

The Latest Word from the Supreme Court on Mental Injuries

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In *Saadati v. Moorehead*, 2017 SCC 28, the Supreme Court of Canada went to great lengths to emphasize the importance of recognizing mental injuries.

Justice Brown, in a unanimous decision of the Court, stated that, where mental injury is negligently inflicted, a person's autonomy to make choices to live life and pursue goals is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury, perhaps even the loss of a finger.

The plaintiff was involved in five motor vehicle accidents. The trial addressed his second accident, which was seemingly minor. The plaintiff led evidence from his friends and family that, after the accident, his personality changed for the worse. He was once a funny, energetic, and charming individual, but he became sullen and prone to mood swings following the accident. His relationships with family and friends deteriorated. He complained of headaches.

The trial judge concluded that the plaintiff had not demonstrated any physical injury resulting from the accident, but he found that the accident caused the plaintiff psychological injuries, including a change in personality and cognitive difficulties. There was no expert evidence to support this. The plaintiff was awarded \$100,000 in non-pecuniary general damages.

The British Columbia Court of Appeal overturned the trial judgment. The Court of Appeal stated that the plaintiff had not proven a medically recognized psychiatric or

psychological illness or condition, and that such an illness or condition must be demonstrated by expert medical opinion evidence.

The Supreme Court of Canada held that expert evidence is not required to prove a mental injury and restored the trial judgment.

The Court noted that mental injury has historically been treated with suspicion and sometimes outright hostility. The Court indicated that the stigma faced by people with mental illness is notorious and often unjustly and unnecessarily impedes their participation in civil society.

The Court held that the objectivity, certainty, and predictability of psychiatric tests are overstated. While, for treatment purposes, an accurate diagnosis is important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but rather with symptoms and their effects.

At the same time, the Court indicated that mental injury is not proven by the existence of mere psychological upset. Happiness is not a legal right. Plaintiffs must show much more, in particular, that the disturbance suffered is serious and prolonged and rises above the ordinary annoyances, anxieties, and fears that come with living in civil society. The injury must be reasonably foreseeable.

Although expert evidence is not required to establish a mental injury, the Court pointed out that it could be of assistance, and that plaintiffs run the risk of being found to have fallen short if they do not present expert evidence.

Moreover, the Court noted that it remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident could not have caused any mental injury, or at least any mental injury known to psychiatry. While the lack of a diagnosis

cannot on its own be dispositive, it is something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.

In light of the Supreme Court's decision, we anticipate seeing many more plaintiffs advance claims for mental injuries, including a change in personality. It should be of some concern to defendants and insurers that the Court agreed that an award of \$100,000 for non-pecuniary general damages is reasonable for such injuries.

The Insurance Bureau of Canada (IBC) was an intervener on the appeal. In its factum, the IBC argued that an objective threshold is required to screen claims for mental distress. It also argued that the elimination of an objective medical standard would expand the liability of defendants and increase the volume of claims.

The IBC further submitted that, without an objective standard, courts would be flooded, trials would be lengthened, the costs of litigation would increase, insurance premiums would rise, and the risk of insurance fraud would be heightened. The Court appears to have given little credence to these arguments.

Only time will tell whether these concerns are borne out, but the Court's decision is one that defendants and insurers will need to pay attention to.

In cases where a plaintiff alleges mental injury, it would be wise to consider retaining a defence psychiatry or psychology expert to rebut the alleged injury, even if the plaintiff has not retained such an expert. Although the defence expert's opinion will not be determinative, it could be persuasive, especially in actions tried by a jury. Surveillance should also be strongly considered in such cases.