

CITATION: Smitten Baby Products Inc v. FirstOnSite Restoration Limited, 2025 ONSC 4281
COURT FILE NO.: CV-19-00629211-0000
DATE: 20250721

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Smitten Baby Products Inc., Plaintiff

-and-

Lloyd's Underwriters under Agreement No. C001571804B (AK)
B1306C001571804B, The Sovereign General Insurance Company, Aviva
Insurance Company of Canada, Royal & SunAlliance Insurance Company of
Canada, Temple Insurance Company, Totten Insurance Group Inc. Hub
International Ontario Limited, SCM Insurance Services GP Inc. SCM Insurance
Services Inc. ClaimsPro Inc., FirstOnSite Restoration Limited, Georgian Claim
Services, Inc., Insurance Intermediary 1, Insurance Intermediary 2, Insurance
Intermediary 3, Adjuster 1, Adjuster 2, and Adjuster 3, Defendants

BEFORE: Robert Centa J.

COUNSEL: William M. Sharpe and Anu Toor, for the plaintiff (responding party)

Mario Delgado and Tiffany Sillanpää, for the defendant (moving party),
FirstOnSite Restoration Limited

Abigail March, for the defendant Totten Insurance Group

HEARD: July 8, 2025

ENDORSEMENT

[1] In October 2018, water damaged the contents of a commercial warehouse occupied by the plaintiff, Smitten Baby Products Inc. Smitten Baby made an insurance claim under a policy of insurance issued by a variety of insurers.¹ The insurers retained the defendant, ClaimsPro Inc., as its adjuster. ClaimsPro, in turn, retained FirstOnSite Restoration Limited (“FOS”) to investigate and report on the state of the property.

[2] Smitten Baby was not satisfied with how quickly the insurers paid out its claim. On November 14, 2019, Smitten Baby issued a statement of claim that named the insurers, their adjusters, and FOS as defendants. Smitten Baby seeks to recover pure economic loss

¹ According to the statement of claim, the defendants, Lloyds' Underwriters, The Sovereign General Insurance Company, Aviva Insurance Company of Canada, Royal & SunAlliance Insurance Company of Canada, Temple Insurance Company, and Totten Insurance Group, are various insurers and/or Lloyd's syndicates involved in the Lloyd's insurance policy under which Smitten Baby made its loss claim.

in the form of economic damages and business losses arising from the insurers' delay in paying the claim.

- [3] FOS moves to have the action against it dismissed. In my view, it is plain and obvious that FOS, an insurance investigator retained by the insurer, does not owe a duty of care to the insured, Smitten Baby. I dismiss Smitten Baby's action against FOS.

1. Smitten Baby's statement of claim

- [4] All of the facts in this section are taken from the statement of claim and are assumed to be true for the purposes of the motions under rule 21.01(1)(a) and 21.01(1)(b).
- [5] Smitten Baby is a corporation incorporated under the law of Ontario, carrying on business in Stratford as a manufacturer and wholesaler of baby clothing and products. FOS is a Nova Scotia corporation that carries on business in Ontario "for insurers and property owners as an insurance investigator, restoration contractor and property salvor."
- [6] On October 18, 2018, one of Smitten Baby's principals, Jason Pearson, observed water pooling on top of stock boxes at its warehouse. The "ingress of water into the Premises ("the Occurrence") was a sudden and fortuitous act from rainwater entering in the ceiling and wall area of the annex to the Premises after a tarpaulin was dislodged."
- [7] On October 19, 2022, Ryan Potts of ClaimsPro called Mr. Pearson and made arrangements to visit the warehouse the next day to inspect the damage. On October 22, 2022, Mr. Potts represented to Mr. Pearson that FOS "was being engaged to investigate the loss" and that Mr. Potts had concluded that the water ingress was seepage or leakage not covered by the policy of insurance. Mr. Potts "speculated and formed the belief that the cause of the loss was seepage or leakage before [FOS] had attended at the Premises and before the investigation commenced."
- [8] Smitten Baby pleads that, once retained by the insurers, FOS owed it certain duties:
33. [FOS], once appointed by Insurers at Interest, had duties to [Smitten Baby] to:
 - a) immediately and properly secure the Premises;
 - b) properly and carefully assist in the investigation of the Loss at the direction of adjusters;
 - c) secure [Smitten Baby's] property from further damage;
 - d) timeously and properly conduct an inventory of lost and damaged property;
 - e) timeously and properly segregate damaged from sound property;

f) make recommendations and conduct operations for the cleaning, recovery and salvage of property; and

g) generally to protect [Smitten Baby's] property.

