CLASS ACTION UPDATE

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CLASS ACTIONS FOR MENTAL INJURY

Damages for mental injuries are often on the lower end of the personal injury spectrum. If a sizable number of people were affected by the same event or events, this can make the case well suited for filing as a class action. As Chief Justice McLachlin stated in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, one of the principal goals for class actions is improving access to justice through the aggregation of claims that are uneconomic to pursue as individual actions:

> [28] [B]y allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.

There have, in fact, been many class actions filed in British Columbia and elsewhere in Canada for groups of individuals who suffered a mental injury with no physical injury. Several of the early cases involved exposure to the risk of illness due to contaminated medical instruments or food poisoning outbreaks. In *Fakhri v. Alfalfa's*, 2003 BCSC 1717, Justice Gerow certified a class action for over 6,000 people who consumed food items that might have been tainted with the Hepatitis A virus due to improper food handling. The vast majority of the class members did not become infected and therefore suffered no physical injury. Their claims were for the inconvenience of having to attend for an inoculation injection and for the anxiety related to the risk of infection. The court accepted the plaintiffs' argument that this made the case ideal for certification as a class proceeding:

> [4] The plaintiff proposes that the class be comprised of two groups, those who claim to have been infected by the Hepatitis A virus (HAV) and those who did not become ill but received an injection as a result of being exposed to HAV. Ms. Fakhri claims to have become infected by HAV and Mr. Aylon received an injection.
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> [5] The plaintiffs argue that this type of action should be permitted to proceed as a class action because the claims are modest and the financial burden of prosecuting the claim would consume all of the proceeds of a judgement of any single plaintiff. As a result, defendants who would otherwise be found responsible would likely be insulated from lawsuits. It is only by spreading the costs of the litigation amongst many that members of the class will have access to justice. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 129 DLR (4th) 110, refusing leave to appeal from (1995), 127 DLR (4th) 552 (Ont. Gen. Div.) at 113.

The defendant's appeal of certification was dismissed (*Fakhri v. Wild Oats Markets*, 2004 BCCA 549). One of the defendant's arguments was that inconvenience and anxiety were not compensable in the absence of a diagnosis of a psychiatric condition. Though the court did not rule definitively on the issue, certification was upheld so that the matter could proceed toward trial:

> [16] The appellant argues that in order to prove mental shock, each individual claimant will have to establish a diagnosis of a recognized psychiatric illness. With respect, I do not think it can be said with finality that only psychiatric disorders are compensable when the facts of the present case are considered. This is not a case where the victim witnessed a traumatic event, such as in *Graham v. MacMillan* (2003), 2003 BCCA 90. Here the claimants were directly affected by the announcement that they were at risk of having contracted HAV. They suffered a physical disturbance when immunized due to the alleged carelessness of the appellant. I do not presume to decide these matters, I simply raise them to indicate that it is by no means certain that the claimants will be put to individual proof of psychiatric illness.
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> [17] I refer in this regard to *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, 175 DLR (4th) 409 (CA), leave to appeal to SCC refused, [1999] SCCA No. 476, 185 DLR (4th) vii [cited to O.R.].

That case involved a class action on behalf of patients who underwent electroencephalogram tests at the defendant's clinic. They were informed that there may be a link between an outbreak of Hepatitis B and the administration of the tests. The judgment of the Court of Appeal was given by Mr. Justice Carthy who at pp. 679-80 said:

> In the present case it is at least arguable that the defendant's alleged negligence had the foreseeable consequence of a general notice to patients that a test was required to determine if they were infected. It was also arguably foreseeable that some suffering from shock would be occasioned by the notice. When the claimants are limited to those who received the notice and family law claimants it can further be argued that there is no ever widening circle of potential liability created in these circumstances and that there is no policy concern to justify excluding recovery.
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> Given the uncertain state of the law on tort relief for nervous shock, it is not appropriate that the court should reach a conclusion at this early stage and without a complete factual foundation. It cannot be said, in this case, that it is plain and obvious that the claim for the tort of mental distress standing alone will fail. On the assumption that a legal obligation may exist, this segment of the class proceeding is ideally suited for certification. There are many persons with the same complaint, each of which would typically represent a modest claim that would not itself justify an independent action. In addition, the nature of the overall claim lends itself to aggregate treatment because individual reactions to the notices would likely be similar in each case – fear of a serious infection and anxiety during the waiting period for a test result. If evidence from patients to support such reactions to the notices is necessary, it would probably suffice to hear from a few typical claimants. The balance of the evidence as to liability would relate to the conduct of the clinics, the reaction of the Public Health Authorities and foreseeability issues. [Emphasis added]

I would respectfully adopt this analysis for the purposes of this case and conclude that no successful attack can be made against the learned chambers judge's finding of preferability.

