

REASONABLE FORESIGHT, THE TOUCHSTONE OF LIABILITY IN NERVOUS SHOCK CASES: *MUSTAPHA V CULLIGAN OF CANADA LIMITED*

By Peter M. Willcock

A Globe and Mail article published on January 16, 2008 bore the headline: "Fly-phobia Case on List for Top Court's Review". Kirk Makin's article began:

OTTAWA -- The strange case of a fly that destroyed Waddah Mustapha's life has reached the Supreme Court of Canada. The insect's body - discovered by the Windsor, Ont., hairstylist while he was drinking a bottle of Culligan spring water - lies at the heart of one of what is inarguably the most bizarre case the court will tackle in its winter session.¹

How did we come to this? The road probably started in Paisley, where Mrs. May McAlister (or Donoghue) is said to have become nauseated after finding a snail in her half-consumed ginger beer.² The allegations in that case are well-known to all law students:

At or about 8.50 p.m. on or about 26th August 1928 the pursuer was in the shop occupied by Francis Minchella, and known as Wellmeadow Cafe, at Wellmeadow Place, Paisley, with a friend. The said friend ordered for the pursuer ice-cream, and ginger-beer suitable to be used with the ice-cream as an iced drink. Her friend acting as aforesaid, was supplied by the said Mr Minchella with a bottle of ginger-beer manufactured by the defender for sale to members of the public. The said bottle was made of dark opaque glass, and the pursuer and her friend had no reason to suspect that the said bottle contained anything else than aerated-water. The said Mr Minchella poured some of the said ginger-beer from the bottle into a tumbler containing the ice-cream. The pursuer then drank some of the contents of the tumbler. Her friend then lifted the said ginger beer bottle and was pouring out the remainder of the contents into the said tumbler when a snail, which had been, unknown to the pursuer, her friend, or the said Mr Minchella, in the bottle, and was in a state of decomposition, floated out of the said bottle. In consequence of the nauseating sight of the snail in said circumstances and

¹http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20080116.SCOC16%2FTPSStory%2FNational&ord=2132192&brand=theglobeandmail&force_login=true

² *Donoghue (or M'Alister) v Stevenson* [1932] A.C. 562, 1932 S.C. (H.L.) 31, [1932] All ER Rep 1

of the noxious condition of the said snail-tainted ginger-beer consumed by her, the pursuer sustained the shock and illness hereinafter condescended on.³

Donoghue v. Stevenson is widely cited as the source of our understanding of the class of persons to whom we owe a duty of care: our neighbours, those who might foreseeably be injured by our errors or omissions. That class has grown over the years and the courts have frequently wrestled with the limiting criteria of foreseeability. The time now appears ripe for a review of some of the leading cases so that when the decision of the Supreme Court is pronounced, any day now, the decision can be appreciated in light of the long development of the law, in the “nervous shock” cases.

Duwyn v Kaprielian

On March 19, 1975 Brent Duwyn, then about six months old was seated on his grandmother’s lap in a parked car on Clarence Street in London, Ontario. His mother was in a nearby office paying bills. Mr. Kaprielian, apparently a terrible driver, backed his car from a lane all the way across the street into the driver’s door of the Duwyn vehicle, denting it and breaking the window, scattering glass throughout the inside. Fortunately no-one was hurt but when Mrs. Duwyn came out of the office, saw people gathered around the car, heard her baby screaming and saw glass on the road, she became so upset she was unable to comfort her infant. In the days and months that followed the baby had difficulty settling down and Mrs. Duwyn became an emotional mess. The child went on to develop a high level of anxiety and hyperactivity. This apparently was caused by his mother’s inability to care for him, due to her strong response to the accident. Both mother and son brought claims. The mother’s reaction to the accident was found to be in part, a result of the fact that when she was a teenager her two year old brother injured himself while she neglected him. When her own child was injured this reawakened feelings of guilt. The infant and mother’s action against the responsible driver was dismissed at trial.