[9] On this basis, FOS was “in a position of legal proximity to” Smitten Baby.

[10] Smitten Baby pleads the following material facts related to FOS's actions on October 22, 2018:

47. Two representatives of Firstonsite Restoration attended at the Premises later on 22 October 2018. The first [FOS] representative:

a) made only a cursory inspection of the damaged property;

b) made only a cursory inspection of the annex to the Premises where the damaged property was located;

c) inspected the rest of the Premises;

d) referred to “seepage” before and in the course of his inspection;

e) represented to Jason Pearson that [FOS] was bringing in a person to trace the source of “seepage”; and

f) represented to Jason Pearson [FOS] would not take an inventory of the damage until instructed to do so by ClaimsPro.

48. The second [FOS] representative attended the Premises on 22 October 2018 to take photographs and conduct a thermography scan. The second [FOS] representative correctly identified the source of water ingress as the displacement of a tarpaulin from a wall area under renovation, allowing the entry of rainwater.

[11] Smitten Baby received a copy of the FOS investigation report on October 24, 2018. Smitten Baby pleads that FOS acted wrongfully in its investigation, as a result of which, Smitten Baby suffered damages:

49. Claimspro provided [Smitten Baby] with a copy of the [FOS] report on 24 October, 2018. In its report, [FOS] suppressed the photographs and thermography scan taken by its second inspector as to the actual source of water ingress. This report was intended to support a pre-investigation denial of the insurance claim.

50. [Smitten Baby] states that ClaimsPro and [FOS] acted wrongfully in their investigation in that they, or persons for whose negligent acts and omissions they are at law responsible:

- a) formed a preconceived speculation as to the cause of the Loss as seepage which was a risk excluded by the Policy;
- b) investigated and sought facts supportive of their preconceived speculation; and
- c) disregarded and suppressed facts contrary to their preconceived speculation and supportive of the actual cause of the Loss.

51. As a result of the wrongful acts and omissions pleaded, [Smitten Baby] suffered loss and damages and the partial indemnity for its property losses which [Smitten Baby] received was wrongfully and unduly delayed.

[12] Smitten Baby does not plead that FOS had any further involvement after it completed its report.

[13] On November 30, 2018, Smitten Baby advised ClaimsPro that it disagreed with the FOS report. ClaimsPro responded that Smitten Baby could obtain its own report if it disagreed with the FOS report. On December 3, 2018, Smitten Baby obtained its own report, which concluded that the water entered the premises through a wall and ceiling under a displaced tarpaulin. Smitten Baby delivered its proof of loss for \$54,088.22 on January 15, 2019, and received payment of \$57,318.51 on or about March 27, 2019.

[14] Smitten Baby pleads that it suffered damages as a result of FOS's negligent acts:

109. [Smitten Baby] has suffered losses and damages a result of the negligent acts and omissions of [FOS] and of persons for whose negligent acts and omissions [FOS] is at law responsible for the heads of negligence pleaded in paragraph 50 herein and in that they failed to:

- a) immediately and properly secure the Premises;
- b) properly and carefully assist in the investigation of the loss at the direction of adjusters;
- c) secure [Smitten Baby's] property from further damage;
- d) timeously and properly conduct an inventory of lost and damaged property;

- e) timeously and properly segregate damaged from sound property;
- f) make recommendations and conduct operations for the cleaning, recovery and salvage of property; and
- g) generally to protect [Smitten Baby's] interest in its property.

- [15] Smitten Baby claims that it suffered economic damages and business losses as a result of the insurers' delay in paying out its claim for the loss. These damages included the cost of hiring its own investigators, offering late-shipment discounts to clients, loss of credit, loss of customers and their good will, interest on loans, overdraft fees, and eventual loss of the business. These damages are purely economic loss.
- [16] Smitten seeks damages of \$950,000 against FOS, which is the same amount of damages sought against Smitten Baby's insurers. Smitten Baby also seeks aggravated and exemplary damages against all defendants.

