief, likely would have survived an application to strike as presenting a viable claim of statutory liability against the City for simple negligence of VicPD members.

- [10] Ms. Mutch filed a notice of application on April 19, 2024 for an order, as she phrased it in para. 1 under "Part 1: Order Sought":
1. To amend the style [sic] by naming John Doe 1-7 defendants.
- [11] When the City's application came on for hearing on May 24, 2024, Justice Wolfe ordered that both Ms. Mutch's application and the City's application be heard together on May 30, 2024. Ms. Mutch filed an amended notice of civil claim on May 24, 2024.
- [12] I heard the City's application on May 30, 2024. Mr. Harrison appeared for Ms. Mutch on the City's application on a limited retainer--he was not retained to represent Ms. Mutch on her application to amend the style of proceeding. Counsel for both parties completed their submissions on the City's application. As there was insufficient time to conclude the hearing of Ms. Mutch's application, the hearing was adjourned and was eventually scheduled to continue on September 25, 2024.
- [13] In the meantime, on September 19, 2024, Ms. Mutch filed a new notice of application to be heard on September 25, 2024 for an order amending the style of proceeding to replace the John Doe defendants with the names of the police officers who were involved in the incident on November 1, 2014, and to amend her original NOCC. The September 19, 2024 proposed amended NOCC was stated to be attached to the notice of application, but it was not.
- [14] The hearing proceeded on September 25, 2024. There was again insufficient time to conclude the hearing and, despite the late filing of the September 19, 2024 notice of application, I granted leave to Ms. Mutch to proceed with that application when the hearing resumed on the new date.
- [15] Ms. Mutch then filed yet another notice of application on October 7, 2024 to amend her original NOCC ("the October 7 application"). The proposed further amended notice of civil claim was attached (the "Proposed Pleading"). When the hearing resumed on October 29, 2024, Ms. Mutch explained her multiple notices of application on the basis that she is working hard to understand the legal issues and wants an opportunity to improve her pleading.
- [16] I granted leave to Ms. Mutch to proceed with the October 7 application. Because the October 7 application is the application that Ms. Mutch wishes to have heard by the court, her previous notices of application filed April 19, 2024 and September 19, 2024 will be deemed to be withdrawn.

The City's Application to Dismiss for Want of Prosecution

- [17] Rule 22-7(7) of the Supreme Court Civil Rules provides:

Dismissal for want of prosecution

- (7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.
- [18] The decision to dismiss an action for want of prosecution is discretionary.
- [19] The framework of analysis that should govern an application to dismiss for want of prosecution has been revised by our Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473. In *Giacomini*, the action, which involved a construction dispute, was commenced in August 2019. By the time of the hearing of the application to dismiss in March 2023, the plaintiff had not produced documents, scheduled examinations for discovery, or set a trial date. The chambers judge found the plaintiff's delay was inordinate and inexcusable, but declined to dismiss the action because the delay had not resulted in prejudice to the defendants: *Giacomini* at para. 2.
- [20] In the revised test, prejudice is no longer a stand-alone requirement for dismissal. The new test asks three questions:
- 1) is the delay inordinate?
 - 2) is the delay inexcusable? and
 - 3) if the first two questions are answered in the affirmative, is it in the interests of justice for the action to continue?
- 1) Inordinate Delay
- [21] Since the filing of the original NOCC on November 1, 2016, Ms. Mutch has taken no steps to advance the litigation. Although Ms. Mutch has her own reasons for the delay, on the preliminary question of whether the delay has been inordinate, it is obvious from the timeline that the answer to the question is "yes".
- 2) Inexcusable Delay
- [22] The litigation proceeded into 2018 with documents being disclosed by both parties, although Ms. Mutch did not produce a formal list of documents.
- [23] Ms. Mutch decided to await the outcome of the IIO investigation and the coroners inquest before proceeding with the litigation. She did this in order to acquire evidence and learn the details of the officers' justification for the shooting. It is important to note, however, that while the evidence she acquired could be used to develop her claim, the statements made by witnesses in the IIO investigation and at the coroners inquest could not be used at trial because the statements are protected by legislation. While her decision to await the outcome of these proceedings was understandable from her subjective point of view, waiting caused unreasonable delay.