An appeal was brought to the Ontario Court of Appeal *Duwyn v Kaprielian* (1978) 22 OR (2d) 736 In November, 1978 the child’s appeal was allowed. The Court held it was foreseeable he might suffer emotional shock as a result of the collision and, further, it was foreseeable that despite their best intentions his parents might not be able to care for him in such a fashion as to resolve the initial shock. The mother’s inability to care for her son as a result of emotional disturbance was, therefore, found to be foreseeable. Bad parenting, like bad medical care, is something that occurs from time to time and it foreseeable an injury will be exacerbated by inadequate care. The damages suffered by the infant were “a foreseeable degree of damage of a foreseeable type and that aggravated injury resulting from the abortive ministrations of the mother was reasonably foreseeable”.

The mother’s action was dismissed. The Court canvassed the law with respect to recovery for psychiatric injury and nervous shock, focusing upon the question of foreseeability and noted “the claims of observers of accidents, and those who come

³ <http://www.scotland.gov.uk/News/News-Extras/190>

upon their aftermath, have generally given the most difficulty in nervous shock cases.”. The Court observed that in most cases the foresight required in order to make emotional injury and the foresight required in order to make physical injury compensable are identical. The standard by which the courts gauge foreseeability of shock reflects a trend toward “a much more sympathetic view of human sensitivity”.

Despite its view that it is foreseeable that a mother who temporarily leaves her young baby in the care of a responsible person may be in the vicinity of the accident and may suffer nervous shock upon witnessing an accident or coming upon its aftermath, the Court of Appeal found that because Mrs. Duwyn’s emotional upset was based on feelings of guilt it was not reasonably foreseeable. If Mrs. Duwyn’s emotional reaction had related solely to witnessing the accident or its aftermath, her damages might have been recoverable.

Mrs. Duwyn was held to be someone with an “unusual sensitivity” and her claim was dismissed.

How do we know what is foreseeable and what is not? The Court agreed with the view that foreseeability “should stop where in the particular case the good sense of the jury or of the judge decides”.

McLoughlan v. O’Brian

A little more than a year before the Duwyn accident a much more tragic accident occurred in Suffolk, England. On October 19, 1973 many members of the McLoughlan family were in a car which was involved in a multiple vehicle accident. The driver, Thomas suffered bruising and shock, his son George, 17, suffered a concussion and many fractures, his daughter Kathleen suffered a concussion and fractures. His youngest child Gilian died almost immediately. Mrs. McLoughlan was at home at the time of the accident and was told about the accident by her neighbour who drove her to Addenbrookes Hospital in Cambridge. There she saw her seriously injured family members and learned of her daughter’s death. Mrs. McLoughlan suffered nervous shock and a subsequent depression and personality change and sued the responsible drivers. Her action was dismissed at trial on the basis her injury was not reasonably foreseeable. On appeal the Court held that while her injury was readily foreseeable that for policy reasons the court was obliged to hold that the defendants owed no duty of care to her. The duty was limited to those on the road nearby.

The case then went to the House of Lords. *McLoughlan v. O’Brian* [1982] 2 All E.R. 298 All five justices of the Court wrote reasons for judgment and all allowed the appeal. In allowing the appeal, the Court dismissed the argument that there should be any line drawn in the sand, for example immediate attendance at the accident scene, beyond which for reasons of public policy of foreseeable damages should not be compensable. The case was said to follow “the process of logical progression”. On the question of foreseeability one judge noted (at p 422) “a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene - normally a parent or a spouse - could be regarded as being within the scope of foresight and duty”.

Some of the judges in the Court of Appeal would have limited the role of the Court to determining whether the plaintiff's damages were foreseeable, without adding another test. Others were of the view, however, that there might be cases where the law should draw the line for policy reasons and bar some remote claims, even though they might be considered to be foreseeable. Those who rejected this argument held that "the policy issue as to where to draw the line is not justiciable. The problem is one of social, economic and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process." Because all of the judges concurred in the result it could be said from the reasons for judgment that the question had been clearly resolved.

