MUSTAPHA REVISITED: IS THE JOB ONLY HALF-DONE?

In the *Mustapha* decision,[1] the Supreme Court of Canada conclusively established the objective nature of the foreseeability test to be applied in the determination of causation in law or, as the issue is sometimes described, remoteness of damage, in claims for psychological injury. What it did not do, however, was set down ground rules for the type and quality of evidence suitable for that determination. It was apparently considered not necessary to do so in *Mustapha* because the plaintiff there did not call any evidence at all to satisfy the onus of proof that rested with him on the issue. The recent decision in *Frazer v Haukioja*[2] highlights the need for guidelines regarding the proof of the element of foreseeability in claims for psychological injury.

The facts in the *Frazer* case

Briefly stated, the facts in *Frazer* were as follows. The plaintiff was injured in a motorcycle accident. X-rays were taken at the hospital and the defendant, who was the emergency room attending physician, diagnosed a left-ankle fracture and a right-ankle soft tissue injury. Several days after the plaintiff's discharge from hospital, a radiologist examined the x-rays and saw that there was a fracture in the right ankle as well. The radiologist reported his finding to the defendant, who made no effort to communicate this new information to the plaintiff until a follow-up visit by the plaintiff more than one month later. At that visit, the defendant characterized the right-ankle fracture as tiny and not requiring treatment, and suggested that continuing pain was attributable to the soft-tissue injury. He advised the plaintiff to return to work, which the plaintiff did. As a result of several episodes of severe pain, the plaintiff attended at a clinic and was told that he had a major fracture in the right ankle that might require surgical intervention and was referred to an orthopaedic surgeon. The surgeon alerted the plaintiff to the seriousness of the injury and potential complications that could result. The court made the following comment:[3]

> When [the plaintiff] realized the full extent of his injuries, he became focused on the fact that [the defendant] had lied to him. This led to [the plaintiff] being "hyper alert" and "hyper aware" as to why he was not called by [the defendant], why he was permitted to walk on a fractured ankle, and why he was allowed to injure himself.

The psychiatrist called by the plaintiff to provide expert evidence at the trial concluded that he suffered from an anxiety disorder with features of panic disorder and that he presented with elements of depressive emotional states that were intermittent in appearance. The trial judge made the finding that this psychological injury was totally the result of the defendant's conduct, but also found that the defendant's incorrect interpretation of the right-ankle x-ray did not breach the standard of care expected of the

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[1] *Mustapha v Culligan of Canada Ltd.* [2008] 2 S.C.R. 114.
[2] 2010 ONCA 249, affirming 2008 CanLII 42207 (Ont. S.C.J.).
[3] *Frazer,* at para. 11.

defendant. The defendant's negligence consisted of the failure to disclose to the plaintiff in a timely manner the existence of the right-ankle fracture, and the complete failure to disclose to him the severity of the fracture (collectively described on appeal as "the non-disclosure"). It was held that the plaintiff had suffered a "recognizable psychiatric illness" and that factual causation had been established because, but for the defendant's negligence, the psychological injury would not have been sustained.

The trial judge found that, although the plaintiff experienced serious pain until his right ankle was immobilized by a cast, the non-disclosure had not caused any permanent injury to the ankle. General damages in the sum of $2,500 were awarded for that pain and suffering. By far the largest awards of damages were made on account of psychological injury and the economic losses associated with that injury. A total sum of approximately $1.75 million was awarded to the plaintiff, together with $50,000 to his wife under the Family Law Act.

The trial judge found, notwithstanding the plaintiff's genuinely-held belief to the contrary, that the defendant had borne no ill will toward the plaintiff or acted in a manner that deliberately exposed the plaintiff to risk.

The decision in *Frazer*

The Court of Appeal commenced its consideration of the causation in law (remoteness of damage) issue with the following observations, all of which involve well-established principles:

> The harm suffered must be of a kind, type or class that was a reasonably foreseeable consequence of the defendant's negligence;
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> A plaintiff making a claim for psychological damage must show that a person of normal or reasonable fortitude might, to the necessary degree of likelihood,[4] sustain a compensable form of mental injury, meaning a recognizable psychiatric illness as opposed to general emotional upset,[5] as a result of the defendant's wrongdoing; and

[4] That degree being: "a 'real risk', i.e. one which would occur to the mind of a reasonable man in the position of the defendant…and which he would not brush aside as far-fetched": *Mustapha,* at para. 13.