[24] Provisions of the Police Act prevent the use of statements made by the police officers in the IIO investigation in a civil proceeding:

Use of statements made by officers

38.102 (1) A statement provided or an answer given by an officer during an investigation under this Part is inadmissible in evidence in court in a civil proceeding for remedies against the officer in relation to the matter under investigation.

(2) Subsection (1) applies also in respect of evidence of the existence of a statement provided or answer given by an officer during an investigation under this Part.

[]

Use of statements made to investigating officer by members and former members

102 (1) A statement provided or an answer given during an investigation under this Part by a member or former member is inadmissible in evidence in court or in any other proceeding, except

- (a) in a discipline proceeding, public hearing or review on the record concerning the conduct under investigation,
- (b) in a prosecution for perjury in respect of sworn testimony,
- (c) in a prosecution for an offence under this Act, or
- (d) in an application for judicial review or an appeal from a decision with respect to that application.

(2) Subsection (1) applies also in respect of evidence of the existence of a request to make a statement under section 101.

[25] Starting in October 2021, Mr. Harrison assisted Ms. Mutch in obtaining an order for the production of the IIO records. A consent order was finally made on June 10, 2022 for the production of such records.

[26] Ms. Mutch obtained all the evidence from the police perspective by the time the coroners inquest results were released pursuant to the consent order made on June 10, 2022.

[27] The police officers were witnesses at the coroners inquest. Evidence given by the police officers at the coroners inquest may not be used to establish the police officer's liability in a civil proceeding. Section 35 of the Coroners Act provides:

Rights of witnesses

35 (1) While giving evidence at an inquest, a witness may receive advice from counsel.

- (2) A witness is considered to have objected to answering, but must still answer, any question that may
 - (a) incriminate the witness in a criminal proceeding, or
 - (b) establish the witness's liability in a civil proceeding.
 - (3) Any answer provided by a witness before a coroner must not be used or admitted in evidence against the witness in any trial or other proceedings, other than a prosecution for perjury in respect of the answer provided.
- [28] Waiting for the outcome of the IIO investigation and the coroners inquest was subjectively reasonable because Ms. Mutch wanted to gather evidence, but from the perspective of the requirement of the civil justice system that a party advance their claim at a reasonable pace, waiting was inexcusable.
- [29] The COVID-19 pandemic explains, but does not excuse some delay. Litigants were expected to get on with their cases once the initial crisis had subsided and court processes were in place so that litigation could be conducted safely.
- [30] Ms. Mutch has been largely self-represented. Being self-represented does not give a litigant a free pass and absolve them of the responsibility to move a case forward.
- [31] Ms. Mutch was involved in a motor vehicle accident on October 3, 2016. The notice of civil claim arising from that accident was filed on August 22, 2018, and the response to civil claim admitting liability was filed on July 16, 2019. The City argues that Ms. Mutch made a priority of her personal injury case and not the present case. There was no evidence before me as to when Ms. Mutch's personal injury claim was resolved. I cannot draw the conclusion the City urges because Ms. Mutch had legal counsel for the personal injury case who would have ensured that the required legal steps in the case were being attended to. I do not place any weight on this argument.
- [32] Ms. Mutch attended a meeting on January 26, 2022 of a Special Committee on Reforming the Police Act. The City uses this fact to argue that Ms. Mutch chose to channel her energies towards advocacy rather than towards advancing her lawsuit. I agree with the City that Ms. Mutch ought to have prosecuted this litigation more vigorously, however, I do not see Ms. Mutch's advocacy efforts as inconsistent with her intention to proceed with the litigation. Attending a meeting is much less onerous than advancing a lawsuit.
- [33] I have concluded that, despite Ms. Mutch's subjective reasons for the delay, there has been inexcusable delay in the advancement of the proceeding.
- 3) Interests of Justice