2. The defendant's motions

- [17] In this motion, FOS seeks three forms of relief:
- a. a determination pursuant to rules 21.01(1)(a) and 21.01(1)(b) that FOS does not owe a duty of care to Smitten Baby and that, therefore, the action should be dismissed;
 - b. a determination pursuant to rule 21.01(1)(b) that Smitten Baby's statement of claim does not disclose a reasonable cause of action because it has not pleaded material facts that, if proved, would demonstrate that FOS caused any of Smitten Baby's losses; and
 - c. partial summary judgment dismissing the claim against it pursuant to Rule 20.
- [18] The proper approach on a motion under rule 21.01(1)(b) motion is well settled.² I am to take the facts asserted in the statement of claim as true unless they are patently incapable

² *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14; *FNF Enterprises Inc. v. Wag and Train Inc.*, 2023 ONCA 92, 165 O.R. (3d) 401, at para. 12; *Fernandez Leon v. Bayer Inc.*, 2023 ONCA 629, at para. 8; *Asghar v. Toronto Police Services Board*, 2019 ONCA 479; *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874, 88 O.R. (3d) 269; *Tran v. University of Western Ontario*, 2015 ONCA 295; *Stronach v. York Region*, 2023 ONSC 1264, at para. 12; *MacLean v. National CarWash Solutions*, 2020 ONSC 6032, at para. 22; and *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (H.C.J.).

of proof or are merely bald conclusory statements of fact, unsupported by material facts.³ No evidence is admissible. I am to read the statement of claim generously. The ultimate question is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the pleaded claims discloses no reasonable cause of action. This is true where:

- a. the allegations do not give rise to a cause of action;
 - b. the plaintiff fails to plead a necessary element of a cause of action; or
 - c. the allegations in the pleading are conjecture, assumptions, or speculation unsupported by material facts.
- [19] This is a stringent test and FOS must satisfy a very high threshold.⁴ However, if the claim has no reasonable prospect of success, where it is plain and obvious that the action cannot succeed, it should not be allowed to proceed to trial.
- [20] Rule 21.01(1)(a) provides that a party may move before a judge for the determination, before trial, of a question of law raised by a pleading where the determination of the question may dispose of all or part of the action, substantially shorten the trial, or result in a substantial saving of costs. On a rule 21.01(1)(a) motion, the test is whether the determination of the issue is plain and obvious. In making this determination, the pleaded facts in the statement of claim are assumed to be true unless patently ridiculous or manifestly incapable of proof, and the statement of claim should be read as generously as possible. If the claim has some chance of success, it should be permitted to proceed.⁵
- [21] On a motion for summary judgment under Rule 20, the court shall grant summary judgment if it is satisfied that there is no genuine issue that requires a trial.⁶ There is no genuine issue that requires a trial if the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious, and less expensive means to achieve a just result.⁷

3. FOS does not owe a duty of care to Smitten Baby

- [22] FOS moves under rule 21.01(1)(a) for a determination that it does not owe a duty of care to Smitten Baby. Relatedly, it seeks to strike out the statement of claim under rule 21.01(1)(b) because it discloses no reasonable cause of action as it does not plead facts that, if proved, would establish that FOS owed a duty of care to Smitten Baby.

³ *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at para. 31; *Balanyk v. University of Toronto* (1999), 1 C.P.R. (4th) 300 (Ont. S.C.J.), at para. 29.

⁴ *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 30.

⁵ *Wyatt v. Mirabelli*, 2025 ONCA 178, at para. 20; *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587, at para. 14.

⁶ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at r. 20.04(2).

⁷ *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49.

A. *The duty of care in cases of pure economic loss*

- [23] To plead a sufficient cause of action in negligence, Smitten Baby must plead material facts capable of proving that:
- a. FOS owed a duty of care to Smitten Baby;
 - b. FOS’s conduct breached the standard of care;
 - c. Smitten Baby sustained damage; and
 - d. the damage was caused, in fact and in law, FOS’s breach of the standard of care.⁸
- [24] Smitten Baby concedes that its claim is for pure economic loss. Smitten Baby submits that it is seeking to recover for FOS’s negligent performance of a professional or advisory service, “which is recognized as economic loss recovery in tort.” Smitten Baby submits that “pure economic loss may be recovered in negligence where the claim falls within a defined and principled category, including negligent performance of a service.”
- [25] Pure economic loss is economic loss that is unconnected to a physical or mental injury to the plaintiff’s body or to physical damage to property.⁹ The common law has been slow to protect purely economic interests and tort law provides no general protection against the negligent or intentional infliction of pure economic loss.¹⁰ While there is no automatic bar to recovery for pure economic loss, such claims warrant more rigorous examination than other claims for negligence.¹¹ The Supreme Court of Canada has identified three categories of pure economic loss that can arise between private parties:
- a. negligent misrepresentation or performance of a service;
 - b. negligent supply of shoddy goods or structures; and
 - c. relational economic loss.
- [26] Smitten Baby relies on the category of negligent misrepresentation or performance of a service. However, simply invoking a category is no substitute examining the relationship between Smitten Baby and FOS.¹²
- [27] In its factum, Smitten Baby relies on the Supreme Court of Canada’s decision in *Hercules Management* in support of its submission that a *prima facie* duty of care can be founded

⁸ *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3.

