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## Is An Expert Diagnosis Required to Prove Mental Injury?

In an action for negligence, a plaintiff may make a claim for mental injury resulting from the defendant's conduct. For years, the common law has struggled with the question of whether the plaintiff needs to tender expert evidence to prove that she has suffered a recognized mental illness. A 2017 decision of the Supreme Court of Canada, *Saadati v. Moorehead*, 2017 SCC 28, puts this question to rest and reflects an important evolution regarding the legal treatment and understanding of mental injury.

*Saadati* involved a motor vehicle accident. The plaintiff was driving a tractor-truck in British Columbia when it was struck by the defendant's vehicle. This was the plaintiff's second accident of five in a six-year span. The plaintiff started an action against the defendant in negligence. The action sought damages for non-pecuniary loss and past income loss. The plaintiff was found by a Court to be mentally incompetent in 2010 and a litigation guardian was appointed to pursue the claim. At trial, the defendant admitted liability, but argued that the plaintiff suffered no damages.

The trial judge held that the plaintiff suffered no physical injuries as a result of the accident, but that the accident caused the plaintiff "psychological injuries, including personality change and cognitive difficulties". Critically, the trial judge's finding was not based on expert evidence identifying a recognized psychological disorder suffered by the plaintiff, but was based on the testimony of the plaintiff's family and friends, who stated that the plaintiff's personality changed and deteriorated following the accident. In the end, the judge awarded the plaintiff \$100,000 for non-pecuniary losses and dismissed the claim for past income loss.

On appeal, the British Columbia Court of Appeal held that the trial judge erred in awarding damages for mental injury in the absence of "expert medical opinion evidence". According to the Court of Appeal, the plaintiff failed to prove that he suffered a recognized psychiatric or psychological condition.

On further appeal to the Supreme Court of Canada, the plaintiff's appeal was allowed and the trial judge's original order restored.



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## The Evolution of Mental Injury at Common Law

The Court began its analysis by reiterating the four-part burden on any plaintiff in a negligence action. The plaintiff has to show that:

1. the defendant owed a duty of care to the plaintiff to avoid the kind of loss alleged;
2. the defendant breached the duty by failing to observe the applicable standard of care;
3. the plaintiff sustained damage; and
4. the plaintiff's damages were caused, in fact and in law, by the defendant's breach.

Mental injury is a component of the third element, i.e. the plaintiff's duty to show damage.

In the early days of common law, mental injury was treated with "suspicion and outright hostility". As the Court in *Saadati* observed, the idea that proof of mental injury requires expert evidence or a recognized diagnosis is based on an archaic perception of psychological damage to the plaintiff:

The view that courts should require something more is founded not on legal principle, but on policy—more particularly, on a collection of concerns regarding claims for mental injury...founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is "subjective" or otherwise

easily feigned or exaggerated; and that the law should not provide compensation for "trivial matters" but should foster the growth of "tough hides not easily pierced by emotional responses"...

The Court held that it was time to move away from this perception of mental injury.

First, any concerns about "feigned or exaggerated" claims of mental injury could be addressed by the robust application of the ordinary negligence test. In other words, the law of negligence is already well equipped to address claims of psychological injury and nothing more is needed.

Moreover, the Court held that mental injury should be treated no differently at common law than physical injury. A claim in negligence recognizes a "right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's mental health—like a person's physical integrity or property, injury to which is also compensable in negligence law—is an essential means by which that person chooses to live life and pursue goals".

Accordingly, there is no merit to treating mental injury as a different kind of personal injury, requiring a special test or higher evidentiary standard.

### No Need for the Plaintiff to Show a "Recognized" Mental Injury

Before *Saadati*, Canadian lower courts required plaintiffs alleging mental injury to show that their injury was a

recognized psychiatric disorder that had been diagnosed by an expert.

This approach was largely based on acknowledged mental illnesses set out in the American Psychiatric Association's *Diagnostic and Statistic Manual of Mental Disorders* (the "DSM") and the World Health Organization's *International Statistical Classification of Diseases and Related Health Problems* (the "ICD").

According to the Supreme Court, limiting mental injury to these recognized disorders is "inherently suspect as a matter of legal methodology".

This is mainly because a judge assessing a negligence claim ought not be concerned with diagnosis, but with "symptoms and their effects". The plaintiff need only prove that the defendant foresaw injury as a result of her negligence, not a "particular psychiatric illness that comes with its own label". The primary concern in a negligence action is with the level of harm that the plaintiff's symptoms represent, not the "label attached to them".

Moreover, the Court expressed skepticism that reliance on recognized psychiatric disorders in the DSM and ICD would prevent "indeterminate liability" by offering an objective standard by which to measure mental injury.

The Court noted that psychiatric diagnosis under the DSM and ICD are far from static: until 1973, for example, the DSM recognized homosexuality as a "psychiatric disorder". Moreover,

post-traumatic stress disorder was not recognized in the ICD until 1980. In the Court's view, negligence law ought not to be held hostage to "*au courant* thinking in modern psychiatry—wherever it may lead, or from wherever it may retreat".

### **Expert Evidence is Not Required to Prove Mental Injury**

Applying the reasoning above, the Court held that while expert evidence and a recognized psychiatric disorder may be helpful in determining whether the plaintiff has suffered a mental injury, such evidence is not required.

The judge or jury can still use other evidence, as the trial judge did in *Saadati*, to determine whether the plaintiff has proven on a balance of probabilities that she has suffered mental injury as a result of the defendant's conduct.

Moreover, the defendant has the right to counter the plaintiff's claims with

expert evidence establishing that the defendant's negligence did not cause mental injury, known or unknown to modern psychiatry, to the plaintiff.

### **A Fresh Approach to Mental Injury**

In many ways, *Saadati* represents an important breakthrough in the way Canadian Courts approach liability for mental injury.

By recognizing that the law of negligence does not require a plaintiff to tender expert evidence of a recognized psychiatric disorder to prove that she sustained damages, *Saadati* equalizes the Courts' treatment of physical and psychiatric injury and does away with anachronistic perceptions of mental injury as a "subjective" or "indeterminate" form of injury.