[5] In *Mustapha,* McLachlin C.J.C. had this to say on the matter (at para. 9): "[P]sychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness…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 somewhat reluctantly, accept." *Healey v Lakeridge Health Corporation* 2010 ONSC 725 held that there is a continuing requirement for the earlier, and probably stricter, standard of "a recognizable psychiatric illness" (at paras. 63-73).

> If the foreseeability of compensable mental injury in a person of reasonable fortitude has been established, the "thin skull" principle applies,[6] meaning that the extent of the injury and damage need not have been foreseeable, because "the defendant must take the plaintiff as it finds him for purposes of damages".

The claim in *Mustapha* failed because the plaintiff did not satisfy the onus of proof that rested with him of showing that it was reasonably foreseeable that a person of ordinary fortitude might sustain a compensable injury – meaning some serious and prolonged form of mental injury,[7] as opposed to ordinary upset or anxiety - from seeing dead flies in a bottle of water. No evidence was led on that issue; "indeed", as noted by the court, "the expert witnesses were not asked this question."[8]

In *Frazer* too, it does not appear that there was any such evidence. While the trial judge said "The psychiatric evidence establishes that the illness that [the defendant's] conduct brought about in [the plaintiff] was foreseeable even if the extent of his disability was not",[9] no evidence to support that conclusion was cited. As in *Mustapha,* there is no indication that any expert at trial was asked the question whether a person of ordinary fortitude might sustain a compensable psychological injury from the type of non-disclosure that was made by the defendant. As more fully discussed hereafter, it is our view that even had there been any such expert evidence, it would have had little probative value.

There certainly was evidence that showed that the plaintiff's psychological injury was genuine and that it was causally connected, on a "but for" basis, with the defendant's conduct, but it does not appear that there was any direct evidence that that type of injury was a foreseeable consequence of that conduct for a person of ordinary fortitude. There was, in other words, evidence of factual causation, but not of legal causation.

Similarly, nowhere in the reasons of the Court of Appeal is there reference to any direct evidence that would have satisfied the plaintiff's onus of proof on the foreseeability issue. To the contrary, the Court of Appeal focused on the nature of the physician/patient relationship between the defendant and the plaintiff, saying on several occasions that the

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[6] The thin skull doctrine applies at the measurement of damages, not at the duty of care, stage: *Bourhill v. Young* [1943] A.C. 92 (H.L.) at pp. 109-110; *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 (H.L.) at pp. 463 and 470; *Tame v New South Wales; Annetts v Australian Stations Pty. Ltd.* (2002) 211 C.L.R. 317 (H.C.A.) at paras. 117, 203 and 279; *Devji v. Burnaby (District)* (1999) 180 D.L.R. (4th) 205 (B.C.C.A.) at para. 74. Were it otherwise, the foreseeability test would be based on subjective, rather than objective, considerations. As stated above, *Mustapha* has conclusively established the objective nature of the test.

[7] Throughout this article we are applying the "serious and prolonged injury" formulation used in *Mustapha,* rather than the stricter requirement for "a recognizable psychiatric illness" applied in *Healey* and *Frazer* (at para. 37).

[8] *Mustapha,* at para. 18. Specific reference to that comment was made in *Frazer* at para. 55.

[9] At para. 227 (referred to at para. 58 in the C.A. reasons). He similarly said (at para. 218) "That [the plaintiff's] psychiatric illness and its attendant consequences fall within the ambit of the risk created by [the defendant's] conduct in this case is clearly demonstrated on the evidence before this court."

defendant was in a position of trust and authority relative to the plaintiff, and that it should have "fallen within [the defendant's] contemplation that a breach of that trust as blatant as the one that occurred in this case could have serious ramifications for his patient's mental health".[10] Apart, however, from the reference to the defendant's position of trust and authority relative to the plaintiff, no explanation was provided *why* that relationship would lead to that contemplation.