⁹ *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, at para. 34; *D’Amato v. Badger*, [1996] 2 S.C.R. 1071, at para. 13; and *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 23.

¹⁰ *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, [2020] 3 S.C.R. 504, at para. 19.

¹¹ *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, at para. 74.

¹² *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855; *Maple Leaf*, at para. 22.

on mere foreseeability of injury.¹³ However, that approach has been superseded by the *Anns/Cooper* framework as refined and explained in *Livent*.¹⁴

[28] The crucial question is whether the requirements for imposing a duty of care are satisfied and, in particular, whether at the time of the loss, the parties were in a sufficiently proximate relationship to impose a duty of care. Parties may be in a sufficiently proximate relationship where:

- a. the relationship falls within a previously established category of relationship in which the requisite qualities of closeness or directness were found, or is analogous thereto; or
- b. a plaintiff may seek to establish a novel duty of care though a full *Anns/Cooper* analysis.¹⁵

[29] I do not accept Smitten Baby’s submission that it can establish that FOS owed it a duty of care simply by claiming that its loss falls within “a defined and principled category, including negligent performance of a service.” Smitten Baby cannot establish that FOS owed a duty of care to it simply by pleading that its claim fits within a category of pure economic loss. The manner in which pure economic loss is said to have occurred or how that loss has been catalogued within the categories of pure economic loss does not signify that FOS owes Smitten Baby a duty of care. Smitten Baby must plead facts that, if proved, demonstrate a relationship between Smitten Baby and FOS that bears the requisite closeness and directness so that it falls within a previously established category of proximity (or is analogous to one) or it meets a novel duty of care.¹⁶

1. Negligent misrepresentation or negligent performance of a service

[30] As noted, Smitten Baby points to the category of negligent misrepresentation or performance of a service as the relevant previously established category of proximity. I find that Smitten Baby has not pleaded facts to bring its relationship with FOS within that category of proximity.

[31] Courts are not to identify established categories in an overly broad manner.¹⁷ In the category of negligent misrepresentation or performance of a service, the proximate relationship is formed when a defendant undertakes to provide a service in circumstances that invite a plaintiff’s reasonable reliance.¹⁸ These two factors (the defendant’s undertaking and the plaintiff’s reasonable reliance) are determinative of whether proximity

¹³ *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 32.

¹⁴ See *Livent*, at paras. 22- 23; *Maple Leaf*, at para. 29.

¹⁵ *Livent*, at para. 26; *Mustapha*, at para. 5; *Maple Leaf*, at para. 22; *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, 142 O.R. (3d) 401, at para. 33.

¹⁶ *Livent*, at para. 26; *Mustapha*, at para. 5; *Maple Leaf*, at para. 23.

¹⁷ *McDonald v. Toronto-Dominion Bank*, 2022 ONCA 788, at para. 40.

¹⁸ *Livent*, at para. 30; *Reset Electronics v. Hydro One Networks Inc.*, 2024 ONCA 311, at para. 5.

is established.¹⁹ The proximate relationship is formed when a defendant undertakes responsibility that invites reasonable and detrimental reliance by a plaintiff on the defendant for that purpose.²⁰ When a defendant undertakes to a plaintiff to do something, it assumes the task of doing so reasonably, which induces the plaintiff's reliance on the defendant.²¹

