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EXPERT EVIDENCE POST

SAADATI V. MOORHEAD

Atlantic Provinces Trial Lawyers Association
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INTRODUCTION

The Supreme Court of Canada released *Saadati v. Moorhead*, 2017 SCC 28 on June 2, 2017.[1] For many, *Saadati v. Moorhead* marks a new, more flexible approach to the evidence required for proving claims of mental injury. Others see it as a case that can be easily distinguished and its impact will be less pronounced. Speaking to the national and public importance of the decision, in less than a year it has been cited over 30 times and at least once in each province and territory.

This brief non-paper will take a practical look at:

- the *Saadati v. Moorhead* decision;
- how it's been applied and followed; and
- what the future looks like for expert evidence and mental injury.

As a courtesy to those attending this conference (and others) if you would like:

- an electronic copy of this non-paper with live hyperlinks
- copy of facta in any of the SCC cases referred to below

send me an email at: emeehan@supremeadvocacy.ca

For future updates on what's happening at Canada's highest court, you can sign up for our newsletter at supremeadvocacy.ca or follow us on Twitter @supremeadvocacy.

[1] My colleague Marie-France Major was SCC agent for the Respondents.

SAADATI V. MOORHEAD

Appeal Heard: January 16, 2017

Judgment Rendered: June 2, 2017

Reasons for Judgment: Brown J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ. concurring)

Facts: Saadati was a truck driver. His tractor-truck was hit by a Hummer driven by the respondent Moorhead and owned by the respondent Able Leasing. This was the second of five motor vehicle accidents involving Saadati. Saadati sued Moorhead in negligence, seeking damages for non-pecuniary loss and past income loss arising from the second accident. At trial, liability was admitted by the respondents, but they took the position that Saadati suffered no damage in that particular accident. Saadati was mentally incompetent and could not testify at trial.

Procedural History: The trial judge rejected Saadati's claim for a physical injury arising from the accident. The trial judge also found that Saadati had not established a psychological injury, based on the evidence of his expert psychiatrist. However, the trial judge found that the testimony of Saadati's family and friends had established a psychological injury, including personality change and cognitive difficulties such as slowed speech, leading to a deterioration of his close personal relationships with his family and friends. Accordingly, the finding was not based on an identified medical cause or expert evidence. The trial judge further found that the mental injury originally caused by the second accident was indivisible from any injury caused by the third accident and awarded Saadati $100,000 for non−pecuniary damages.

The British Columbia Court of Appeal allowed the appeal on the ground that Saadati had not demonstrated by expert evidence a medically recognized psychiatric or psychological injury and dismissed the claim outright with costs to the respondents. In the absence of a specific medical diagnosis, the Court of Appeal concluded the trial judge had no discretion to award damages for the psychological harm he found to have occurred. It also noted the trial judge erred by deciding the case on a basis neither pleaded nor argued by Saadati.

Issue: Are claimants required to show a recognizable psychiatric illness as a precondition to recovery for mental injury?

Held:

- "[A] finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness. It follows that I would allow the appeal and restore the trial judge's award." (para. 2)
- "what matters is substance — meaning, … symptoms — and not the label". (para. 40)

Analysis:

Sufficiency of pleadings

- As a preliminary matter, the Court considered the sufficiency of the pleadings with respect to putting the respondents on notice for a claim for mental injury.
- In claims for negligently caused mental injury, it is generally sufficient that the pleadings allege some form of such injury: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 74. (*Saadati* at para. 10)
- The appellant made arguments regarding "psychological", "emotional" or "psychiatric" reactions to the accident and put forward broad heads of damage in the pleadings. This was ample notice and therefore no breach of procedural fairness. (para. 12)

Elements of the cause of action of negligence

- Liability in negligence law is conditioned upon the claimant showing:
  - (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged;
  - (ii) that the defendant breached that duty by failing to observe the applicable standard of care;
  - (iii) that the claimant sustained damage; and
  - (iv) that such damage was caused, in fact and in law, by the defendant's breach. (para. 13)[2]
- At issue here is the third element.

Mental injury

- The SCC has never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. (para. 2)
- "[T]he trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not to whether a label could be attached to them." (para. 31)

Physical injury and mental injury to be treated the same

- Recovery for physical injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support. Similarly, recovery for mental injury does not require proof of a recognizable psychiatric illness. (para. 38)
- "In short, no cogent basis has been offered to this Court for erecting distinct rules which operate to preclude liability in cases of mental injury, but not in cases of physical injury. Indeed, there is good reason to recognize the law of negligence as already according each of these different forms of personal injury — mental and physical — identical treatment. As the Court observed in

[2] The Court cited *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 SCR 114, 2008 SCC 27 at para. 3.

Mustapha (at para. 8), the distinction between physical and mental injury is 'elusive and arguably artificial in the context of tort'." (para. 35)

What about unworthy claims?

