MANAGING PSYCHOLOGICAL INJURY CLAIMS

THE 11TH ANNUAL ADVOCACY CONFERENCE

presented by:

The Hamilton Law Association

Prepared by: **Helen Pelton**
Pelton Law
10 George St. Suite 203
Hamilton, ON L8P 1C8

hpelton@peltonlaw.ca

MANAGING PSYCHOLOGICAL INJURY CLAIMS

Introduction

When Waddah Mustapha saw dead flies in his bottled water, his reaction was extreme. He suffered severe psychological damage because he was a fragile individual – a classical "thin-skulled" plaintiff. And yet he recovered no damages from the defendant.

Later, Grant Frazer went off the psychological "deep end" when he discovered he had unknowingly been walking around on a broken ankle for two months. But unlike Mustapha, Frazer was awarded $1.75 million in damages. Can these two decisions be reconciled?

The Supreme Court ruled that Mustapha had no claim against the defendant because his case did not pass an initial foreseeability test. Only **after** it has been found foreseeable that an ordinary individual was likely to be harmed by the defendant's conduct, is there any inquiry about the thickness of the plaintiff's skull.[1]

The Ontario Court of Appeal concluded that Frazer's psychological injury was foreseeable and therefore compensable.[2]

Elements of a Negligence Action - Mustapha

It is useful to visualize negligence claim as passing through a series of gates. The claim must pass through each in a certain order before reaching the goal – an award of damages. The Supreme Court set out these elements in the *Mustapha* decision.

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

The defendant must be shown to owe a duty of care to the plaintiff. In other words, the relationship between them must be sufficiently close that it is reasonably likely that the plaintiff would be harmed by the defendant's acts. This is an objective test, using hypothetical "normal" people. There is no analysis at this stage of whether the plaintiff has a thin, crumbling or any other type of skull.

In a great many lawsuits, the relationship between the plaintiff and the defendant falls into a recognized category where the duty of care is well established. For example, motorists owe a duty of care to other motorists and to pedestrians, doctors to patients, and product manufacturers

[1] Mustapha v. Culligan of Canada Ltd. (2008), 293 D.L.R. (4th) 29, 2008 CarswellOnt 2824 (S.C.C.)
[2] Frazer v. Haukioja (2010), 317 D.L.R. (4th) 688,2010 CarswellOnt 1996 (Ont. C.A.)

to consumers. Only novel categories of relationships will require a detailed analysis by the court.

Once a duty of care is established, the question then becomes whether the defendant's behaviour breached the standard of care. The standard must be established in each particular relationship, but it can be summarized as follows. A defendant's conduct is negligent if it creates an unreasonable risk of harm.

Next, the plaintiff must demonstrate having sustained damage. In *Mustapha*, the Supreme Court ruled:

> *8 Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort. As Lord Lloyd said in Page v. Smith (1995), [1996] 1 A.C. 155 (U.K. H.L.), at p. 188:*
>
> > *In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests in law. [Emphasis added.]*

The court stated further:

> *9 This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see Hinz v. Berry, [1970] 2 Q.B. 40 (Eng. C.A.), at p. 42; Page v. Smith, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from Vanek v. Great Atlantic & Pacific Co. of Canada (1999), 48 O.R. (3d) 228 (Ont. C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.*

Finally, the plaintiff must show that the defendant's breach of duty caused the plaintiff's harm. This inquiry is often broken into two parts, causation and remoteness.

The plaintiff must show factual causation of the harm that occurred. This has generally been achieved by showing that but for the defendant's conduct, harm would not have come to the plaintiff. The "but for" test was briefly shunted aside by the "material contribution" test set out in *Athey v. Leonati*.[3] In that case, the defendant's conduct was found to have materially contributed to the plaintiff's loss. Since "material" was defined as "not trivial", it was viewed as a relatively easy hurdle to cross, and definitely a gift to the plaintiffs' bar. However, the subsequent decision of the Supreme Court in *Hanke v. Resurfice Corp*[4]. established that the "but for" test remains the basic test for causation in negligence cases. The "material contribution" test will only be used in exceptional cases where the "but for" test is impossible to apply.

Finally the plaintiff must show that the plaintiff's harm is not too remote from the defendant's conduct to warrant recovery. This is often referred to as "causation in law", as distinct from causation in fact. It is here that an objective foreseeability inquiry takes place.