- [32] In this case, I must examine the statement of claim to see if Smitten Baby has pleaded facts that, if proved, make out a relationship of proximity between Smitten Baby and FOS. Did Smitten Baby plead that FOS made an undertaking to it? If so, did Smitten Baby plead for what purpose FOS made this undertaking? Did Smitten Baby plead that it relied on this undertaking within its scope and purpose? The answer to all three questions is no.
- [33] First, Smitten Baby does not plead that FOS made an undertaking to it to perform any services. At paragraph 33 of the statement of claim, Smitten Baby pleads that FOS had certain duties to it “once appointed by the” insurers and, at paragraph 35, that this put FOS “in a position of legal proximity to [Smitten Baby].” At paragraphs 47 and 48 of the statement of claim, Smitten Baby pleads facts related to the actions taken by the FOS representatives during their visits to the warehouse. Not only does Smitten Baby not plead that FOS undertook to provide any services to it, but Smitten Baby also specifically pleads that FOS stated that it “would not take an inventory of the damage until instructed to do so by ClaimsPro.” Nowhere in the statement of claim does Smitten Baby plead that FOS gave an undertaking to Smitten Baby capable of inducing Smitten Baby’s reasonable reliance on it.
- [34] Second, Smitten Baby does not plead that it relied reasonably, or at all, on any undertaking by FOS to perform a service. Smitten Baby pleads that it disagreed with the report FOS prepared for its client and then retained its own investigators to investigate the nature and cause of the loss. Smitten Baby pleads that it engaged its own restoration company to prepare an inventory of the damaged property.
- [35] Even reading the pleading generously, I conclude that Smitten Baby has not pleaded facts that, if proved, make out a proximate relationship with FOS within the category of negligent misrepresentation or performance of a service.

2. Analogous categories of proximity

- [36] Smitten Baby did not present any cases that authoritatively establish that investigators appointed by insurance adjusters owe a duty of care to the insured. Indeed, the weight of authority in Canada, New Zealand, England, and the United States suggests that no such

¹⁹ *Maple Leaf*, at para. 32.

²⁰ *Maple Leaf*, at para. 32; *Del Giudice v. Thompson*, 2024 ONCA 70, at para. 55.

²¹ *Lavender*, at para. 37.

duty of care is owed.²² Smitten Baby did not suggest that there is an analogous category of proximity that applies in this case.

3. Novel duty of care

[37] Smitten Baby may also plead material facts that show that its relationship with FOS establishes a novel duty of care. The applicable framework, known as the *Anns/Cooper* test, has three elements: proximity, reasonable foreseeability of harm, and the absence of countervailing public policy considerations.²³

[38] At the first stage of the *Anns/Cooper* test, the court examines whether the alleged negligence imposes a reasonably foreseeable risk of the type of injury that occurred on a class of persons to which the plaintiff belongs.²⁴ I am satisfied that Smitten Baby has pleaded facts that, if proved, could establish foreseeability of harm. FOS could foresee that it would create a risk of harm to Smitten Baby if it investigated and reported carelessly to ClaimsPro and the insurers.²⁵

[39] I am satisfied that Smitten Baby has pleaded facts that, if proved, could establish proximity. In my view, this case is indistinguishable from the decision of the Court of Appeal for Nova Scotia in *Elliott*. In that case, Cromwell J.A. (as he then was) provided lengthy and persuasive reasons finding that insurance investigators working for an insurer stood in a relationship of proximity to the insured but did not owe the insured a duty of care. Justice Cromwell also canvassed the five opinions of the New Zealand Court of Appeal in *Mortensen v. Laing*, four of which found insurance investigators to stand in a relationship of proximity to the insured.²⁶

[40] Justice Cromwell identified a number of factors that supported his conclusion that insurance investigators stood in a relationship of proximity to the insured:

- a. the obvious risk of serious harm to the insured and that a negligent investigation could cause harm to and a denial of coverage for the insured;
- b. the vulnerability of the insured to careless work by an investigator;
- c. the insured's reasonable expectation that those retained to act on behalf of the insurer would do so with reasonable care; and

²² See cases cited in the paragraph 93 of *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, 236 N.S.R. (2d) 104.

²³ *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55, at para. 16; *Price v. Smith & Wesson Corporation*, 2025 ONCA 452, at para. 22.

²⁴ *Smith & Wesson*, at para. 51.

²⁵ *Elliott*, at para. 56.

²⁶ [1992] 2 N.Z.L.R. 282 (C.A.).