- To weed out "unworthy claims" for mental injury, the Court held that, as is the case for claims of physical injury, a robust application of the elements of the cause of action of negligence should be sufficient. (para. 34)
- "Mental injury, however, will often not be as readily apparent. Further, and as *Mustapha* makes clear, mental injury is not proven by the existence of mere psychological upset. While, therefore, tort law protects persons from negligent interference with their mental health, there is no legally cognizable right to happiness. Claimants must, therefore, show much more — that the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society (*Mustapha*, at para. 9). … Ultimately, the claimant's task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness)." (para. 37, emphasis added)[3]

But should you still have expert evidence?

- "Nor should any of this be taken as suggesting that expert evidence cannot assist in determining whether or not a mental injury has been shown. In assessing whether the claimant has succeeded, it will often be important to consider, for example, how seriously the claimant's cognitive functions and participation in daily activities were impaired, the length of such impairment and the nature and effect of any treatment (*Mulheron*, at p. 109). To the extent that claimants do not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short." (para. 38, emphasis added)
- "[W]hile relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry. While, for the reasons I have given, 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." (para. 38, emphasis added)

[3] *Perzoff v Pringle*, 2017 BCSC 1448 at para. 83 relied on *Saadati* at para. 37 to dismiss a claim in tort for mental distress.

APPLICATION OF *SAADATI V. MOORHEAD* SO FAR

Saadati v. Moorhead has been cited over 30 times, with at least 14 of those being in B.C. decisions. We've seen it cited in employment law and criminal law cases, but the majority of decisions involve motor vehicle claims or other tort claims.

TORT CASES

In ***Ponsart v Kong*, 2017 BCSC 1126**, the plaintiff claimed damages arising out of multiple motor vehicle accidents. The trial judge awarded damages for non-pecuniary loss for mental injury:

> [84] As I have described, a major component of the plaintiff's injury is emotional or mental. As the Supreme Court of Canada recently affirmed in *Saadati v. Moorhead*, 2017 SCC 28 (CanLII), such losses are compensable where, quoting *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 (CanLII), they are "'serious and prolonged and rise above the ordinary annoyances, anxieties and fears' that come with living in civil society". The plaintiff has clearly met the burden of proving serious and prolonged disturbance to her emotional well-being arising from the injuries in the First and Second Accidents.

The trial judge, however, had the benefit of evidence from a psychiatrist who saw the plaintiff for an independent medical assessment. The trial judge also accepted evidence from the plaintiff's parents on the emotional impact of the accidents.

In ***Urquhart v MacIsaac*, 2017 NSSC 313**, a case involving a professional negligence claim against a lawyer, the trial judge declined to award damages for mental injury on the basis that mere psychological upset or trivial annoyances, anxieties and fears are not compensable. He also stated, "In this regard, their evidence was limited with no documentary support or expert opinion."

In ***Maniaci c. Grandé*, 2018 QCCQ 305**, a Québec Small Claims Court relied on *Saadati* to award $1,000 in compensation for the stress, inconvenience and anxiety from incidents involving a neighbour's dogs. In awarding substantially less than what was claimed, the Court noted the plaintiff was not obliged to consult a psychologist, psychiatrist or other health care professional.

In ***Ahmad v Pandher*, 2017 BCSC 1732**, the Court cited *Saadati* in awarding $70,000 for non-pecuniary damages. The evidence in support of the award was from friends and family testifying and the amount was based on a range supported by cases presented by both parties. The claim for "mental injury" was lumped in with general damages for pain and suffering and it is difficult to see what portion was specifically for mental injury.

In ***MacKenzie v John Doe*, 2018 BCSC 104**, the plaintiff's claims for mental injury stumbled at the causation stage. The Court accepted that he had mood and irritability problems, but not to the extent that they were a psychological injury. The Court noted that there had been no expert evidence called to connect these complaints to the accident, but added that it was not a case similar to *Saadati*.

In ***Gregg v Ralen*, 2018 BCSC 171**, the Court stated: "I should note that even if I had not concluded that the plaintiff suffered a [Mild Traumatic Brain Injury] in the accident, I would nevertheless conclude that he suffered mental injury in the accident that is compensable on the principles set out in *Saadati v. Moorhead*, 2017 SCC 28. For the reasons I have given, I accept that the plaintiff suffered significant psychological and cognitive problems as a result of the accident." However, the Court had evidence before it from a psychiatrist.

In ***Bruen v University of Calgary*, 2018 ABQB 26**, Dr. Bruen claimed against the University in part for emotional injury resulting from the University's lack of support for one of his proposals. The University made a non-suit application and cited *Saadati* "in support of its submission that emotional injury must be proven; and contends that there is no evidence before this Court to prove that Dr. Bruen suffered emotional injury." (para. 10) The Court agreed with the University and noted the absence of any evidence of emotional injury.

