

ASSESSING REMOTENESS

IN FAMILY MEMBERS' CLAIMS FOR PSYCHOLOGICAL INJURY

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Bottom Line

RESEARCH AND COMMUNICATIONS

Tort law has historically been cautious in granting relief for injuries to mental well-being. While in modern times the scope for compensation related to psychological injury has expanded beyond the limited sphere that was permitted in the early nervous shock cases, the common law’s concern for open-ended liability continues to be reflected in the case law. In particular, where psychological injury is alleged, remoteness and foreseeability are typically key issues.

Claims by indirect plaintiffs – for example, family members who were not present at the scene of an accident but nonetheless suffer emotional distress or shock as a result of a loved one’s injury – continue to be interesting and challenging cases where the analysis of remoteness and foreseeability is key. Case law indicates that the analysis is factually driven, and there is no “bright line” determining which types of facts will or will not support a successful claim.

Basic Principles Governing a Claim for Psychological Injury

Negligence claims for psychological injury have been considered by the Supreme Court of Canada in two prominent cases, *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] SCJ No 27 and *Saadati v. Moorhead*, 2017 SCC 28, [2017] SCJ No 28.

In *Mustapha*, McLachlin CJ confirmed that like any negligence claim, a claim for psychological injury requires that the plaintiff demonstrate 1) that the defendant owed him a duty of care; 2) that the defendant’s conduct 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. While McLachlin CJ declined to define compensable injury exhaustively, she noted 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” (at para 9).

In psychological injury claims, it is not uncommon for debate to focus in particular around the fourth element of the test – namely, causation in fact and law – where issues of remoteness and foreseeability are addressed. The remoteness issue asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable. It depends on the degree of probability required to meet the reasonable foreseeability requirement and also on whether the plaintiff’s harm is considered objectively or subjectively.

The law has consistently held that the question is what a person of ordinary fortitude would suffer. In *Mustapha*, McLachlin CJ explained how distinctions may be drawn between psychological injuries that are foreseeable, and those that are not:

[15] [...] 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. [...] As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, 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 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.** [...] 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 ‘egg-shell 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. [emphasis added]

The degree of probability that would satisfy the reasonable foreseeability requirement is a “real risk”, one which would occur to the mind of a reasonable person in the position of the defendant and which they would not brush aside as far-fetched (para 13).

In *Mustapha*, the plaintiff claimed damages for psychological injuries sustained as a result of seeing dead flies in a bottle of water supplied by the defendant. Although successful at trial, the Supreme Court of Canada found a cause of action in negligence had not been established. It was accepted that the defendant’s breach of its duty of care in fact caused the plaintiff’s psychiatric injury. However, at issue was whether the breach also caused the plaintiff’s damage in law or whether it was too removed to warrant recovery. The plaintiff had failed to establish his damage was caused in law by the defendant’s negligence. The plaintiff had failed to show it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the water bottle. His damages were too remote to allow recovery.

Mustapha thus recognized that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury. The ordinary duty of care analysis is to be applied. It is unnecessary to mandate formal, separate consideration of certain dimensions of proximity. Temporal, geographic and relational considerations might inform the proximity analysis but the proximity analysis is to be sufficiently flexible to capture all relevant circumstances that might in any given case be relevant to determining a close and direct relationship, which is the hallmark of the common law duty of care.

In *Saadati*, the Supreme Court of Canada confirmed the elements of the cause of action in negligence as well as the threshold for proving mental injury as outlined in *Mustapha*. Brown J. further confirmed that *Mustapha* stands for the proposition that recoverability of mental injury depends on the claimant satisfying the criteria applicable to any successful action in negligence and that each of the four criteria can pose a significant hurdle as, for example, not all claimants alleging mental injury will be in a relationship of sufficient proximity with the defendants to ground a duty of care, and not all mental injury is caused, in fact or in law, by the defendant’s negligent conduct:

[20] *Mustapha* thus serves as a salutary reminder that, even where a duty of care, a breach, damage and factual causation are established, there remains the pertinent threshold question of legal causation, or remoteness -- that is, whether the occurrence of mental harm in a person of ordinary fortitude was the rea-

sonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16). And, just as recovery for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant's negligence, so too will claimants be denied recovery (as the claimant in *Mustapha* was denied recovery) where mental injury could not have been foreseen to result from the defendant's negligence.

However, *Saadati* also rejected authorities suggesting that requirements of "relational", "locational", and "temporal" proximity should be formally applied as part of the test for establishing a viable claim:

[16] Further obstacles to recovery for mental injury arose in English law. In *McLoughlin v. O'Brian*, at pp. 419-21, Lord Wilberforce posited three considerations that could limit the boundaries of compensable "nervous shock": the class of persons whose claims should be recognized (often referred to as relational proximity), the proximity of such persons to the accident (locational, or geographical proximity), and the means by which the "shock" is caused (temporal proximity). [...]

