

Mental injury claims: do plaintiffs need to show a recognizable psychiatric illness to succeed?

Stuart Dalzell, Partner and Jackie Frampton, Associate, discuss the recent decision of the Supreme Court of Canada in *Saadati v Moorhead* 2017 SCC 28, in which the Court held there is no requirement to demonstrate a "recognizable psychiatric illness" supported by expert opinion.

Currently, a plaintiff in New Zealand claiming for mental injury caused by the defendant's negligence must show a recognizable psychiatric illness to succeed. However, this rule has never been considered by the Supreme Court of New Zealand.

In the recent decision of *Saadati v Moorhead*, the Supreme Court of Canada found that a plaintiff claiming for psychological or psychiatric injury caused by negligence does not have to prove that they have suffered a recognized psychiatric illness.

Rather, the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury in Canada and the claimant will succeed if they can satisfy the criteria applicable to any successful action in negligence: a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. The Supreme Court of Canada said that these elements of the cause of action of negligence furnished principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury. The view that courts should require something more to prove a mental injury claim was founded not on legal principle, but on dubious views that mental illness is "subjective" or otherwise easily feigned or exaggerated [20].

The court said that confining compensable mental injury to conditions that can be medically diagnosed was inherently suspect as a matter of legal methodology. Instead, the inquiry should be directed to the level of harm that the claimant's particular symptoms represent rather

than to whether a label could be attached to them [30].

What approach do the New Zealand courts take to mental injury claims currently?

In New Zealand, personal injury claims are compensated for under the ACC system rather than through the courts.

However, in *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549, the Court of Appeal recognised that nervous shock from witnessing the death or personal injury of someone else was not covered by ACC. It could therefore be the subject of a common law claim for damages. There are, however, limitations on this right to sue for nervous shock or other forms of mental injury and plaintiffs claiming for mental injury must satisfy certain criteria before the courts will find a duty of care exists in an individual case.

In *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 family members of patients who died during or after surgery at Christchurch Public Hospital brought claims for mental distress. The court described the plaintiffs as secondary victims because they had experienced mental suffering but were not physically injured or placed in physical danger by the defendant's negligence.

The plaintiffs described their mental distress as including grief, shock, trauma and anxiety as well as outrage but they did not claim to have suffered psychiatric disorder or illness.

In a majority judgment, the Court of Appeal found that a claim by a secondary victim for mental suffering caused by awareness of death or injury to a primary victim through the negligence of the defendant will not succeed unless the secondary victim can prove a recognisable psychiatric disorder or illness. The court said it was not in the best interests of society to throw the Courts open to everyone caused distress by the negligent injuring of a loved one.

Thomas J issued a dissenting judgment in which he criticized the law relating to compensation for mental injury as arbitrary and illogical and said it would cause individual injustices [80-81]. He said that a plaintiff should not be prevented from recovering if he or she can demonstrate that their mental suffering is of the order, or approaching the order, of a psychiatric illness even if not actually a recognisable psychiatric illness.

What are the implications of the *Saadati v Moorhead* decision in New Zealand?

The issue of whether a plaintiff claiming for mental injury must show a recognisable psychiatric illness is an issue which the Supreme Court of New Zealand is yet to determine. When this question does come before the Supreme Court, it will have the choice to adhere to the approach taken in *van Soest*, which requires the plaintiff to establish a recognisable psychiatric illness or adopt the Supreme Court of Canada's more flexible approach, which does not.

The New Zealand Supreme Court's decisions in the law of negligence have removed arbitrary distinctions. For example, in *Spencer on Byron* (2012), the Supreme Court held there was no principled basis for distinguishing between liability of those who play a role in the construction of residential buildings as against non-residential buildings. This followed the Court's earlier *Sunset Terraces* decision in 2010, in which the Court held the longstanding *Hamlin* duty of care in respect of defective buildings should not be confined to traditional stand-alone dwellings as opposed to multi-unit complexes. Given this, it seems likely that the Court will find that proving actual psychiatric illness is no longer necessary provided that the plaintiff establishes a sufficient level of harm.

What lessons can we take from *Saadati v Moorhead*?

If the New Zealand Supreme Court does adopt the approach taken in *Saadati v Moorhead*, to establish a mental injury a plaintiff will still need to show the disturbance is serious and prolonged and rises above ordinary annoyances, anxieties and fears. However, they will not need to prove that they have suffered a recognisable psychiatric disorder or illness. This will generally mean that plaintiffs will find it easier to prove a claim which could lead to more mental injury claims being brought.

It will also mean that plaintiffs claiming for mental injury may not require expert evidence in order to recover damages. It will be open to the court to find based on other evidence that the plaintiff has proven that they have suffered a mental injury. However, in most cases expert evidence will still be of assistance to determine whether the injury has been shown.

The *Saadati v Moorhead* approach also removes the difficult distinction between primary victims, who have suffered physical injury, and secondary victims, who have suffered mental but not physical injury. Instead, the recovery for mental injury in negligence law will depend on the plaintiff satisfying the criteria applicable to any negligence action: a duty of care, a breach, damage and factual and legal causation between the breach and damage.