The inconvenience and anxiety cases suffered a setback with the Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27. The plaintiff had suffered a major depressive disorder after finding a dead fly in a bottle of water supplied by the defendant. The Supreme Court confirmed the Ontario Court of Appeal's dismissal of the claim on the basis that the injury was too remote as the plaintiff had failed to "show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install." [at para. 18] In discussing this topic, the Supreme Court commented on the nature of mental injuries generally:

> [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (CA), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (CA): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

The plaintiffs in the *Kotai v. Queen of the North (Ship)*, 2009 BCSC 1405 class action urged the court to interpret *Mustapha* as requiring that the injury be "serious and prolonged" but not that the injury need not rise to the level of a diagnosed psychiatric condition. The Queen of the North was a passenger ferry that sank on the BC coast on May 21, 2006. Most of the 59 passengers and 42 crew members were safely evacuated into life rafts and life boats, though two passengers perished. A central issue was

whether class members who suffered no physical injury could recover damages for anything less than a psychiatric injury. The court held that they could not:

> [69] Accordingly, I conclude that there remains a requirement that the claimants prove not just psychological disturbance or upset as a result of the defendant's negligence but also that their psychological disturbance rises to the level of a recognizable psychiatric illness.

Kotai was cited with approval and followed by Justice Perell in *Healey v. Lakeridge Health Corporation*, 2010 ONSC 725:

> [73] In my opinion, the current law in Ontario is that in the absence of a physical injury to recover for a psychological injury, the plaintiff must establish: (1) the psychological injury was a foreseeable consequence of the defendant's negligent conduct; and (2) the psychological injury is a recognizable psychiatric illness.

The decision was affirmed by a five judge panel of the Ontario Court of Appeal: *Healey v. Lakeridge Health Corporation* 2011, ONCA 55 at paras. 58 – 65.

It looked like that was the end of inconvenience and anxiety class actions. But the pendulum has recently begun to swing the back other way. In 2014, the New Brunswick Court of Appeal overturned a lower court decision and certified a class proceeding on behalf of 15,000 patients who were informed that their tests for cancer might have been inaccurate due to quality control errors in the health region's pathology department. In *Gay v. Regional Health Authority 7*, 2014 NBCA 10, the court held that "the recoverability of damages for psychological harm that falls short of a medically recognized illness remains an open question, at least in the context of class proceedings for systemic failures in the provision of healthcare services for potential cancer or cancer-related diseases." The court questioned the appropriateness of the "recognized psychiatric illness" standard of proof:

> [93] Moreover, and more generally, the "recognized psychiatric illness" standard has been criticized, notably by trial courts and academic commentators, as unduly restrictive, overly cautious, and out of step with the expansionary trends of modern negligence law (see Philip H. Osborne, *The Law of Torts*, 3rd ed. (Toronto: Irwin Law, 2007) at p. 82). That broad criticism seems even more compelling in the context of class proceedings, where some of the policy concerns (e.g. fear of fraudulent claims) that drive judicial acceptance of the threshold lack traction (see Louise Bélanger-Hardy, "Reconsidering the 'Recognized Psychiatric Illness' Requirement in Canadian Negligence Law" (2013) 38:2 Queen's LJ 583). It is difficult to imagine how the large scale conspiracy required to advance class-wide fraudulent claims of psychological harm would not be easily exposed.

The most recent and, for plaintiffs, most promising development on the law regarding proof of mental injuries came this year with the Supreme Court of Canada's decision in *Saadati v. Moorhead*, 2017 SCC 28. The court unequivocally states that it not necessary for the plaintiff to show that he or she has a recognizable psychiatric illness:

> [2] This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for *physical* injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for *mental* injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 9, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness.

Furthermore, the court made an important statement condemning the prejudicial stereotypes applied to those who suffer mental injuries:

> [21] … The stigma faced by people with mental illness, including that caused by mental injury, is notorious (J. E. Gray, M. Shone and P. F. Liddle, *Canadian Mental Health Law and Policy* (2nd ed. 2008), at pp. 139 and 300-301), often unjustly and unnecessarily impeding their participation, so far as possible, in civil society. While tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them.
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> [36] It follows that requiring claimants who allege one form of personal injury (mental) to prove that their condition meets the threshold of "recognizable psychiatric illness", while not imposing a corresponding requirement upon claimants alleging another form of personal injury (physical) to show that their condition carries a certain classificatory label, is inconsistent with prior statements of this Court, among others. It accords unequal — that is, less — protection to victims of mental injury. And it does so for no principled reason (Beever, at p. 410). I would not endorse it.

Neither *Mustapha* nor *Saadati* were class actions. They will be seen, however, as the bookends that frame the issues of foreseeability and proof of injury in class actions for plaintiffs who have suffered mental injuries. We live in interesting times. V