[...]

[24] [...] **it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity, as was done in *McLoughlin v. O'Brian***. Certainly, "temporal", "geographic" and "relational" considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, **sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the "close and direct" relationship** which is the hallmark of the common law duty of care [...].

Saadati further confirmed that a recognizable psychiatric illness is not a precondition to recovery for mental injury or nervous shock (at para 2).

The principles regarding reasonable foreseeability in negligence cases outlined in *Mustapha* and *Saadati* were recently recognized by the Alberta Court of King's Bench in the medical negligence case of *KY v. Bahler*, 2023 ABKB 280, [2023] AJ No 486. Renke J. noted that foreseeability is assessed in the circumstances of the defendant. The injury or loss must not simply have been possible but rather, the injury must have been a "real risk", as described in *Mustapha*. The issue is whether the class, type, or kind of injury was foreseeable, not the extent of the actual injury or the precise manner of its occurrence (at paras 862-864).

Claims by Indirect Plaintiffs

Cases post-*Saadati* have wrestled with whether or not a claim for psychological injury is sustainable when the claimant was not present at the accident scene. The cases suggest that although refuting remoteness and foreseeability concerns may be challenging, each case turns on its own facts, and successful claims are not precluded.

In *Cox v. Fleming*, [1995] BCJ No 2499, 15 BCLR (3d) 2011 (CA), the plaintiffs were the parents of an 18-year-

old who was critically injured in a motor vehicle accident and who later died in hospital. Although accepting expert evidence that the father did not suffer from PTSD, the court nonetheless allowed the father's claim for psychological injury, finding that the sight of his son so badly injured in the hospital did have a lasting impact on him, and qualified this type of impact as an "emotional scar" that is compensable (at paras 13-15).

In *Labrosse v. Jones*, 2021 ONSC 8031, [2021] OJ No 6829, the plaintiff claimed for psychological injuries suffered after she was called by her daughter from the scene of an accident in which the daughter was seriously injured. The plaintiff was traumatized by what she heard on the telephone, by her inability to provide assistance to her daughter and by the traumatic nature of her daughter's injuries. MacLeod RSJ found that foreseeability, whether at the duty of care stage or the remoteness stage, was the key issue. He further found it appeared "far fetched" to include a person phoned by an accident victim in the same class as a person who is present at an accident, noting there is a significant body of case law that has refused to award damages for mental injury to family members who were simply informed of an accident. However, given the "omnipresence of digital communication" and the rejection of arbitrary proximity factors in *Saadati*, it was difficult to justify a distinction between a plaintiff who was present at an accident and saw or heard it and a plaintiff that was able to hear the accident while connected by a phone. The foreseeability analysis required nuanced findings of fact that were genuine issues best resolved at trial, sufficient to defeat the defendants' motion for summary judgment.

In *Snowball v. Ornge*, 2017 ONSC 4601, [2017] OJ No 3932, Faieta J. found it was not plain and obvious that the plaintiffs' negligence action seeking damages for mental distress as a result of the death of their family member in a helicopter action had no reasonable prospect of success and also refused to summarily dismiss the action. Given that *Saadati* rejected the distinction between primary and secondary victims and the view that there are geographic, temporal and relational proximity restrictions that are an absolute limitation on the duty to take reasonable care to avoid causing foreseeable mental injury, the plaintiffs' claims for mental distress might succeed even though they were secondary victims who did not witness the accident. The outcome of the action would turn on the robust application of the elements of an action in negligence by the trier of fact rather than on the separate application of geographic, temporal, and relational considerations or a distinction between primary and secondary victims.

In *Stroup v. Klaassen*, 2023 BCSC 1944, [2023] BCJ No 2129, Brongers J dismissed an application to summarily dismiss the plaintiffs' claim for negligent infliction of mental injury claim arising from the death of their daughter in a motor vehicle accident. The parents attended at the hospital and saw their daughter, unconscious in the intensive care unit, before she passed away. Brongers J found that there was no "bright line" permitting the viability of the plaintiffs' claim to be decided fairly by means of a summary trial:

[53] [...] a review of the jurisprudence discussed above reveals that the facts of this case may or may not establish that the defendants owed a duty of care to the plaintiffs. [...] **Each case, of course, turned on its own unique set of facts, and I am unable to discern any "bright-line"** regarding where, when, and how a plaintiff can be said to have experienced compensable mental injury from seeing their relative after an accident caused by a defendant. [emphasis added]

By contrast, in *Devji v Burnaby (District)*, 1999 BCCA 599, 70 BCLR (3d) 42, leave to appeal refused [1999] SCCA No 608, File No 27667, the court granted summary dismissal of claims for psychological injury brought

by the parents and sisters of a woman who had been killed in a motor vehicle accident. The plaintiffs claimed to suffer the injuries at the hospital where they had been asked by the police to identify the body. In rendering judgment, however, the court recognized that locational proximity sufficient to ground a claim is not limited to just being at the scene of an accident but may extend to seeing its "immediate aftermath", such as at a hospital (at para 67).