At this point mention should be made of two matters relied upon by the trial judge but which received little attention in the Court of Appeal. The trial judge made express reference to the evidence of a psychiatrist that the plaintiff's psychiatric illness was the result of a number of factors, one being physiologic pain,[11] presumably referring to the unnecessary pain suffered by the plaintiff because of the defendant's non-disclosure. The trial judge also said that the plaintiff had "suffer[ed] physical injury by reason of the failure of the [defendant] to diagnose and/or treat or make treatment recommendations relating to the talar fracture. Although the plaintiff has failed to demonstrate that [his] orthopedic outcome has been adversely affected, the early stages of orthopedic recovery were clearly set back by reason of the defendant's conduct."[12] The Court of Appeal referred to the matter of pain in the following statement: "Although the specific mechanisms of psychological injury are still being discussed, the correlation between pain and anxiety cannot be said to be a revolutionary concept."[13]

The findings that pain was a factor in the development of the psychological injury, and that a result of the defendant's negligence was a setback in recovery from physical injury, may well take this case out of the category of "pure" psychological injury. It may, in other words, have been the type of claim that is sufficiently associated with physical injury (which might include pain and/or prolongation of recovery) to avoid the restrictive rules that apply to claims for "pure" psychological injury. That is a matter worthy of separate analysis and is merely identified but not considered here.

In the Court of Appeal decision, the proof necessary to satisfy the burden that rested with the plaintiff therefore consisted largely of the nature of the relationship between the parties. Apart from the brief reference to the correlation between pain and anxiety, there was no allusion to direct evidence that would have satisfied that onus of proof; instead, the court drew the inference that it was reasonably foreseeable that a person of ordinary fortitude who was the patient of a doctor might suffer a serious and prolonged form of mental harm from the type of non-disclosure that occurred in this case.

Scientific evidence, or the absence thereof

It is hardly surprising that expert or other forms of evidence on the question whether a particular type of conduct might result in psychological injury could be difficult to find or, if obtained, would have little probative value. While it is likely that there is a body of

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[10] *Frazer,* at paras. 30, 54, 57 and 59.
[11] At para. 220.
[12] At para. 224.
[13] At para. 60.

scientific knowledge and data regarding the connection between certain forms of conduct and mental injury, such as post-traumatic stress disorders caused or contributed to by military service during war, and psychological injury due to witnessing a horrific accident, particularly one involving a family member, there is undoubtedly a large gray area in which there is no reliable scientific evidence as yet. In that murky zone, it falls to the court to determine in each case, on the basis of life experience, ordinary knowledge and common sense, whether the requisite element of reasonable foreseeability has been proved.

Is the nature of the relationship sufficient to satisfy the onus of proof?

A concern we have with the court's decision in *Frazer* is the apparently wide ambit of the ruling. The impression left by the decision is that a doctor/patient relationship, or any other relationship involving trust and authority (which would seem to include fiduciary and professional relationships of all sorts), will automatically satisfy the plaintiff's onus of proof on the issue of foreseeability. We see no sound basis for what amounts to the carving out of an exception to the general requirement for proof of foreseeability that a person of ordinary fortitude might have sustained a compensable psychological injury in the circumstances of the case. Why should a doctor, a lawyer, or any other person in the type of relationship referred to by the court, be deprived of the right to require the plaintiff to prove that the damages are not remote in law? Unfortunately, no detailed explanation was given for this exception to the general rule.

The law has traditionally treated claims for psychological injury unassociated with physical injury more cautiously than other types of claim,[14] just as it has with claims for economic loss.[15] One of the reasons for that different treatment is the difficulty of determining the validity of claims for psychological injury. Despite many advances in the diagnosis of such illnesses, the validity of the claim depends, in some measure at least, upon the reliability of the patient's own utterances.[16] Stated more baldly, fears remain that exaggerated or false claims will be allowed.[17] The relaxation of the onus of proof placed on the plaintiff in the case of a relationship involving trust and authority runs counter to that cautionary approach.