The question becomes – is it reasonably foreseeable that a person of ordinary fortitude would suffer harm in this particular situation. It is an objective test. It was set out by the Supreme Court in *Mustapha* as follows:

> *14 ..... The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see White v. Chief Constable of South Yorkshire Police, [1998] 3 W.L.R. 1509 (U.K. H.L.); Devji v. Burnaby (District) (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599 (B.C. C.A.); Vanek. As stated in White, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."*
>
> *15 As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in Vanek, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in Tame v. New South Wales (2002), 211 C.L.R. 317, [2002] H.C.A. 35 (Australia H.C.), per Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.*
>
> *16 To say this is not to marginalize or penalize those particularly vulnerable to*

[3] Athey v. Leonati (1996), 140 D.L.R. (4th) 235, 1996 CarswellBC 2295 (S.C.C.)
[4] Hanke v. Resurfice Corp. (2007), 278 D.L.R. (4th) 643, 2007 CarswellAlta 130 (S.C.C.)

> *mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in White, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.*

The Court found that Mustapha failed to lead evidence on this point. The only evidence was about Mustapha's own "highly unusual" response to the finding of the flies in the water bottle. The court noted that the expert witnesses were not asked the relevant question – whether a person of "ordinary fortitude" would have suffered injury from seeing the flies. By failing to establish this crucial point, Mustapha's claim failed.

The Frazer Case

Turning now to *Frazer v. Haukioja*, a brief review of the facts is necessary. After a motorcycle accident, Dr. Haukioja told Frazer he had a left ankle fracture and a right ankle soft tissue injury. A week later, a radiologist reviewed Frazer's X-rays and told Dr. Haukioja there was in fact a fracture of the right ankle. About a month later, Dr. Haukioja met with Frazer and told him he had a tiny fracture of the right ankle, not requiring treatment. He advised him to return to his job and work through the pain. After one day of work, Frazer went to a walk-in clinic where he learned he had a major fracture requiring surgery. He subsequently saw an orthopaedic surgeon, who confirmed this and told Frazer about possible future complications, including necrosis of the bone and fusion of the ankle joint. It is from this point that Frazer's psychological injuries appear to start. He developed an anxiety disorder with features of panic disorder, aggravated by agoraphobia. He became focused on the fact that Dr. Haukioja had lied to him.

The trial judge allowed Frazer's claim, awarding him $1.75 million. Dr. Haukioja appealed.

The Court of Appeal analyzed the case, reviewing the four elements set out by the Supreme Court in *Mustapha*. The first three elements required only a brief comment. As a doctor treating a patient, Dr. Haukioja owed Frazer a duty of care, his conduct fell below the standard of care, and Frazer suffered injury.

The appeal court therefore focused on the fourth element, whether Frazer's psychiatric damage was caused, in fact and in law, by the doctor's non-disclosure of the fracture. Writing for the court, Justice LaForme held as follows:

39 Accordingly, the only live issue is the fourth element; that is, whether the psychiatric damage was caused, in fact and in law, by Dr. Haukioja's non-disclosure. In undertaking the causation analysis, I note the importance of keeping the issues of factual causation, often referred to as the "but for" test, and legal causation, often referred to as remoteness, distinct. As noted in A. Linden and Feldthusen at 360 the failure to do so can be a source of much confusion:

> *Most of the difficulty in this area stems from an unfortunate blurring of two issues that should not be intermingled: (1) cause-in-fact, and (2) proximate cause or remoteness. If the cause-in-fact issue were kept separate from the proximate cause or remoteness issue, much of the confusion would vanish. ... Although one cannot totally and completely divorce the two issues, it can be said that cause-in-fact is fundamentally a question of fact, which can be treated relatively expeditiously in most tort litigation. Proximate cause or remoteness, on the other hand, cannot be handled so simply, because it deals with the limits of liability for negligent conduct, which...demands delicate value judgments and the drawing of fine lines. It is more a question of law and policy than fact.*

The appeal court held that factual causation was established by applying the "but for" test. But for Dr. Haukioja's negligence, Frazer would not have suffered psychiatric harm.

The court went on to review the issue of legal causation, stating

> *51 Legal causation is informed by the general principle that the harm suffered must be of the kind, type or class that was reasonably foreseeable as a result of the defendant's negligence.*

After rejecting the proposition that Frazer was an emotionally vulnerable person, the court then held that psychiatric damage was a foreseeable consequence of a breach of a doctor's duty of care because of the nature of the doctor patient relationship.

> *57 Second, in Mustapha, the relationship was of a contractual, commercial nature. In this case, the relationship was between a professional and a client; Dr. Haukioja was in a position of trust and authority relative to Mr. Frazer. The nature of this relationship is, in my view, such that it should have fallen within Dr. Haukioja's contemplation that a breach of that trust as blatant as the one that occurred in this case could have severe ramifications for his patient's mental health.*

An interesting feature of this finding by the Court of Appeal is that it appears no evidence had been led by Frazer's experts to support it. The court simply states this proposition as assumed fact.

Where a claim is advanced for pure psychological damage, both plaintiff and defence counsel would be well advised to put the specific question to their experts – is it foreseeable that a person of ordinary fortitude would suffer psychological harm from this defendant's conduct.