- [34] The power to dismiss an action for want of prosecution must be interpreted in light of the general object of the Supreme Court Civil Rules as stated in R. 1-3(1), "to secure the just, speedy and inexpensive determination of every proceeding on its merits". In the present case, the prosecution of the case certainly has not been speedy, but to dismiss it would mean that the proceeding would not be determined on its merits.
- [35] Undue delay in civil proceedings undermines public confidence in the justice system: Giacomini at para. 5. If Ms. Mutch had been able to be represented by legal counsel experienced in the area of police civil liability from November, 2016 onwards, I think the case would have progressed at an acceptable pace. The fact is, however, Ms. Mutch is on her own. I recognize, taking a holistic approach, that Ms. Mutch has been disadvantaged by having to prosecute a challenging case as a self-represented litigant. I further note that Ms. Mutch has become bogged down in trying to amend her original NOCC to comply with the requirements of pleading that she does not fully understand. Whether Ms. Mutch is capable of seeing this case through to its conclusion (win or lose) remains to be seen. There is much difficult legal work ahead of her.
- [36] The context in which the delay has occurred is a factor to be considered. Ms. Mutch has suffered from post-traumatic stress disorder arising from the incident. Ms. Mutch's mental health has been a significant impediment to her prosecuting her case in a timely manner.
- [37] If Ms. Mutch had had legal counsel from the beginning of the case, I doubt counsel would have awaited the outcomes of the IIO investigation and the coroners inquest. The litigation and those other processes would have unfolded in parallel and the required steps in the litigation would already have been achieved, including trial. In my view, the case ought to have been concluded by now.
- [38] There is a public interest in having cases heard on their merits, especially a case like the present one that involves alleged negligence of police officers who perform a public duty.
- [39] Although prejudice is not a stand-alone consideration on an application to dismiss for want of prosecution, prejudice (or the lack thereof) may be taken into consideration on the analysis of the interests of justice. There is no requirement for the applicant to prove or rebut prejudice: Giacomini at para. 72. There is no evidence that the City is prejudiced in its defence of the claim by the delay.
- [40] I am not persuaded that the interests of justice justify depriving Ms. Mutch of her presumptive entitlement to an adjudication of her case on its merits. The action is not bound to fail. Although the issue of whether the conclusions of the CCD can be used by any of the parties at trial is not an issue on this application as that is an issue for trial, Ms. Mutch may be able to develop her case and replicate the evidence elicited during the IIO investigation given the CCD's conclusions as follows:

The subject officer was recognized as the tactical expert at the scene. Had he been informed that the affected person was in the residence alone, and that the affected person had threatened [sic] "suicide by cop", it is clear from his statement that different tactics would have been used and the involved officers would have immediately retreated from the residence in favour of declaring an armed barricade or never entered the residence in the first place.

[41] The CCD ends his report with the following:

Further review into this matter (which may include a review of officer conduct, policy, tactics and training opportunities) is part of a mandatory review process required by the Police Act. Such a review falls under the jurisdiction of the Victoria Police Department and the Office of the Police Complaints Commissioner.

[42] I have concluded that it is in the interests of justice to allow Ms. Mutch to continue with her action.

[43] The City's application to dismiss the action for want of prosecution is dismissed. The next question is whether Ms. Mutch should be permitted to substitute the John Doe defendants with the named police officers, and to amend the body of the original NOCC (which has already been amended once after Ms. Mutch filed her original notice of application on April 19, 2024).

Ms. Mutch's Application to Substitute Named Police Officers for John Doe Defendants and to Amend the Original NOCC

[44] Ms. Mutch seeks to substitute the John Doe defendants with the names of the police officers involved in the incident.

[45] She also seeks to extensively amend her original NOCC.

Naming the Police Officer Defendants

[46] Rules 6-2(7)(b) and (c) of the Supreme Court Civil Rules provide:

Adding, removing or substituting parties by order

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

[]

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
- (i) any relief claimed in the proceeding, or
- (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[47] Pursuant to Rule 6-2(9.1), unless the court otherwise orders, an application to add or substitute a party may be made without notice to any person who is not a party. In the present case, the court did not order that any of the John Doe defendants be served with notice of the application. Although the City may have given notice to the police officers informally, the application response is filed only on behalf of the City and not on behalf of any of the named police officers. If a person is added or substituted as a party, that party then has the right pursuant to Rule 6-2(8)(c) to apply to the court to vary or discharge the order within 21 days after the date on which the order is served on the person.

