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# *Mustapha v. Culligan* and "Psychiatric Illness" Cases

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**PUBLICATION NOTE: The Commentary below was based on the Ontario Court of Appeal's decision in *Mustapha v. Culligan of Canada Ltd.*, [2006] O.J. No. 4964. This decision was appealed to the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, where the appeal was dismissed. This article was actually considered and debated as part of the Court's deliberations at the Supreme Court of Canada.**

In *Mustapha v. Culligan of Canada Ltd.*, the Ontario Court of Appeal, in a unanimous decision released in December 2006, overturned the lower Court decision in which Mr. Mustapha was awarded approximately $350K, plus interest and costs, for psychiatric injuries sustained as a consequence of seeing a fly in an unopened and unconsumed Culligan water bottle.

In overturning the trial judge's decision, the Court of Appeal dealt broadly with nervous shock (now said to be more appropriately described as "psychiatric illness") cases.

The Ontario Court of Appeal held that the English distinction between primary and secondary victims should not be adopted in Ontario. Primary victims are those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant; secondary victims are those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others.

The Court concluded that there is no convincing rationale for concluding that the test for foreseeability in a psychiatric harm case should depend upon the outcome of the exercise of determining whether the plaintiff is a primary or a secondary victim. The Court stated:

> Instead, I prefer the reasoning of the dissenting opinions in Page rejecting the distinction between primary and secondary victims, and concluding that even a plaintiff who was involved in the incident must demonstrate reasonable foreseeability of psychiatric illness in order to recover in tort.

As a result, the Court essentially relied upon and applied the two-part *Anns v. Merton* test as adopted in *Kamloops v. Nielsen* to the determination of tort liability in psychiatric illness cases, as in all other negligence based cases.

In formulating and enunciating the test, the Court stated as follows:

> Reasonable foreseeability of harm is the hallmark of tort liability. In my opinion, the test for the existence of a duty of care - and, therefore, for liability - in cases of psychiatric harm is whether it is reasonably foreseeable that a person of normal fortitude or sensibility is likely to suffer some type of psychiatric harm as a consequence of the defendant's careless conduct. That is what reasonable foreseeability means. This test, which is the foreseeability test enunciated in *Vanek*, applies regardless of the distinction between "primary victim" and "secondary victim" cases.

The Court indicated that in determining potential liability, one is to factor in the "person of normal fortitude and robustness" principle into the reasonable foreseeability equation, as the Court did in *Vanek*.

In finding in favour of the appellant Culligan, the Court stated that the plaintiff's reaction to the fly in the bottle: was abnormal, a product of his "particular hypersensitivity"; was not the response of the average sensitive person; nor was it the response of a person of reasonable fortitude and robustness. The Court concluded that these objective elements are essential to the psychiatric harm analysis.

Furthermore, the Court of Appeal clarified that a duty of care will only be found where the resultant harm is reasonably foreseeable. In order to determine whether the harm was or ought to have been foreseeable, one examines the proximity of the relationship between the parties and the probability of the harm actually occurring. The Court found that the trial judge erred in considering whether there was a foreseeable possibility of damage, and that the Court's reliance on the test of possibility and not probability was an error in law.

As a result, in nervous shock (psychiatric illness) cases the question is whether it would be reasonably foreseeable to the defendant that a person of normal fortitude or sensibility is likely to suffer some type of psychiatric harm as a consequence of the defendant's careless conduct.

**Implications Beyond "Nervous Shock" Cases**

One wonders whether this objective foreseeability analysis as it relates to claims of psychiatric illness may be utilized, as a result of this decision, in other cases where there is a very minor physical injury followed by a major psychiatric or psychological illness.

By having eliminated the distinction between primary and secondary victim cases, the Court has arguably opened the door to the application of a more "robust" foreseeability standard in other, and not just pure, psychiatric injury cases.

If one were to contemplate a scenario where an individual is in a very minor motor vehicle accident, where minimal damage is sustained to the vehicles, and the forces transmitted to the occupants are less than one would expect in a bumper car incident or as experienced by the body in the throes of a violent sneeze. If, in the aftermath of such a minor collision, a plaintiff is to develop a major psychiatric illness, the line it appears must now be drawn between reasonable foreseeability as a threshold test for liability, and the thin skull doctrine as it relates to damages as a secondary analysis.

In the *Culligan* decision, the Court rejected the primary versus secondary victim distinction, noting that the primary victim rationale is based on the premise that the participant is within the range of foreseeable physical injury. The Court concluded that in both (primary and secondary victim) cases the plaintiff must demonstrate a reasonable foreseeability of ("psychiatric") harm. Accordingly, it would seem that the presence of a minor physical injury does not catapult a plaintiff beyond the grasp of the foreseeability test and into the thin skull doctrine. The Court cited with approval the following quote from its previous decision in *Vanek* in which it quoted from a previous House of Lords case as follows:

> The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals. This 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. It is a threshold test of breach of duty; before a defendant will be held in breach of duty to a bystander he must have exposed them to a situation in which it is reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury.

Similarly, the Court of Appeal, in rejecting the primary/secondary victim distinction, states that:

> "In none of the judgments was it suggested that the need to prove foreseeability of nervous shock was other than a general requirement applicable to all cases where damages therefor were claimed"

In the second place foreseeability of injury is necessary to determine whether a duty is owed to the victim. Unless such injury can be foreseen the victim is not a neighbour within the celebrated dictum of Lord Atkin in *Donoghue v. Stevenson*.

Accordingly, I believe a strong argument can be made that a defendant is not, in law, to be held responsible for a disproportionate psychiatric injury sustained by a plaintiff as a result of an accident where the physical injury is minor, if it be found that it is not reasonably foreseeable that a person of normal fortitude or sensibility is likely to suffer psychiatric harm as a consequence of the defendant's careless conduct.

While that issue was not before the Court, the ratio in *Culligan* clearly gives rise to an argument that a profound and inexplicable major psychiatric episode may be seen as unforeseeable, and hence unrecoverable, if it flows from a minor motor vehicle accident with minor physical injury.

Whether lower Courts, or indeed Ontario's top Court, will interpret the *Culligan* decision in this fashion remains to be seen. In any event, it seems to this writer that the language used by the Court in rendering its decision certainly leaves room for such an argument to be made.