While a "floodgates" argument is generally frowned on by the courts, it remains a factor for consideration.[18] The ease with which a claim for psychological injury can be made, and the difficulty of disproving the genuineness and severity of the injury, combined with

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[14] *W and Others v Essex County Council* [2001] 2 A.C. 592 (H.L.) at p. 599.
[15] *White,* at p. 492 (Lord Steyn): "The contours of tort law are profoundly affected by distinctions between different kinds of damage or harm…The analogy of the relatively liberal approach to recovery of compensation for physical damage and the more restrictive approach to the recovery for economic loss springs to mind." See also *Tame,* at para. 334.
[16] *Tame,* at para. 308.
[17] *Tame,* at para. 243. We believe it to be a justifiable comment that, because of the largely subjective nature of its proof, claims for psychological injury provide greater opportunity for fraud and exaggeration than do most other claims involving personal injury.
[18] Reference to the opening of floodgates to claims for psychological injury was made in *Tame,* at para. 244.

the applicability of the thin skull principle once all of the elements for liability have been proved, make the relevance of that consideration all the greater. As reflected in the following remarks, an open season might develop for claims for psychological injury against anyone who stands in a position of trust and authority:[19]

> …I am not confident that the administration of justice is usually able to identify unmeritorious claims successfully…Recent experience shows it is naïve to believe that an expansion of any area of liability will not produce a volume if not a flood of both valid and invalid claims. This is particularly so when…proof…depends so greatly upon the credibility of the claimants and their expert witnesses, whose advocacy is often impossible to refute.

Criticism of the *Frazer* decision

Returning to the circumstances of the *Frazer* case, the nature of the non-disclosure was wholly different than that in another case where damages were awarded for psychological injury similarly caused by a doctor's non-disclosure to his patient.[20] The non-disclosure there involved the failure by the doctor to advise his patient that a biopsy had revealed cancer, and his failure to mention available forms of treatment. The patient ultimately died from the cancer. The non-disclosure here, "blatant" though it may have been, involved a matter far less serious than the failure to disclose information that might have been, both in fact and in the patient's belief, life-saving.

More importantly, the court in *Frazer* appears to have given little or no attention or weight to the plaintiff's singular makeup, as evidenced by his unusual reactions to the defendant's negligence. The psychiatric evidence showed the following causative factors underlay the plaintiff's injury:[21]

> The difference between the true severity of the fracture and what was conveyed by the defendant to the plaintiff;
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> The plaintiff's belief that he had been "medically mistreated" and "deliberately harmed"; and
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> The plaintiff's belief that he had contributed to his disability by walking on the ankle.

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[19] *Devji,* at para. 47 (McEachern C.J.B.C.).
[20] *Laferriere v Lawson* [1991] 1 S.C.R. 541 (see para. 169 in particular). In that case, as here, the evidence did not establish that the non-disclosure had any probable impact on the patient's health or the physical outcome.
[21] *Frazer,* at para. 45.

The major factor seems to have been the plaintiff's belief that he had been deliberately harmed, as indicated by the following comment: "When [the plaintiff] realized the full extent of his injuries, he became focused on the fact that [the defendant] had lied to him."[22]

The error regarding the difference between the true severity of the fracture and what was conveyed by the defendant to the plaintiff was corrected before the mental injury was sustained; it was, in fact, one of the factors that led to the psychological injury. The error therefore involved merely the timing of the disclosure of the true severity of the injury. One can argue whether the defendant's non-disclosure constituted "medical mistreatment" (although note must be taken of the trial judge's finding that the defendant's conduct prolonged the recovery from the physical injury), but there was no basis for the plaintiff's belief that he had been lied to or deliberately harmed by the defendant. There was also no basis for the plaintiff's belief that he had contributed to his disability by walking on the ankle.[23] The plaintiff therefore persisted in holding unsupported beliefs, ones that a person of ordinary fortitude would not be expected to have held. A matter of particular note is the principle, discussed below, that "foreseeability of the psychiatric illness is considered *ex post facto* in the light of all that has happened."[24]

The hindsight rule

The Report of the Law Commission (England) provided the following explanation for this rule:[25]

> Unless hindsight is used, '[t]he question ceases to be whether it is foreseeable that a reasonably robust person would have suffered psychiatric illness as a result of what actually happened and becomes instead whether it is foreseeable that such a person would have suffered psychiatric illness as a result of what might have happened but did not in fact do so.'