[48] Ms. Mutch frames her application as being an application to add parties pursuant to Rule 6-2(7)(c). In fact, it could properly be considered an application to substitute parties because the John Doe defendants were named parties in the original NOCC.

[49] The original NOCC pleaded that:

- a) the actions of VicPD members who attended the call to Ms. Mutch's residence were negligent, breached Rhett Mutch's s. 7 Charter rights, and violated use-of-force law as set out in s. 25 of the Criminal Code; and
- b) the City is vicariously and jointly and severally liable for the actions of the John Doe defendants pursuant to s. 20 of the Police Act.

[50] As previously noted, the City concedes that, while brief, the original NOCC likely would have survived an application to strike as presenting a viable claim of statutory liability against the City for simple negligence of VicPD members.

[51] In her original NOCC, Ms. Mutch named the seven police officers as John Does because she did not know their names. Ms. Mutch learned the names of the police officers just prior to the May, 2017 coroners inquest. The City argues that Ms. Mutch did not take timely steps to apply to substitute the names. I agree, but there is no prejudice to the police officers by being named now. The City must have known their names at the time the City was served with the original NOCC. The police officers cannot now claim to be surprised by the application to substitute their names for "John Does 1-7".

[52] Section 21 of the Police Act permits a claim to be advanced against a police officer personally for gross negligence. Section 21 states:

Personal liability protection for police officers and appointed persons

21 (1) In this section, "police officer" means either of the following:

- (a) a person holding an appointment as a constable under this Act;
 - (b) an IIO investigator.
- (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by the person in the performance or intended performance of the person's duty or in the exercise of the person's power or for any alleged neglect or default in the performance or intended performance of the person's duty or exercise of the person's power.
- (3) Subsection (2) does not provide a defence if
- (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
 - (b) the cause of action is defamation.
- (4) Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious liability arising out of a tort committed by the police officer or other person referred to in that subsection:
- (a) a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
 - (b) a regional district, government corporation or entity prescribed for the purposes of paragraph (d) of the definition of "entity" in section 1, in the case of a tort committed by any of its designated constables or enforcement officers;
 - (c) the government, in a case to which section 11 applies.

[53] In my view, the police officers' names should be substituted for the "John Doe" names. Alternatively, and adopting the framing of Ms. Mutch's notice of application, if the application is more properly considered an application to add parties, I would reach the same conclusion. The individual police officers ought to have been joined as parties because Ms. Mutch wishes to advance claims against them personally for gross negligence. In fact, they were joined as parties but as "John Does". The police officers' actions are inextricably linked to the claim against the City. The addition of the police officers (assuming that the framing of the issue is "adding" and not "substituting") is just and convenient: *Madadi v. Nichols*, 2021 BCCA 10.

[54] It is open to Ms. Mutch to claim that any or all of the police officers acted with gross negligence. The issue is whether the Proposed Pleading discloses such a claim.

[55] I conclude that the police officers may be individually named. Ms. Mutch runs the risk, as does any plaintiff, that if she fails to amend the Proposed Pleading to properly plead the facts and law regarding gross negligence, she may be faced with an application brought by any, or all, of the now-named police officers to strike her pleading.

[56] Also, Ms. Mutch needs to be aware that because an application to add or substitute a party may be made without notice to any person who is not a party (in this case, this would be the seven police officers), pursuant to Rule 6-1(9.1), the Supreme Court Civil Rules provide that after the person is made a party, that person may apply to the court to vary or discharge the order: Rule 6-2(8)(c).

Proposed Amendments to the Original NOCC

[57] A notice of civil claim must be in Form 1: Rule 3-1(1). Rule 3-1(2) sets out the requirements of a notice of civil claim:

Contents of notice of civil claim

(2) A notice of civil claim must do the following:

- (a) set out a concise statement of the material facts giving rise to the claim;
- (b) set out the relief sought by the plaintiff against each named defendant;
- (c) set out a concise summary of the legal basis for the relief sought;
- (d) set out the proposed place of trial;
- (e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;
- (f) provide the data collection information required in the appendix to the form;
- (g) otherwise comply with Rule 3-7.

