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DEAD FLY IN A BOTTLE: PSYCHOLOGICAL HARM AND THE HYPERSENSITIVE PLAINTIFF

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On November 21, 2001, Mr. Waddah Mustapha and his wife saw a dead fly in an unopened bottle of Culligan water. Neither Mr. Mustapha nor any member of his family drank from the bottle. He became obsessed, however, with thoughts about the dead fly. After accepting medical evidence that Mr. Mustapha suffered from a major depressive disorder, with associated phobia and anxiety, Justice John Brockenshire of the Ontario Superior Court of Justice awarded Mr. Mustapha more than $340,000.00 in damages.

In December 2006, the Ontario Court of Appeal overturned the lower court decision in a unanimous decision. This article will examine the Ontario Court of Appeal's decision and consider the impact of the decision on the "thin skull" rule and its possible future implications.

Ontario Court of Appeal Decision

In overturning the trial judge's decision, the Court of Appeal identified three important errors in the trial judge's reasons:

1. The trial judge focussed on the specific subjective sensibilities of Mr. Mustapha, rather than conduct an objective analysis into whether a person of normal fortitude would likely suffer psychological injury from having seen a dead fly in a bottle of water from which no water had been consumed;

2. The trial judge made no finding – nor was there any evidence to support one – that Culligan was made aware of, or ought to have known, anything about the particular sensibilities of Mr. Mustapha and his family; and

3. The trial judge erred in considering whether there was a foreseeable *possibility* of damage rather than considering whether there was a foreseeable "*probability*" of psychological damage as a result of seeing a dead fly in a bottle of water.

The Court of Appeal framed the issue to be decided as follows: Should a defendant be liable for damages for psychiatric harm where the harm, by any objective measurement, consists of an exaggerated reaction by an obsessive person of particular sensibilities to what, in reality, is a relatively minor or trivial incident - the sight of a dead fly in a bottle of water? In other words, was the psychological harm foreseeable in the circumstances?

After reviewing the historical case law in both the United Kingdom and Canada relating to tort-induced psychological injuries, the court refused to accept a distinction adopted in the United Kingdom between victims involved in the incident itself ("primary" victims) and victims who merely observed another's pain and/or injury ("secondary" victims). Primary victims seeking damages for psychological harm had to establish reasonable forseeability of *physical* injury to recover, whereas secondary or "bystander" victims seeking such damages had to show that some form of psychiatric illness in

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a person of normal fortitude was reasonably foreseeable before being entitled to recover.

The court in *Culligan* concluded that there was no convincing rationale for distinguishing between primary and secondary victims in formulating the test for foreseeability in psychological harm cases. Instead, the court held that the test, regardless of the distinction between primary and secondary victim cases, is as follows:

> Reasonable foreseeability of harm is the hallmark of tort liability….**[T]he 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.

Impact on the "Thin Skull" Rule

The Court of Appeal decision in *Culligan* does not affect the "thin skull" rule.

Under the thin skull rule, a tortfeasor is liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The thin skull rule relates to only *quantum of damages*, once liability has already been established. The issue in *Culligan* was whether there should be any *liability* at all in cases of psychiatric harm where the harm suffered is:

(a) significantly disproportionate to the relatively inconsequential nature of the incident in question, and

(b) a function of the particular sensibilities of the plaintiff rather than a person of normal fortitude.

The Court of Appeal resolved the issue by factoring the "person of normal fortitude and robustness" principle into the "reasonable foreseeability" equation. In reaching its decision, the Court of Appeal was careful to draw a line between reasonable foreseeability as a threshold test for liability, and the thin skull rule as it affects the measure of damages, citing with approval the following quote from its previous decision in *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.), leave to appeal refused [2000] S.C.C.A. No. 50:

> *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.