Where the claim is one that includes both physical and psychological harm, it may be easier for plaintiffs' counsel to show that psychological harm can be a foreseeable consequence of physical injury. Nevertheless, it is still prudent for the expert to be asked the question – was any psychological harm foreseeable as a consequence of these physical injuries to a person of ordinary fortitude.

Evidence for Psychological Injury

Just as with chronic pain, evidence for psychological injury is primarily subjective in nature. Reports from psychologists, psychiatrists and other therapists will be based on what the plaintiff has recounted. Even psychometric tests, which appear to be more objective, are susceptible to challenge. Thus well written reports from treating psychologists and psychiatrists will be the cornerstone of a plaintiffs' case. This can be greatly assisted by judicious choice of lay witnesses who can give evidence about the changes they have observed in the plaintiff's behaviour both pre- and post-accident.

Defence counsel will need to retain experts, who of course will not have treated the plaintiff. However, even the limited contact of an IME is preferred to a paper review.

However, the underpinning of the case will be the plaintiff's credibility. If the plaintiff is found to be less than credible in any other area of the evidence, the claim for psychological injury will be greatly undermined.

Some Other Noteworthy Cases

Vanek v. Great Atlantic & Pacific Co. of Canada[5]

11 year old Eva Vanek drank from a juice bottle containing a noxious fluid, possibly paint thinner. She suffered no serious effects. However, her parents were greatly upset by the incident and sued the grocery store for the psychiatric damage they experienced. The trial judge's decision in favour of the parents ($20,000 in total) was overturned by the Court of Appeal on the basis that psychiatric damage to the parents could not have been reasonably foreseen by the defendants. (Eva recovered $2,000 plus costs.)

[5] Vanek v. Great Atlantic & Pacific Co. of Canada, 1999 CarswellOnt 4036 (Ont. C.A.)

Healey v. Lakeridge Health Corp.[6]

Two patients at a hospital were diagnosed with tuberculosis. A class action was launched on behalf of three classes of persons. One class included uninfected persons and their families claiming for psychological injury. The motions judge granted summary judgment to the defendant hospital, including a finding that the plaintiffs did not suffer from a recognizable psychiatric illness. The Court of Appeal reviewed the appellants' proposition that Mustapha had changed, and significantly lowered the threshold for compensable psychiatric injury. The appellants' position was that they need not demonstrate the existence of a recognizable psychiatric illness, but only that they suffered from harm that went beyond "upset, disgust, anxiety, agitation or other mental states that fall short of injury" and amount to serious and prolonged trauma. After an extensive review of caselaw on the issue, the Court of Appela held that the threshold has not changed, it is still necessary to show the existence of a recognizable psychiatric illness in order to be awarded compensation.

Chin-Sang v. Bridson[7]

Michael Chin-Sang suffered a head injury in a car accident and went on to develop cognitive deficits and major depression and anxiety. The jury found in his favour and awarded damages of $993,000. The defendant brought a motion for an order that the plaintiff's injuries were too remote to permit recovery. After applying the considerations set out in Mustapha, the judge dismissed the motion, finding that evidence met the objective test that there was a "real risk" that a person of ordinary fortitude would have experienced such injuries.

Zawadzki v. Calimoso[8]

Pedestrian Tadeusz Zawadzki was struck from behind by a U-Haul truck. He suffered numerous physical injuries, and also went on to develop major depression and generalized anxiety. Unfortunately, he also had a serious alcohol problem, which had been present before the accident. This interfered with his recovery and resulted in some reduction of damages for failure to mitigate. Nevertheless, Zadwaczki was awarded damages of over $800,000. The judgment is a careful analysis of the type of evidence that persuades a court in this type of case.

Conclusion

Claims for psychological injury can be divided into two groups, those where the injury develops as a consequence of physical injuries, and those where the only injury is psychological. Both types of case require evidence of the foreseeability of such injury occurring to a person of ordinary fortitude. It will be crucial to put this question to the experts offering opinions.

---

[6] Healey v. Lakeridge Health Corp, 2011 CarswellOnt 229 (Ont. C.A.)
[7] Chin-Sang v. Bridson, 2008 CarswellOnt 7709 (Ont. SCJ)
[8] Zawadzki v. Calimoso, 2011 CarswellBC 57 (BCSC)

Credibility problems may be somewhat easier where there are physical injuries. Firstly, because it is becoming well established that on-going pain and impairment can result in psychological effects. Secondly, because the plaintiff's credibility can be demonstrated on the physical injuries, and lead to the inference that the plaintiff is a truthful person. Many decisions contain such comments from the trial judge.

This remains a challenging area of law, both for the plaintiff and defence bar.

Helen Pelton