[58] A party may amend a pleading once without leave of the court, or at any time with leave of the court: Rule 6-1(1).

[59] Amendments will be permitted if necessary to determine the real question in issue. They will not be permitted if they violate the rules of pleading, including the requirement to disclose a reasonable claim. The overriding consideration is what is just and convenient: *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 at para. 166.

[60] I will now turn to the amendments in the Proposed Pleading.

- [61] Ms. Mutch has included claims for simple negligence and gross negligence against the named police officers within Part 1: Statement of Facts, Causes of Action. The City argues that Ms. Mutch has removed the material facts and legal basis that could make out a claim in negligence for which the City could be statutorily liable. Thus, the City argues, the Proposed Pleading now discloses no reasonable claim: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 22-25.
- [62] In the new Statement of Facts, Ms. Mutch provides extensive evidence of the circumstances surrounding the incident. Pursuant to Rule 3-7(1), a party must plead material facts but not the evidence that would prove the material facts. A material fact is one that, when resolved, will have legal consequences between the parties to the dispute: *Sahyoun v. Ho*, 2013 BCSC 1143 [Sahyoun 2013] at para. 26. *Sahyoun 2013* is one in a line of decisions regarding claims brought by self-represented plaintiffs. *Sahyoun 2013* was not relied on by either party, but it is a well-known decision on pleadings requirements and is recommended reading. The City relied on a later *Sahyoun* decision, *Sahyoun v. Ho*, 2016 BCSC 392 on the want of prosecution issue. In the court's experience, even legal counsel sometimes have difficulty distinguishing between material facts and evidence. In the Proposed Pleading, Ms. Mutch weaves evidence into the narrative of material facts. On the whole, and reading the Statement of Facts generously, I find that the excessive recitation of evidence is acceptable given the difficulties Ms. Mutch has as a self-represented litigant.
- [63] Ms. Mutch sets out in a section entitled "Causes of Action" a subheading "Gross Negligence". In that section, she pleads a set of facts that she describes as a gross deviation from the standard of care. The City concedes that, while poorly pleaded, this pleading, without the extraneous evidence, could stand as a pleading of negligence with material facts in support of a claim of gross negligence. However, it is not clear which claims of gross negligence she is making against which police officer. If Ms. Mutch wishes to pursue claims of gross negligence, she will need to specify what conduct of which police officer constitutes gross negligence.
- [64] The Statement of Facts in the Proposed Pleading includes the list of the named police officers with statements of fact that may support the claims of simple or gross negligence. However, Ms. Mutch needs to be more specific regarding which statements of fact apply to which officer.
- [65] None of the statements of fact support claims of criminal misconduct. Assertions of criminal misconduct with no material facts pleaded in support are vexatious, scandalous, and embarrassing: *Sahyoun v. Ho*, 2016 BCSC 392 at paras. 58-63, appeal dismissed as abandoned, 2017 BCCA 96. The court is entitled to subject allegations of criminal misconduct to "skeptical analysis": *Grosz v. Royal Trust Corporation of Canada*, 2020 BCSC 128. There has been no criminal charge or prosecution against any of the named police officers.