The foreseeability test should have been applied in *Frazer* on the basis of the following approach:[26]

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[22] *Frazer,* at para. 11.
[23] It was found that this resulted in unnecessary pain, but not in any worsening of the injury, which is why only $2,500 in damages was awarded on this account. As mentioned, however, while there was no worsening of the physical injury, the recovery time was prolonged.
[24] *Report of the Law Commission (England) on Liability for Psychiatric Illness* (Report No. 249, London, H.M.S.O. 1998, http://www.lawcom.gov.uk/docs/lc249(1).pdf), at para. 2.8.
[25] At para. 2.8. Lord Goff, dissenting in *White,* put it this way (at p. 477): "[T]he court has to assess culpability by reference to what has actually happened; if you do not know the outcome of an accident it is impossible to determine whether what occurred should have been foreseen."
[26] *Report of the Law Commission (England)*, at para. 5.18.

> So, for example, where a mother suffers psychiatric illness as a result of thinking about a potential accident which might have injured her son, but which in fact was avoided, the courts should assess the foreseeability of her illness on the basis that she is aware that the accident did not actually happen.

That was the approach adopted in the *Vanek* decision.[27] The plaintiffs there were the parents of a young child and feared that she had suffered serious harm to her health when she felt ill after drinking from a juice bottle containing toxic fluid. They subsequently learned, however, that the child had not sustained any serious injury. The foreseeability issue was determined on the basis of that subsequent knowledge.

The failure of the plaintiff in *Frazer* to satisfy the onus of proof

Subject to the comments made above regarding the elements of pain and setback from recovery, we are left with the plaintiff's belief that he had been medically mistreated and the fact that an erroneous diagnosis was made but corrected without any resulting adverse health or physical consequences. Removing from account, because of the hindsight rule and the absence of any basis for the beliefs held by the plaintiff, the other factors referred to above, it seems quite unlikely that the notional "person of ordinary fortitude" might have sustained a compensable form of mental injury as a result of the defendant's non-disclosure, regardless of its "blatant" nature. It is more likely that the injury was due to a paranoid personality, leading to unusual reactions on the part of the plaintiff to the defendant's non-disclosure, reactions that would not have been exhibited by a person of ordinary fortitude.[28] In effect, a subjective test was used and the thin skull principle was applied prematurely, at the liability rather than assessment of damages stage. In our view (subject again to the matters of pain and prolongation of recovery), the plaintiff in *Frazer,* as had the plaintiff in *Mustapha,* failed to satisfy the onus of proof on the issue of causation in law.

The quality of expert evidence, or the lack thereof

Turning from the specific (the *Frazer* decision) to the general, it is a normal requirement to consider the scientific underpinning of any expert evidence, and that need is particularly evident in regard to opinion evidence in claims for psychological injury. It is likely that in the majority, perhaps the large majority, of cases involving that type of claim, there will be very little of that. The expert's opinion will usually be based largely on analogy, extrapolation, and his or her personal views, unsupported by knowledge and

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[27] *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999) 48 O.R. (3d) 228 (C.A.).

[28] We say this despite the following comment in *Frazer* (at para. 56): "There is no evidence that Mr. Frazer's injuries were the result of a…hypersensitivity [similar to that of the plaintiff in *Mustapha*]. To the contrary, in our case, all the evidence suggests that Grant Frazer had no particular sensitivities, emotional or otherwise." While we are not experts in the area of psychological injury, neither (presumably) were the members of the court, and the proof, as they say, is in the pudding. A paranoid belief (the plaintiff's unfounded belief that he had been deliberately harmed and lied to by the defendant) is a manifestation of paranoia and should be taken as evidence of hypersensitivity.

data that is truly scientific in nature. Psychology is not an exact science to begin with, and it is quite unlikely that there will be experience or data to cover situations like those that led to the claims in *Mustapha* and *Frazer*.

