

June 6, 2008



## SUPREME COURT AFFIRMS FORSEEABILITY PRINCIPLE



### BACKGROUND

On May 22, 2008 the Supreme Court of Canada delivered its ruling in *Mustapha v. Culligan of Canada Ltd.* In this case, the Plaintiff was replacing an empty bottle of Culligan water with a new one when he noticed a dead fly in the unopened bottle. As a result, he developed a major depressive disorder, phobia and anxiety. He sued the Defendant who was the supplier of the bottled water for psychiatric injury.

At trial, the judge awarded \$80,000 for general damages and \$237,600 in damages for loss of business. The Court of Appeal reversed the trial decision on the basis that the injury was not reasonably foreseeable. The Plaintiff appealed to the Supreme Court of Canada.

### RULING

The Supreme Court affirmed that in order for the Plaintiff to recover damages in negligence he was required to demonstrate that (1) the Defendant owed the Plaintiff a duty of care; (2) the Defendant breached the standard of care; (3) the Plaintiff sustained damages; and (4) the damages were caused, in fact and in law, by the Defendant's breach.

The Court held that the first three elements were satisfied but that the Plaintiff failed to prove the damages were caused in law by the Defendant's breach. The Court stated that while the Plaintiff's psychiatric injury was caused in fact by Defendant's breach of its duty of care, it had not been caused in law by that breach because it was not reasonably foreseeable that a person would have such an unusual or extreme reaction to the sight of a dead fly in one of its bottles of water.

The Court said that while it was possible for someone to suffer such serious psychological injuries, since it had actually occurred here, more than just a possibility is required. A Plaintiff must prove that such an injury is foreseeable to a person of ordinary fortitude and robustness.

The Court said that the trial judge had erred in applying a subjective test instead of an objective one. They stated that “unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable”.

The Court went on to emphasize that the law of negligence is not the same as insurance, that would compensate for every injury:

*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. 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 damages, 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 damages at law.*

The Court went on to note that in cases where a Defendant is aware of a Plaintiff’s particular sensibilities, the ordinary fortitude requirement need not be applied strictly. In this case, there was no evidence that the Defendant knew of the Plaintiff’s particular sensibilities. The appeal was therefore dismissed.

## IMPACT ON INSURANCE INDUSTRY

In the writer’s view, it may be possible to use the *Mustapha* case to defend cases where minor accidents or minor physical injuries result in claims for major psychiatric or psychological illnesses or other conditions not proportionate to the accident. In these cases, the plaintiff must first pass the threshold test for liability. That is, the plaintiff must prove that the injury to a person of ordinary fortitude and robustness was reasonably foreseeable. If it is not, then a defendant cannot in law be held liable for the disproportionate psychiatric or other disproportionate injury.

**AUTHOR** Seema S. Kanji  
Direct Line: 604-891-0351 E-mail: skanji@dolden.com

**EDITOR** Alex L. Eged  
Direct Line: 604-891-0357 E-mail: aeged@dolden.com