d. the insured would rely on the investigators to do a careful investigation.²⁷

- [41] In *Elliott*, Justice Cromwell concluded that there was sufficient proximity to make it just and fair to impose a *prima facie* duty of care to the insured by an investigator retained to investigate the cause of a loss on behalf of an insurer. I reach the same conclusion in this case.
- [42] The second stage of the *Anns/Cooper* test requires consideration of whether there exist any residual policy considerations that ought to negative or reduce the scope of the duty or the class of persons to whom it is owed. This stage of the analysis is not concerned with the relationship between the parties. It is concerned with the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally. The court asks whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that the harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties such that the imposition of a duty would not be unfair.²⁸
- [43] In *Elliott*, Justice Cromwell held that there were two policy considerations that justified negating the *prima facie* duty of care that insurance investigators owed to the insured.
- [44] First, the insureds had their contractual claims under the insurance policy, including claims for breach of the duty of good faith, aggravated, and punitive damages, which is a substantial and meaningful remedy that makes the case for a new form of liability less compelling than it would absent such a remedy.²⁹ This policy consideration applies with equal force in this case.
- [45] Second, recognizing the proposed duty of care would distort the legal relationships among the insured, the insurer, and the investigators and cause serious negative effects for all. The insured and the investigators each have defined their relationship with the insurer through contract. Where, as here, the insured has a contractual right to recover its losses from the insurer, the common law typically allows the contract to control the allocation of risk among the parties.³⁰ Recognizing a duty of care between Smitten Baby and FOS would create a scenario where FOS might have greater liability to Smitten Baby than would the insurers.
- [46] In addition, there is a real possibility of conflict between the contractual duties an investigator owes to the insurer and the proposed duty of care the investigator would owe to the insured. As Justice Cromwell explained:

²⁷ *Elliott*, at paras. 60-70.

²⁸ *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 51; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 37; *Smith & Wesson*, at para. 67; *Livent*, at para. 41; and *Elliott*, at para. 79.

²⁹ *Elliott*, at para. 80; *Cooper*, at para. 37; *Odhavji*, at para. 60; and *Mortensen*.

³⁰ *Elliott*, at para. 86; *Mortensen*, at p. 308.

I am also concerned about other difficulties that would arise if, as the appellants propose, insurance investigators were to be subject to both the contractual obligations to the insurer and a duty of care in negligence to the insured. The nature of the investigator's engagement is defined by the contract and could be different from a duty imposed by the law of negligence: Casey, J. [in *Mortenson*] at 314. The insurer is entitled to contract with the investigator for a particular type of service to be performed within parameters of cost and time dictated by the circumstances and the parties' choice. The express and implied duties arising from that contract of service may or may not be the same as the proposed duty of an investigator to take reasonable care for the interests of the insured. There is a real possibility of conflict between the contractual and the tortious duties which could undermine the ability of the insurer to administer insurance contracts in a cost effective and expeditious manner.³¹

- [47] This concern also affects plaintiffs' investigators and highlights why recognizing this duty of care is inappropriate. In *Vie Holdings*, a plaintiff retained a consultant to conduct an environmental assessment of the plaintiff's property to assess whether it had become contaminated as a result of pollution migrating from a neighbouring gas station.³² The consultant concluded that a hydrocarbon spill at the gas station had contaminated the groundwater at the plaintiff's property. The plaintiff sued the gas station. The gas station defended and commenced a third-party claim against the consultant, alleging that the consultant breached a duty of care to the gas station and produced a report containing a negligent misrepresentation.
- [48] Justice Panet found that the plaintiff's consultant did not owe even a *prima facie* duty of care to the gas station and that if there was such a duty, it should be negated for policy reasons.³³ Justice Panet held that imposing the proposed duty of care would distort the legal relationships among the plaintiff, its consultant, and the gas station:

[T]he recognition of the proposed duty of care would distort the legal relationships in that it would set up an incoherent scheme of liability, where, rather than focus on the obligation or the possible liability of the Defendant with respect to damages caused to the Plaintiff, there would be a further issue, a distorting one, where the Defendant would focus any alleged liability on the party who prepared the report for the Plaintiff in the first place.³⁴

³¹ *Elliott*, at para. 90.

³² *Vie Holdings Inc. v. Imperial Oil Ltd.*, 2007 CanLII 242 (ON SC).

³³ *Vie Holdings*, at paras. 11-26.

³⁴ *Vie Holdings*, at para. 24.