Rhodes v CNR

Shortly thereafter the judges of our Court of Appeal wrestled with these issues in *Rhodes v CNR* (1990) 75 DLR (4th) 248. In 1986 there was serious accident in Hinton, Alberta which resulted in the death of Conor Rhodes, a 23 year old passenger on a VIA Rail train. At the time of the accident Conor's mother was living in Errington on Vancouver Island. She heard of the accident on the radio, went to Edmonton the next day and then to Hinton to discover what had happened to her son. She saw pictures of the wreckage in the newspaper and over a period of several days came to realize that her son must have died. She was not at the scene. She did not see any particularly shocking site in person. When she arrived at the scene of the accident the wreckage had been removed. A psychiatrist expressed the opinion that Mrs. Rhodes was suffering from depression as a result of the horror of the event, the uncertainty regarding the fate of her son and not knowing how he died. Mrs. Rhodes brought action for her shock but before trial there was an application to dismiss her claim. The application failed and it was held that the action should be allowed to proceed. That decision was appealed. The appeal was allowed and the action was dismissed unanimously by the Court of Appeal. The Judges of the Court expressed the following opinions:

1. Grief, sorrow or reactive depression are not compensable.
2. A duty of care is not owed to everyone but only to those persons the defendant should have foreseen would be directly affected by his conduct.
3. In order to advance the claim for nervous shock the plaintiff must be able to establish that they are so closely and directly affected by the accident as to be a member of a foreseeable class of plaintiffs.
4. There must be proof that the injury was caused by some experience of an alarming, startling, or frightening nature.

In Mr. Rhodes' case the psychological evidence did not support the conclusion the injury suffered by Mrs. Rhodes was a result of an unexpected, alarming or horrifying experience caused by the circumstances of the accident.

There were three concurring opinions. Mr. Justice Wallace concluded "considerations of policy respecting the limits to be placed upon the right of recovery for psychiatric illness,

when it is unaccompanied by conventional injury, must enter into the determination of the foreseeability issue”.

At page 266, Mr. Justice Wallace noted:

In my view, the confusion surrounding the right of recovery for psychiatric illness arises, in part, from the failure to differentiate between the significance of the requisite proximity relationship in respect of the issue of reasonable foreseeability giving rise to a duty of care, on the one hand, and its significance, on the other hand, to the issue of causation and of demonstrating whether the defendants’ tortious conduct was the direct cause of the complainants psychiatric illness. While both analyses involve consideration of the proximity relationship they are separate and distinct and are directed to different objectives. To be successful, the complainant first must establish the duty of care and its breach and then establish that the defendants’ tortious conduct was the direct cause of the psychiatric illness he or she sustained.”

Madame Justice Southin would have dismissed the case because there was no plea of “fright”, “horror” or “terror” and Mrs. Rhodes had not suffered a physical injury leading to the mental condition.

Mr. Justice Taylor would have dismissed the case on the basis there was insufficient “causal proximity”. For policy reasons he held that there cannot be sufficient causal proximity where the claim is for indirect injury, such as that which results from merely learning of an accident or of injury or death.

Alcock v Chief Constable of South Yorkshire Police

The issue was again considered in England as a result of claims brought following the terrible deaths of 95 soccer fans at the Hillsborough Stadium, the grounds of Sheffield Wednesday football club on April 15, 1989. Thousands of people watched in person or on television while their loved ones suffered and died. Many were said to have suffered post traumatic stress disorder. The claims of those who were not physically injured were considered in a very extensive decision of the House of Lords reported as *Alcock v Chief Constable of South Yorkshire Police* [1992] 1AC 310, and later revisited in related cases in *White v Chief Constable of South Yorkshire Police* [1999] 1 All E.R.1.

The initial test cases were brought on behalf of sixteen relatives of individuals who died in the mishap. The trial court found in favour of ten plaintiffs and dismissed the claim of six. In doing so the court set aside traditional categories defining the relationships which must exist before such a claim could be brought and expanded the class of foreseeable plaintiffs to include those who watched the incidents on television. The court was satisfied that the observation of the disaster through simultaneous television was sufficient to satisfy the test of proximity of time and space required in actions for nervous shock.

The case went to the Court of Appeal in respect of nine of the ten successful plaintiffs and six unsuccessful plaintiffs.

All of the defendants' appeals were allowed and all of the plaintiffs' appeals dismissed. The Court of Appeal held there should be no strict categorization of those entitled to bring a claim for nervous shock as a result of the death or injury to a loved one. There should be a *prima facie* presumption in favour of a plaintiff parent or spouse. Plaintiffs who were not parents or spouses however would have to lead evidence of a particularly close relationship, which had not been done in the case. The questions the court said it had to address were: (a) could the defendant reasonably foresee his acts or omissions would be likely to cause psychiatric illness of the plaintiff, and (b) is the plaintiff someone so closely and directly affected by the act or omission complained of that the defendant ought reasonably to have had him in contemplation as being so affected. The television coverage of the event was such that none of those watching could be certain their loved one had been injured or killed and graphic scenes of injury in which individuals were identified were not permitted on the television.