- [66] Ms. Mutch also makes perjury claims that certain of the named police officers gave false testimony under oath. A claim that a party has committed perjury is not a cause of action.
- [67] All claims alleging that any officer committed perjury are struck and must not be included in the Proposed Pleading.
- [68] The claim raised against Daryl Lillev of the VicPD described as "negligence" is permissible and may be included.
- [69] The amended claims in negligence against the City are acceptable as they expand on the original NOCC, but do not raise new claims. Put another way, if I did not permit the new particulars of negligence to be included in the Proposed Pleading, Ms. Mutch could still put forward the claims at trial as they are caught in the original basket of allegations set out in the original NOCC.
- [70] In the "Losses Suffered" section, Ms. Mutch describes the facts of her losses, but also expands on those facts and provides evidence. Evidence should not be pleaded, but reading the pleading generously, it is acceptable.
- [71] Within the Legal Basis section, Ms. Mutch includes a subsection "Perjury s. 131(1)". This section must be removed.
- [72] The subsection "Criminal Negligence s. 219" must be removed because there are no material facts pleaded that support a claim of criminal negligence.
- [73] In presenting her evidence at trial, Ms. Mutch will likely want to lead evidence regarding the use of force. However, the evidence is to be presented at trial (through expert reports), not set out in a notice of civil claim.
- [74] The pleading under the heading "Section 7 - Life, Liberty and Security of the Person" is acceptable and may remain in the Proposed Pleading.
- [75] Ms. Mutch alleges within the Legal Basis section that Rhett was not informed of the reasons for his detention. There are no material facts that allege that Rhett was being detained. I do not understand this pleading. The pleading is confusing and must be removed.
- [76] In a section Ms. Mutch calls "Negligence - Psychiatric Injury", all Ms. Mutch does is cite *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27. I think she intends to plead that the City and the named police officers owed her a duty of care, that they breached the standard of care, that she sustained a psychiatric injury as a result. If that is her intention, she must comply with the rules of pleading. She may advance the claim, but will need to either inform herself of the requirements of the pleading or, preferably, obtain legal advice to assist her with the drafting.
- [77] Ms. Mutch seeks to advance a claim of negligence in regard to police training. She cites an American decision that seems to deal with a city's liability for inadequate training of police officers. The Proposed Pleading adequately sets out the material facts that, if proved, could

lead to a finding at trial of liability on the part of the City for negligence in regard to police training. However, reliance on an American decision in the pleading is not useful. It is possible that the trial judge may permit Ms. Mutch to refer to American case authorities in her legal argument, but the case she cites should not be included in the notice of civil claim.

- [78] Ms. Mutch lists each police officer's name and sets out the claims after each name. The claims of perjury and criminal negligence must be removed.
- [79] Under "Part 4: Material to be Relied Upon", Ms. Mutch writes: "IIO Case Files; Coroner's Report; Inquest Transcript and Audio Recording; and Exhibits, including of a physical nature."
- [80] Part 4 of a notice of civil claim, as per the required Form 1, is intended to be restricted to enactments to be relied on. None of the items Ms. Mutch lists are enactments and therefore the items listed must be removed. Whether Ms. Mutch is permitted to refer to the items listed in her evidence at trial is a matter to be determined by the trial judge after considering the issue of the statutory inadmissibility of witnesses' statements.
- [81] I will conclude my review of the Proposed Pleading to point out the Ms. Mutch that it is not the role of the court to draft pleadings on behalf of a party. I urge Ms. Mutch to read carefully Sahyoun 2013. This decision provides a roadmap on how to draft proper pleadings. I can do no better than Justice Voith did in Sahyoun 2013 in making clear to Ms. Mutch what the rules of pleading require. I also strongly urge Ms. Mutch to retain legal counsel, on whatever basis she can, to help her with the redrafting of the Proposed Pleading. Counsel may be available on a limited retainer basis, also known as "unbundled legal services".
- [82] As a cautionary tale, I note that the endpoint of the long line of Sahyoun decisions was a dismissal of the action. If Ms. Mutch wishes to avoid that fate (and I am sure that she does), she must comply with the requirements of a proper pleading or she may be facing a future application to strike her claim.

Summary of Orders

- [83] I make the following orders:
- 1) The notices of application filed by Ms. Mutch on April 19, 2024 and September 19, 2024 are deemed to be withdrawn.
 - 2) The City's application to dismiss the action for want of prosecution is dismissed.
 - 3) Ms. Mutch has leave to name the seven police officers as defendants.
 - 4) Ms. Mutch has leave to file, within 45 days of the release of these reasons, a further amended notice of civil claim that complies with Rule 3-1 of the Supreme Court Civil Rules and that complies with the guidance provided by these reasons.
 - 5) Ms. Mutch must deliver her list of documents within 60 days of release of these reasons.

- 6) I will not be seized of any further applications.
- 7) Costs will be in the cause.

"Harper A.J."

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Prepared on 27 October 2026 · Esheria