Suppose the plaintiff in *Mustapha* had called an expert witness to testify that there was a real risk that a person with ordinary fortitude might sustain a serious and prolonged psychological injury as a result of seeing dead flies in a bottle of water? What probative value would, or more to the point, should, have been assigned to that evidence? Those of us who practise in the area of litigation know that experts can often be found to support claims of apparently dubious merit. The common law has long required, and the Ontario Rules of Civil Procedure now explicitly require,[29] that experts provide opinion evidence that is fair, objective and non-partisan. This is not to impugn the motives of experts; the vast majority of those who provide opinions do so honestly and with a genuine belief in their opinion. The fact remains, however, that an expert can often be found, regardless of the position to be espoused. Evidence from an expert can lend an aura of scientific legitimacy to such positions, even if the evidence, in reality, provides no more than a patina or gloss of scientific reliability.

Given that opinions submitted in claims for psychological injury generally will not approach the same level of scientific reliability as, for example, opinions regarding engineering or medical issues other than those involving psychological injury, this type of claim should not be resolved through a "battle of the experts". A claim should not succeed merely because a judge or jury finds one expert to appear to be more persuasive than another, when the foundation for the opinion of each of the experts is not, at bottom, scientific in nature.

The nature of the foreseeability test and the importance of life experience, ordinary knowledge and common sense

Foreseeability, in any event, is a matter for determination by the court, not by experts, although the evidence of experts is admissible for consideration.[30] In *Mustapha,* and at the trial level in *Frazer,* considerable weight was attached to the expert evidence. As indicated above, the court in *Mustapha* expressly noted the fact that the expert witnesses had not been asked whether it was reasonably foreseeable that a person of ordinary fortitude might sustain a compensable psychological injury from seeing dead flies in a bottle of water. In *Frazer,* the trial judge said "The psychiatric evidence establishes that the illness that [the defendant's] conduct brought about in [the plaintiff] was foreseeable even if the extent of his disability was not",[31] and that statement was reproduced and relied upon in the decision of the Court of Appeal.[32]

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[29] Rule 4.1.01.
[30] *Report of the Law Commission (England)*, at para. 2.9; *Tame,* at paras. 115, 203, 234, 274 and 331.
[31] At para. 227. As indicated above, this statement was made without any reference to underlying supporting evidence.
[32] At para. 58.

"Foreseeability depends on what a reasonable person would anticipate."[33] The question to be asked is what "a reasonable [person] of ordinary intelligence and experience so acting would have in contemplation".[34]

The foreseeability test therefore involves questioning what a reasonable person standing in the shoes of the defendant (and, in the case of a claim for psychological injury, with the benefit of hindsight) would have foreseen, not what an expert placed in that situation would have foreseen. The opinion of an expert is certainly relevant on the matter of the likelihood that the conduct in question would result in psychological injury to a person of ordinary fortitude, but it is the notional "reasonable person", not the expert, whose foresight is to be considered. The question of what the likelihood of psychological injury might be is a separate and different question than the question whether a reasonable person would anticipate/foresee/have-in-contemplation psychological injury as a possible consequence of the wrongdoing. That second question is, of course, related to and influenced by the answer to the first question. The more likely it was that psychological injury would occur as a result of the defendant's conduct, the more likely it is that a reasonable person in the defendant's position would have anticipated or contemplated that result.[35]

The answers to the two questions do not, however, march in lockstep. The "reasonable person" presumably would have less knowledge than the expert, and it is that lesser knowledge that must be taken into account. Furthermore, as stated above, in many cases the expert's opinion will not be based on reliable scientific knowledge and data so much as on his or her own views, although it should be granted that those would be views based on education and experience in the general area. That lack of scientific reliability will be due to the rarity of occasions involving the circumstances leading to the claim, or of psychological injury stemming from those circumstances.