The case then went to the House of Lords where the judgment of the Court of Appeal was upheld. All appeals were dismissed. The court underlined the importance of both a close emotional bond between the victim of the physical injury and victim of the psychological trauma and the relationship of proximity in time and place. One of the judgements noted "in my opinion the necessary proximity cannot be said to exist where the elements of immediacy, closeness of time and space, and direct visual or aural perception are absent" (Lord Oliver).

The House of Lords held the existence of a duty of care on the part of the defendant does not depend on foreseeability alone. The law should place some limitation upon the extent of admissible claims. The class of persons with recognisable claims "will be determined by the law's approach as to who ought, *according to its standards of value of justice*, to have been in the defendant's contemplation" (Lord Chauncey).(emphasis added)

Bechard v. Halburton Estate

Another tragic and strange accident leading to a nervous shock claim was considered by the Ontario Court of Appeal following *Alcock: Bechard v. Halburton Estate* (1991) 5 OR (3d) 512. On October 9, 1982 Mr. and Mrs. Bechard were driving on a rural road near Windsor, Ontario when Charles Halburton, operating a motorcycle ran into the side of their car, bounced off the windshield and landed in the middle of the road. When the Bechard vehicle stopped, Mr. and Mrs. Bechard went back to find Halburton and Mr. Bechard tended to him. He did not want to be moved from the road. Shortly thereafter Ben Damsgard drove through the accident scene without heeding a warning from Mrs. Bechard and drove over Halburton's body. Mrs. Bechard had not been injured in the accident but suffered a severe psychiatric illness as a result of everything that she witnessed. She sued Damsgard and Halburton for her nervous shock. Her psychiatric reaction was, primarily, to witnessing the death of a stranger, Halburton. The trial judge found in favour of Mrs. Bechard and awarded damages for mental shock, apportioned to the two defendants.

On appeal, the court reviewed the judgement of the House of Lords in *McLoughlan v O'Brian* and considered that the majority of the Law Lords held that matters and policy

and factual proximity had to be weighed by the court, in addition to foreseeability of nervous shock. The Ontario Court of Appeal sidestepped the significant issues in the case:

The trial judge correctly held that the right of Dolores Bechard to recover damages for her nervous shock depended on whether her shock was reasonably foreseeable by the defendant Damsgard in all the circumstances. Whether one applies the rule of foreseeability as the principal exercise as suggested by Lord Scarman in *McLoughlan* . . .or whether one resorts to policy considerations to place some limit on the foreseeability rule, it seems to me that Dolores Bechard should recover in the circumstances of this case. It was foreseeable that those involved in an accident might suffer nervous shock from observing the gruesome sight of the person they were attempting to save being injured and killed.

Of significance in the case was the a finding by the Court of Appeal that despite the fact Dolores Bechard had had some prior psychiatric problems, the defendants were liable to her because the shock that she suffered was foreseeable to an average person. That being the case, she was entitled to recover damages for the more extensive mental illness she suffered due to her unusual susceptibility.

Nespolon v Alford

The circumstances in which a claim for nervous shock may be brought were again considered by Canadian courts in tragic circumstances arising out of a motor vehicle accident on April 8, 1988 in Harrow, Ontario. Late on that night, Gary Nespolon was returning from a restaurant after his work shift ended near midnight and he ran over a drunken teenager on the road, dragged him for more than fifty feet and killed him. Mr. Nespolon was distraught. He started having nightmares and became withdrawn and short-tempered with his family. He became estranged from his sons and separated from his wife. His was hospitalized twice for psychiatric care and required at least five years of treatment. He sued the estate of the teenager who had fallen drunk on the road and the friends who had accompanied him, assisted him in drinking and later left him alone at the side of the road. When the question of foreseeability of damages for nervous shock was considered at trial, the judge held:

I am of the view that the public generally and the ordinary reasonable man, even to the extent of the ordinary reasonable sixteen year-old, ought to be aware, and indeed in law should and is aware . . . that a person who is made to be the instrument of another's death, and then exits the vehicle and sees the mangled remains is likely to suffer the exact horrendous damages that have been sustained by Mr. Nespolon.