Possible Future Implications

Based on the reasoning in *Culligan,* could one argue that a defendant should not be held responsible for a major psychiatric illness allegedly sustained by a plaintiff as a result of a very minor car accident? *Culligan* does not address this issue. However, we expect that attempts will be made to use the *Culligan* decision to argue that a major psychiatric condition

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which is shown to have developed due to a minor car accident is unforeseeable and therefore unrecoverable. The difficulty with this argument is that in most cases involving a collision between motor vehicles, injury is foreseeable. If the plaintiff sustains even a minor physical injury coupled with psychiatric harm, we doubt that the reasoning in *Culligan* will be applied. *Culligan* is more likely to be applied in the unusual situation where the plaintiff suffers no physical injury. For example, a truck comes to a stop at a crosswalk and avoids striking a pedestrian by a hair. If the pedestrian goes on to develop a major psychiatric illness as a result of such an incident, then a strong argument can be made that the condition was unforeseeable. No liability should be imposed on the truck driver based on the reasoning in *Culligan*. How far the courts will ultimately go in interpreting and applying *Culligan* remains to be seen. ■

VIDEOTAPING OF DEFENCE MEDICAL EXAMINATIONS

Eugene Mazzuca

Over the last couple of years, there has been a growing trend amongst plaintiffs' counsel to request that defence medical examinations be either audiotaped or videotaped. This trend is primarily a result of the 2003 decision of the Ontario Superior Court of Justice in *Willits v. Johnston*.

In the *Willits* case, the plaintiffs sought to have their defence psychiatric examinations videotaped. The plaintiffs were concerned that their poor English would prevent them from properly advising their counsel of the examinations. The plaintiffs were of Greek origin and an interpreter would be required at their examinations. Despite the refusal by the defence expert to conduct the examination if videotaped, Mr. Justice Quigley ordered that the examinations be videotaped. His Honour found that the defence expert's position was solely a preference and that the videotaping would not adversely impair a psychiatrist's ability to conduct the examination. His Honour also held that without the videotaping the plaintiffs would be at a significant disadvantage if there was a dispute as to what happened at the examination for purposes of cross-examination at trial. Leave to appeal this decision to the Divisional Court was denied.

It is noteworthy that prior to the *Willits* decision, attempts made to videotape or audiotape defence medical examinations had been denied by the Courts. Mr. Justice Quigley relied upon the decision of Mr. Justice Doherty in the 1992 Ontario Court of Appeal decision of *Bellamy v. Johnson*. In that case, Justice Doherty set out the following factors that a Court should consider in permitting a recording:

1. the opposing party's ability to learn the case it has to meet by obtaining an effective evaluation;

2. the likelihood of achieving a reasonable pre-trial settlement; and

3. the fairness and effectiveness of the trial.

Since the *Willits* decision, the issue has been before the Courts on several occasions. The results have been fairly evenly divided. In cases where the plaintiff has given sufficient reason for requiring the videotaping, the Courts have

granted the request. The primary reasons that have been accepted by the Courts are cases in which the plaintiff has alleged memory or neurological defects.

There are significant difficulties that defence counsel face in relation to a request for the taping of a defence medical examination. First, counsel may not be able to use his/her expert of choice as many medical experts are uncomfortable with the concept and are not prepared to conduct such examinations. Second, having the defence medical examination taped results in an unfair litigation advantage in favour of the plaintiff as the defence is unlikely to have tapes of the plaintiff's medical examinations by either the plaintiff's treating physicians or the plaintiff's medical/legal experts.

Third, the videotaping of defence medical examinations will make litigation much more costly. In particular, there is the cost of the actual videotaping itself. As well, the defence expert may also require an additional fee to conduct a defence medical examination under these circumstances. Further, once a tape is created, counsel will have to review the tape for purposes of ensuring that the report accurately reflects what happened at the examination, as well as for purposes of cross-examining the expert at trial. For example, the *Willits* case ultimately went to trial and plaintiffs' counsel spent over 60 hours reviewing the videotape in order to prepare for the cross-examination of the defence psychiatrist alone.

There are a number of strategies that can be employed by defence counsel to resist a taping request, depending upon the individual circumstances of the case. Defence counsel should assess whether there is a valid reason for the request and, if not, must challenge the reason being given as a litigation strategy. Another possible avenue is to request plaintiff's counsel to videotape future examinations of the plaintiff by his of her own medical expert. This latter approach can be advanced as a matter of fairness to ensure that neither party is disadvantaged in the litigation. If there is evidence that reasonable efforts have been made to locate appropriate experts and they are not willing to agree to the taping of their examinations, the Courts have refused to permit the taping. ■

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