In *Toukaev v. Insurance Corp. of British Columbia*, 2011 BCCA 87, [2011] BCJ No 288, a pre-*Saadati* case, the plaintiff was also unsuccessful in his claim for nervous shock arising from hearing of his wife's accident and seeing her in a very bad state at the hospital 40 to 50 minutes after the accident. The Court of Appeal found that as the plaintiff had learned of his wife's injuries before he saw her, and while her condition must have been upsetting to him when he saw her, it could not be said to have been unexpected. The plaintiff's claim did not fall within the requirements of the law relating to the circumstances in which persons who were not physically injured were entitled to damages for nervous shock. That aspect of his appeal lacked the degree of merit necessary to justify a finding of indigent status for his appeal.

In *Bevan v. Husak*, 2023 BCSC 304, [2023] BCJ No 375, the plaintiff claimed damages for negligent infliction of mental distress. The plaintiff alleged she suffered a nervous shock when she attended the defendant's residence to pick up her daughter, who had stayed overnight, and found out she was not there. The daughter arrived home within a few hours and disclosed that the defendant had provided her with alcohol and had sexual intercourse with her. The situation had a profound impact on the mental health of both the daughter and the plaintiff.

Betton J. noted that it is often difficult to predict the cases in which liability will be imposed in claims for nervous shock. The claim for nervous shock must be for actual psychiatric or emotional injury caused by, not just resulting from, the actionable conduct of the defendant. In other words, the injury must arise from exposure to the defendant's negligence, not from consequences that resulted from that negligence. Temporal proximity, the relation in time between the defendant's conduct and the onset of the psychiatric illness, is used in assessing foreseeability because it evidences the connection between the conduct and the injury:

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

In *Bevan*, Betton J found that the plaintiff was effectively asserting her psychiatric response resulted from the defendant's conduct as opposed to being caused by it. There was insufficient proximity to establish a duty of care between the parties. The claim failed to disclose a reasonable cause of action.

In *Rowe Estate v. Hanna* (1989), 102 AR 88, [1989] AJ No 1046, another pre-*Saadati* case, the mother claimed damages for nervous shock following the death of her 18-year-old daughter in a motor vehicle accident. The mother had not been present at the accident and learned of her daughter's death within an hour or two, upon attending at the hospital and being informed by doctors. Forsyth J. acknowledged that the determination of the mother's claim was dependent on a consideration of foreseeability. He concluded the mother's shock was not

reasonably foreseeable because she was not at the accident scene and only learned of the accident later from third parties.

However, in *Leckie Estate v. Stevenson* (1997), 56 Alta LR (3d) 431, [1997] AJ No 439, which arose from a claim for nervous shock brought by the parents and sisters of a man killed in a motor vehicle accident, Master Funduk refused to find that *Rowe* had narrowed foreseeability to situations where the victim observes an accident or sees the body a short time after the accident. He noted that: “Foreseeability is not a question of law. It is a question of fact, or the conclusion to be drawn from the facts. A conclusion based on the evidence cannot be or become a rule of law.” Master Funduk therefore dismissed the defendant’s application to strike portions of the pleadings dealing with the claims for nervous shock (at para 11).

In *Brown (Next friend of) v. University of Alberta Hospital* (1997), 145 DLR (4th) 63, [1997] A.J. No 298, the mother claimed damages for nervous shock against the defendant medical professionals who failed to report the suspected abuse of her infant daughter. The daughter had been brought to the hospital on two occasions by her father, who claimed on both occasions she had fallen. The daughter sustained severe and permanent brain damage. Marceau J. found the mother was clearly within a class of persons to be compensated, as she saw the aftermath of the injuries sustained by the child. She had suffered from stress-related headaches, back problems, and depression. However, the expert medical evidence failed to state the cause of the mother’s mental shock. Marceau J. concluded the cause was the mother’s grief at the plight of her child and the terrible pressures of dealing with the child’s needs and care, which was not compensable in Alberta. The court found that nervous shock was not the immediate cause of the mother’s mental injuries.

Conclusion

As these decisions illustrate, claims brought by family members and other indirect plaintiffs seeking compensation for emotional and psychological distress are not barred as a matter of law. Rather, their success turns on examination of the specific factual circumstances, which will often make them unsuitable for summary determination. Courts evaluating such claims can be expected to look closely at factors related to the proximity of the psychological harm to the accident itself, the foreseeability of psychological injury to indirect plaintiffs, and the extent to which the harm was caused by, rather than merely the result of, the defendant’s conduct.



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