The defendants successfully appealed the judgement (*Nespolon v Alford* (1998) 40 OR (3d) 355). Two of the three judges of the Court of Appeal held that a duty of care will

only be found where the resultant harm is reasonable foreseeable and 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.

Nespolon's nervous shock is too remote from any relationship with or behaviour of (the defendants) to be compensated in damages from any of them. Nespolon's injuries, in other words, were not caused by or related to any fault on the part of any of the three boys and were not reasonably foreseeable by them. There has therefore been no breach of any duty of care.

The opinion is an odd one. It appears to be founded more upon the courts' view that the boys were not at fault in leaving their friend by the side of the road. "They dropped him off at the place where he asked to be dropped off - in front of a house whose occupants he said he knew. They had no reason to question his request." And "It is difficult to say what more they could have done in the circumstances, short of demanding that (their drunken friend) tell them where he lived and insisting on taking him home." Further:

Based on their experience, and based too on seeing (their friend) walking in apparent safety across lawns the first time they drove back to check on him, there was no reason (the defendants) to suspect that (their friend) was at risk, let alone that he would fall on the road, causing risk of nervous shock to a stranger.

In this sense, the case was resolved on the basis of what the court thought ought to have been foreseen in the way of possible injury to their friend, as opposed to whether or not nervous shock to a third party ought to have been foreseen.

There is a dissenting judgment finding the trial judge was right in concluding the defendants were negligent in leaving their friend in a position of risk. Like the judgment of the majority the dissent addresses the foreseeability of the injury to the drunken teenager in the middle of the road, rather than injury to the driver who is devastated by his injury. Having found they ought to have foreseen the risk of injury to their friend, the dissenting judge concludes the trial judge correctly found the defendants ought to have foreseen the injury suffered by the plaintiff. In coming to this conclusion the dissenting judge relies upon the rule that "in most cases the foresight concerning emotional injury and that concerning physical injury are identical".

Devji v District of Burnaby

On December 30, 1991 Jasmin Devji lost control of a motor vehicle on what were said to have been unsafe streets in Burnaby. She died at the scene of the accident and her family was called, notified of the accident and asked to come to the hospital to identify the deceased. Four family members went to the hospital, all identified Jasmin's body after it had been prepared for viewing. All subsequently claimed to have suffered nervous shock and brought action against the District of Burnaby alleging negligent maintenance of the road has caused Jasmin's death and, consequently, their

psychiatric illness. On a summary judgment application the case was dismissed on the basis the chambers judge was of the view it was not reasonably foreseeable that psychiatric injury would flow from the negligence of the defendants.

That decision was appealed. (*Devji v District of Burnaby* (1999) 180 DLR (4th) 205 (BCCA)). The Court of Appeal reviewed the cases arising out of claims for nervous shock including many of those described above. Upon doing so, McEachern CJBC noted:

One of the difficulties arising from the simple test of foreseeability is to determine how it is to be applied in particular circumstances. As already mentioned, some eminent judges believe nervous shock cases can be decided solely by reference to the principle of foreseeability. Other courts have taken the view that the application of the foreseeability principle is too open-ended and that “control mechanisms” are required.

The court noted that in the UK the contest between pure foreseeability and “control mechanisms” had been decided in favour of the latter and that control mechanisms had been approved by the British Columbia Court of Appeal in *Rhodes*. The court also found support for a public policy limitation upon claims in the decision of the Supreme Court of Canada in *Kamloops v Nielsen* [1984] 2 SCR 2, where the court set out the “conventional approach” to negligence cases where there is an issue with respect to the duty of care, which is to ask:

1. Whether there is a sufficiently close relationship between the plaintiff and the defendant to establish a duty of care, and,
2. If so, whether any public policy negates such duty.

Mr. Justice McEachern held, at page 226, “the Supreme Court of Canada has authorized the imposition of policy-based control mechanisms in proper cases. In *Rhodes* this court actually did so in connection with nervous shock.” The court held while emotional or psychological injury on the part of a mother whose child has been killed will often be reasonably foreseeable psychological injury is not what one expects or would reasonably foresee from the experience of having to identify the deceased significantly after the accident. The court held at page 227 “common experience demonstrates that the usual fortitude of our citizens protects them from psychiatric injury and makes such injury, if it occurs, not reasonably foreseeable.”