- [49] I agree with Cromwell J.A. that recognizing a duty of care owed by insurance investigators to both the insured and the insurer would create problems of divided loyalties on the part of investigators.³⁵
- [50] I find that any *prima facie* duty of care owed by FOS to Smitten Baby should not be recognized on policy grounds. I conclude that it is plain and obvious that FOS does not owe a duty of care to Smitten Baby for its investigation and report. For that reason, I would strike out the statement of claim as against FOS on the ground that it discloses no reasonable cause of action.
- [51] I recognize that leave to amend a claim should be denied only in the clearest of cases.³⁶ In this case, I would not grant leave to Smitten Baby to amend its statement of claim.
- [52] Smitten Baby did not deliver a draft amended statement of claim that could resolve the problems that I have identified above. Moreover, during the hearing of this motion, counsel for Smitten Baby did not point to any material facts or suggest any amendments to its claim that would make out a plausible case that FOS owed a duty of care to Smitten Baby. Even considering the evidence filed by Smitten Baby for use on FOS's motion for partial summary judgment, there are no facts that would establish a plausible theory under which FOS could owe a duty of care to Smitten Baby.
- [53] Finally, I note that this action was commenced in 2019. The lengthy passage of time since Smitten Baby commenced this action is another factor that suggests that Smitten Baby should not receive leave to amend its statement of claim.³⁷
- [54] Considering all of these factors, I exercise my discretion and do not grant leave to Smitten Baby to amend its claim.³⁸ I dismiss Smitten Baby's action against FOS.

4. The statement of claim does not make out causation

- [55] FOS also moves to strike out the statement of claim on the ground that Smitten Baby did not plead material facts capable of making out causation.
- [56] The Supreme Court of Canada's decision in *Clements* remains the binding authority on causation in negligence cases.³⁹ In general, to establish factual causation, the plaintiff must prove on a balance of probabilities that without a breach of the standard of care by one or more defendants, the injury would not have occurred.⁴⁰ This is the "but for" test.

³⁵ *Elliott*, at para. 90.

³⁶ *South Holly Holdings Ltd. v. The Toronto-Dominion Bank*, 2007 ONCA 456, at para. 6.

³⁷ *Grigonis v. Toronto Boardsailing Club*, 2010 ONCA 651, at para. 5.

³⁸ *Chowdhury v. Exquisite Bay Development Inc.*, 2024 ONCA 852, at paras. 10 to 11; *Miguna v. Ontario (Attorney General)*, (2005) CanLII 46385 (ON CA), 205 O.A.C. 257, at para. 22;

³⁹ *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181; *Hasan v. Trillium Health Centre (Mississauga)*, 2024 ONCA 586, 499 D.L.R. (4th) 178, at para. 14.

⁴⁰ *Clements*, at paras. 8, 37; *Donleavy v. Ultramar*, 2019 ONCA 687, 60 C.C.L.T. (4th) 99, at para. 62.

[57] Causation must be assessed in the context of a breach of the standard of care. It is necessary to identify the act or omission that breached the standard of care and determine what connection, if any, it has to the harm at issue.⁴¹ The plaintiff must prove that the defendant's conduct was necessary to bring about the injury.⁴² The plaintiff need not prove that the defendant's conduct was the only cause of the injury, but the plaintiff must prove on a balance of probabilities that the defendant's breach of the standard of care was part of the cause of their loss.⁴³ Chief Justice McLachlin's statement on the law of causation remains authoritative:

The plaintiff must show on a balance of probabilities that “but for” the defendant's negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails. [Emphasis in original.]⁴⁴

[58] Causation requires a substantial connection between the injury and the defendant's conduct.⁴⁵ Causation is made out under the “but for” test if a defendant's breach of the standard of care caused the whole of the plaintiff's injury, “or contributed, in some not insubstantial or immaterial way, to the injury that the plaintiff sustained.”⁴⁶ Put differently, a defendant that is found to have caused some harm to a plaintiff will be liable in tort. A defendant will be liable for all injuries caused or contributed to by his or her breach of the standard of care, even if other non-tortious causes are present.⁴⁷ A court that concludes that one or more defendants “materially contributed” to a plaintiff's loss is simply recognizing that the defendant's breach of the standard of care was a “but for” cause of the loss but was not the only cause of loss.⁴⁸

[59] As this is a pleadings motion, the question is whether it is plain and obvious that Smitten Baby's action cannot succeed because it has not pleaded material facts that, if proved, could make out causation. I agree with FOS that Smitten Baby has not pleaded material facts that, if proved, would demonstrate that FOS caused its alleged losses.

[60] Smitten Baby pleads that ClaimsPro decided that the loss was uninsured (because it was caused by seepage) before FOS ever attended the warehouse to conduct its inspection. On

⁴¹ *Chasczewski v. 528089 Ontario Inc.*, 2012 ONCA 97, 91 C.C.L.T. (3d) 206, at para. 15.

⁴² *Clements*, at para. 8.

⁴³ *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 17.

⁴⁴ *Clements*, at para. 8.

⁴⁵ *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at para. 23.

⁴⁶ *Donleavy*, at para. 72.