In ***Snowball v. Ornge*, 2017 ONSC 4601**, the family of a paramedic that died in the crash of an air ambulance helicopter sued the operator in negligence for damages for mental distress. Ornge moved under rule 21 to have part of the claim dismissed. It submitted that "no right of action exists at common law for mental distress resulting from the negligently caused death of a human being unless the plaintiffs witnessed the accident or its aftermath." The motions judge dismissed the motion on the basis that the plaintiffs' claims for mental distress following Snowball's death might succeed even though they are secondary victims who did not witness this sudden, traumatic event. He stated:

> As directed by the Supreme Court of Canada in *Saadati*, the outcome of the Snowball action should turn on the robust application of the elements of an action in negligence by the trier of fact rather than on the separate application of geographic, temporal, and relational considerations or a distinction between "primary" and "secondary" victims. (para. 21)

In ***Johnson v Cline*, 2017 ONSC 3916**, the Court considered a claim for mental distress in the context of a dispute between neighbours. The Court relied on *Saadati* to award $4,500 in total for mental distress resulting from the interference with and the loss of enjoyment of home. The Court relied not on expert evidence, but on the fact the problems faced by one party were "neither minor nor transient". (para. 123)

EMPLOYMENT LAW CONTEXT

The application of *Saadati* has not been limited to tort cases. In ***Lau v. Royal Bank of Canada*, 2017 BCCA 253**, the B.C. Court of Appeal held that the discussion in *Saadati* on proving mental injury is applicable in contract cases. The case involved a wrongful dismissal claim against RBC. The trial judge awarded aggravated damages based on mental distress arising from the manner of dismissal.

The B.C. Court of Appeal allowed the appeal on the basis that there was no evidentiary foundation for an award of aggravated damages. The Court concluded:

> [69] To receive aggravated damages based on mental distress, the employee is required to show that the manner of dismissal caused injury rising beyond the normal distress and hurt feelings that arise from the fact of dismissal. In this case, Mr. Lau did not adduce evidence which could have discharged that burden.
>
> [70] In awarding damages for mental distress, the trial judge erred by relying on her observations of Mr. Lau's demeanour while testifying, in the absence of any evidence or testimony other than Mr. Lau's own. Even Mr. Lau's testimony did not provide a sound basis for finding he suffered injury beyond the hurt feelings and distress that accompany any termination.
>
> [71] Nor, in my view, can Mr. Lau's claim to aggravated damages rest on an unsubstantiated claim that he suffered intangible effects from the manner of his termination. There was simply no evidence of damage to support that claim.

Lau signifies that *Saadati* has application beyond tort law, but more importantly, it is an example that many claims for mental injury without expert evidence have a high likelihood of failing.[4]

In ***Galea v. Wal-Mart Canada Corp., 2017 ONSC 245***, the trial judge awarded $250,000 for moral damages, including aggravated damages and damages for mental distress. The trial judge stated "It would appear that the state of the law in Ontario does not require a plaintiff to lead medical evidence to make out a case for damages for mental distress in an employment context" (para. 270) and cited *Saadati*. The trial judge went on to find there was compensable mental distress on the basis of evidence as to Wal-Mart's conduct toward the plaintiff's employment and termination.

WHAT THE FUTURE LOOKS LIKE FOR EXPERT EVIDENCE AND MENTAL INJURY

Plaintiffs' counsel in *Saadati* described the decision as follows:

> This landmark case removes barriers to compensation for people who suffer psychological injuries and is an important step toward showing Canadians with psychological injuries the equal respect they deserve.[5]

While the decision is a landmark in the sense of clarifying the law, the practical impact will likely be less significant. As Justice Brown noted at the beginning of the decision, the SCC has "never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury". (para. 2)

As the cases above demonstrate, *Saadati* will allow some cases to proceed that might otherwise be summarily dismissed. Furthermore, it confirms trial judges' discretion to find compensable mental injury

[4] See also *Ward v Metepenagiag Mi'kmaq First Nation*, 2017 CanLII 55934 (CA LA) at paras. 120-21.
[5] Preszler Law Firm, "Saadati v. Moorhead: A New Era for Personal Injury Law in Canada", online: https://www.preszlerlaw.com/blog/saadati-v-moorhead/ (last updated Jan. 22, 2018)

on the basis of evidence other than expert evidence. This will in some instances result in damage awards that might previously not have been made.

However, for the majority of cases, *Saadati* will not alter the outcome. A plaintiff is still required to lead some evidence of a mental injury and where mental injury forms a significant part of the damages claims, it would be prudent to have expert evidence to assist in proving that a mental injury has been shown. The lack of a diagnosis can weigh against evidence supporting mental injury.

Justice Brown was careful to address the insurance industry's concerns about indeterminate liability and addressed weeding out unworthy claims. He emphasized using a robust application of the elements of the cause of action of negligence (para. 34) and reiterated the threshold from *Mustapha*: the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society. (para. 9)