That did not, however, end the analysis. The court held that the control mechanisms would bar the *Devji* claim, in any event, because the plaintiffs had not suffered the “requisite experience”: exposure to a horrifying, shocking and frightening scene.

In this decision, Mr. Justice McEachern makes a very interesting point which later becomes key in the judgments in *Vanek* and *Mustapha*, discussed below. It is the observation, at page 228 with respect to why “usual fortitude” is even considered in the case:

I have already mentioned “usual fortitude” on the part of the plaintiffs which has been assumed in the cases. For the purpose of determining liability (although not necessarily for fixing damages), I consider it necessary to make that same assumption. *The eggshell skull rule has no application until liability has been determined.*

The law requires us to take care to avoid causing injury to those who might foreseeably be injured by our actions, subject only to the policy limitations described in *Kamloops v Nielsen* and *Devji v Burnaby*, among other cases. In describing the scope of those to whom a duty is owed the courts will permit us to assume that those who may be affected by our actions will possess the usual fortitude. The concept of the “eggshell skull” should be shelved until the court has determined there is a duty of care, that duty has been breached and the plaintiff has suffered some damages as a consequence of the breach. It is only at that point the plaintiff can invoke the rule that the tortfeasor takes the victim as he finds him.

Vanek v A&P

In *Vanek v The Great Atlantic and Pacific Company* (1999) 48 OR (3d) 228, the Ontario Court of Appeal considered a case which arose from far less tragic circumstances than those we have previously discussed. On June 16, 1993, Eva Vanek an 11 year old grade six student drank a small amount of Beatrice grape drink at school. She noted it had a foul taste and regurgitated some of it but did not vomit or lose consciousness. She told her classmates who told the teacher who took her to the principal’s office, who called her parents, who took her to the hospital. There she was reassured. She went back to school the next day and resumed her normal academic and athletic activities but her parents went off the deep end. They began conducting their own research and as they became more and more worried. Both mother and father received prescriptions for Atavan, became less active and depressed. Just less than a year after the incident Mr. Vanek was hospitalized for coronary artery disease and unstable angina. They then brought an action for damages in the amount of \$925,000.00. The parents obtained nominal awards of \$15,000.00 and \$12,500.00. An appeal was brought. On appeal the court held the trial judge had failed to fully address the question of foreseeability. The appeal court reviewing many of the cases discussed above and three recent Ontario decisions held:

In these three cases, and in the many other cases dealing with psychiatric damage caused to a bystander, it is clear that the courts focused their analysis on two factors - the actual event or its aftermath, witnessed by the bystander, and the reaction this event and its aftermath might engender *in the reasonable person.*

The Vanek parents, according to the Court of Appeal, saw and experienced “a fairly ordinary situation”. The psychiatric damage they suffered following the consumption of the juice by their daughter could not have been reasonably foreseen. They did not witness the consumption of the juice, they did not see anything “distressing in the extreme” or “horrifying or gruesome”. They were not present for the “immediate aftermath” of the event. This was a minor mishap in everyday family life. The parents

were displaying “particular hyper-sensitivity”. They lacked the “reasonable fortitude and robustness” the law expects of its citizens.

Mustapha v. Culligan

All of which brings us to the subject of this paper. On November 21, 2001 an incident occurred in the home of the Mustapha family in Windsor, Ontario that shattered Mr. Mustapha’s life. In the course of replacing an empty bottle of Culligan water on the dispenser provided by Culligan, he and his wife saw a dead fly and part of another dead fly in the fresh, unopened replacement bottle. Mr. Mustapha became obsessed with thoughts about the dead fly in the water to the point where he began to suffer from a major depressive disorder with associated phobia and anxiety. He did what most obsessive people would do in the circumstances: he brought an action against the water supplier, Culligan of Canada Limited. The case went to trial and in April of 2005 Mr. Mustapha recovered judgment in the amount of \$341,775 ((2005) 32 CCLT (3d) 123). An appeal from the judgment was heard on June 28, 2006 and the judgment of the Ontario Court of Appeal was delivered December 15, 2006. The Court of Appeal unanimously allowed the appeal and set aside the judgment. On Appeal, Culligan argued that the trial judge had failed to apply the laws described in the *Vanek* case. Culligan said that the presence of a dead fly in a bottle of water from which no-one had consumed anything is not such as to cause one to foresee psychological injury to anyone with reasonable fortitude and robustness.