⁴⁷ *Donleavy*, at para. 63, citing *Athey*, at paras. 12, 17.

⁴⁸ *Donleavy*, at para. 72; *Farej v. Fellows*, 2022 ONCA 254, at para. 67; and *Athey*, at paras. 13-16.

the face of the pleading, it is difficult to see how FOS's investigation caused Smitten Baby's losses.

- [61] Similarly, Smitten Baby pleads that the insurers caused damages to the company because they delayed payment under the policies of insurance. However, Smitten Baby pleads that FOS completed all its work before Smitten Baby submitted any proofs of loss to ClaimsPro for adjustment. On the face of the pleading, it is difficult to see how FOS caused any delay or caused any of the alleged losses.
- [62] I find that the statement of claim does not disclose a reasonable cause of action because it is plain and obvious that Smitten Baby has not pleaded material facts that, if proved, would demonstrate that FOS caused its losses.
- [63] If I am wrong, and FOS owed Smitten Baby a duty of care, I would grant Smitten Baby leave to amend the statement of claim to attempt to fix the problems with its pleading of causation.

5. The motion for partial summary judgment is dismissed

- [64] FOS also moves for partial summary judgment to dismiss the claim against it. Given my decision that it is plain and obvious that FOS does not owe a duty of care to Smitten Baby, I do not reach this issue. However, if I am wrong, and it is not plain and obvious that FOS does not owe a duty of care to Smitten Baby, then I would dismiss FOS's motion for partial summary judgment.
- [65] One of the purposes of the summary judgment rule is to eliminate the need for a trial or shorten it or the action. Partial summary judgment is not impermissible *per se*. Granting partial summary judgment may well be appropriate where it would meet the purposes set out in *Hryniak* (access to justice, proportionality, efficiency and cost-effectiveness).⁴⁹ If partial summary judgment does not present a risk of duplicative proceedings or inconsistent findings of fact in the context of the litigation as a whole, and resolving the claim could significantly advance access to justice and be the most proportionate, timely, and cost-effective approach, then it may be in the interests of justice to grant partial summary judgment.⁵⁰
- [66] Smitten Baby submits that partial summary judgment is not appropriate because this case does not meet the considerations set out in *Malik*.⁵¹ In *Malik*, Brown J.A. explained the

⁴⁹ *Chitaroni Estate v. Coleman (Township)*, 2025 ONCA 424, at para. 16; *VP Auto Sales & Service Ltd. v. Ahmed² Inc.*, 2024 ONCA 507, at para. 25.

⁵⁰ *Boltyansky v. Joseph-Walker*, 2024 ONCA 682, at para. 17; *Heliotrope Investment Corporation v. 1324789 Ontario Inc.*, 2021 ONCA 589, 462 D.L.R. (4th) 731, at para. 32; *Truscott v. Co-Operators General Insurance Company*, 2023 ONCA 267, 482 D.L.R. (4th) 113, at para. 54; and *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, at para. 38.

⁵¹ *Malik v. Attia*, 2020 ONCA 787, 29 R.P.R. (6th) 215.

three factors that should be considered “before embarking on a motion for partial summary judgment.” Justice Brown explained as follows:

When faced with a request to hear a motion for partial summary judgment, a motion judge should make three simple requests of counsel or the parties:

- (i) Demonstrate that dividing the determination of this case into several parts will prove cheaper for the parties;
- (ii) Show how partial summary judgment will get the parties’ case in and out of the court system more quickly;
- (iii) Establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.⁵²

[67] I have already found that it is plain and obvious that FOS does not owe Smitten Baby a duty of care. But if I am wrong about that, I would not grant partial summary judgment in favour of FOS. There would be a significant chance of inconsistent findings of fact if partial summary judgment is granted to FOS given its interconnected role with ClaimsPro and the insurers. Partial summary judgment is reserved for a discrete issue that may be readily bifurcated from the remaining issues in the action. Smitten Baby’s claim against FOS is not a discrete issue that may be readily bifurcated from the other issues at trial.

6. Conclusion

[68] I find that it is plain and obvious that FOS did not owe a duty of care to Smitten Baby and that the action is fatally flawed. I dismiss Smitten Baby’s action against FOS.

[69] If the parties are not able to resolve costs of this action, FOS may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before July 28, 2025. Smitten Baby may deliver its responding submission of no more than three double-spaced pages on or before August 5, 2025. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: July 21, 2025

⁵² *Malik*, at paras. 61-63.