Mr. Mustapha’s counsel suggested the law has long distinguished between primary and secondary victims. He argued there is a line of cases that establishes that a different test should be used to limit the scope of a tortfeasor’s duty to secondary victims such as bystanders or spectators but there is no corresponding policy reason to restrict the scope of a tortfeasor’s liability to a primary victim, the person directly affected by the tortfeasor’s action. Because Mr. Mustapha was not a bystander but a primary participant, it was argued, it was unnecessary to demonstrate psychiatric harm, in particular, was reasonably foreseeable. If it was reasonably foreseeable a purchase or consumer of Culligan water would be injured in some fashion if Culligan distributed contaminated bottle water then this foreseeability was sufficient for the purposes of the claim. The Court of Appeal did not accept the argument that there is any distinction between primary and secondary victims.. It held, even in respect of primary victims, the particular type of injury must be foreseeable. It is merely its extent that need not be foreseen.

The Court underlined the rule that the thin skull principle relates only to quantum of damages once liability has been established. The rule that one takes the victim as he finds him: “is only true . . . on the condition that the wrong has been established or admitted. The question of liability is anterior to the question of the measure of the consequences which go with the liability.”

After noting it was difficult to determine whether Mr. Mustapha was a primary or secondary victim or both, Mr. Justice Blair concluded:

Why should it matter in principle? I can see 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 secondary victim. Instead, I prefer the reasoning ... that even a plaintiff who was involved in the incident must demonstrate reasonable foreseeability of psychiatric illness in order to recover in tort.

In the result, the court concluded, in determining whether or not a tortfeasor should have foreseen that an individual would suffer nervous shock as a result of his negligent act, the proper test is to assume the victim is of reasonable fortitude, unless of course the tortfeasor has special knowledge of the victim's unusual condition. Mr. Justice Blair cited with approval the rule stated in the *Halburton Estate* case that "reasonable foresight of nervous shock to the plaintiff is the touchstone of liability."

The Court of Appeal held the trial judge in addressing the question of foreseeability had erroneously focused solely upon the subjective, specific sensibilities of Mr. Mustapha. His reaction, was, even according to his own physicians, unique and strange. He was clearly a person of "particular hyper-sensitivity".

The Court went on, however, to consider an additional question which may be equally significant when the case is argued before the Supreme Court of Canada. The Ontario Court of Appeal concluded the trial judge also erred in considering whether there was a foreseeable "possibility of damage" arising as a result of seeing the dead fly in the bottle of water. The Court held there must be a probability of such damage to make it foreseeable. The Court cited with approval from the judgment of Abella, J.A. in the *Nespolon* case at page 363-364:

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 relationship between the parties and the probability of the harm actually occurring. (emphasis added)

Blair also cites with approval from *Fridman* in *The Law Of Torts in Canada*:

Only if what happened is considered to be a natural and probable result of what the defendant did or omitted to do will the defendant be regarded as having behaved so unreasonably as to be guilty of negligence, i.e. of conduct falling short of the standards of the ordinary reasonable man.

Despite the fact the decision of the Court of Appeal was unanimous, the Supreme Court of Canada granted leave to Appeal from the judgment in *Mustapha* on June 21, 2007. The Appeal was heard on March 18, 2008. The Supreme Court previously refused leave to Appeal in a number of the cases referred to in this paper, including the *Devji* case and the *Vanek* case. There is now a reasonable body of law from appellate courts in Canada addressing the question of foreseeability in nervous shock cases, the question of whether there should be a policy limit on such claims and the issue of whether there is a distinction between primary and secondary victims. Because all of these issues have been raised in the *Mustapha* case the Supreme Court of Canada now has an opportunity to settle the law and relieve many of those who have for some time complained of the jumble of decisions in this area arising, particularly, as a result of

the large number of conflicting decisions in the cases which have gone to the House of Lords in England and the sometimes divergent approaches which have been taken toward these cases in Canada.

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