For the purposes of a claim, it is the second question that is critical. That is the question that forms part of the test for liability. The second question involves the foresight of a reasonable person, not an expert, placed in the circumstances of the defendant and having the benefit of hindsight, and the determination of that question depends far more on the life experience, ordinary knowledge and common sense of the judge or jury, than it does on expert evidence.[36]

The comments made above are intended to apply to the usual situation where the defendant is what might be described as an ordinary person. It should be noted that the defendant in *Frazer* fell outside that characterization; he was a physician. Thus, in

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[33] *Hanke v Resurfice Corp.* [2007] 1 S.C.R. 333 at para. 11 (McLachlin C.J.C.).
[34] *Gilchrist v A.R. Farms Ltd.* [1966] S.C.R. 122 at para. 6, quoting from *Glasgow Corporation v Muir* [1943] A.C. 448 (H.L.).
[35] Although in *Healey,* the assumed fact that 40% of persons in a given fact situation would have sustained a recognizable psychiatric illness was not sufficient to prevent a finding that the injury would nevertheless have been remote in law (at paras. 257-58).
[36] For example, in the recent decision *Piresferreira v Ayotte* 2010 ONCA 384, it was held reasonably foreseeable that an employee of ordinary fortitude would suffer serious psychological injury as a result of abusive conduct on the part of the employer (at paras. 52-54).

Frazer, the question to be asked was whether a reasonable physician, or an emergency room physician if they were shown to have special knowledge not held by an ordinary physician, would, with the benefit of hindsight, have anticipated or contemplated the real possibility of mental injury as a consequence of the defendant's non-disclosure. It does not appear that evidence of that nature was led in *Frazer*.

Conclusion

In long form, the question to be asked should be: Would a reasonable person, standing in the shoes of the defendant and having the benefit of hindsight, have anticipated/contemplated that there was a real risk – i.e. one which would occur to the mind of a reasonable man and which he would not brush aside as far-fetched – that a person of ordinary fortitude in the position of the plaintiff would sustain a psychological injury - meaning some serious and prolonged form of mental injury[37] as opposed to ordinary upset or anxiety - as a result of the wrongdoing?

Subject to the matters of pain and setback from recovery from physical injury referred to above, the decision in *Frazer* was based on what appears to have been a conclusory view that, because of the physician/patient relationship between the parties, it was reasonably foreseeable that a person of ordinary fortitude in the plaintiff's position might sustain a compensable psychological injury from the defendant's failure to disclose to the plaintiff in a timely manner the existence of a right-ankle fracture, and the complete failure to disclose to him the severity of the fracture. In our view that is a questionable decision, both because the nature of the relationship does not appear to us to be a sufficient basis for a finding of foreseeability, and because the unusual reactions of the plaintiff suggest that the true basis of the injury was the fact that the plaintiff was not a person of ordinary fortitude, but rather one with a "thin skull" personality, and the latter was a matter to be considered only at the assessment of damages stage, not at the determination of liability stage. While not experts, we consider it unlikely that a reasonable physician, knowing through hindsight that the non-disclosure had not resulted in any new injury or aggravation of the existing injury, would have contemplated a real risk that a person of ordinary fortitude in the position of the plaintiff would sustain some serious and prolonged form of mental injury as a result of the non-disclosure. Adopting the rationale in *Mustapha*, the plaintiff failed to satisfy the onus of proof on the issue.

Expert opinions in claims for psychological injury in circumstances that are otherwise rare in occurrence, such as those that occurred in *Mustapha* and *Frazer,* are not likely to be based on scientific knowledge and data, but rather on the personal views of the expert. That lack of scientific reliability should be explicitly acknowledged and taken into account. Furthermore, in most cases the test of foreseeability in a claim for psychological injury will depend to a much greater degree on the life experience, ordinary knowledge and common sense of the judge or jury, than on expert evidence, and that too should be expressly noted by a judge or explained to a jury.

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[37] As indicated in footnotes 5 and 7 above, we are applying the formulation used in *Mustapha*, rather than the stricter requirement for "a recognizable psychiatric illness" adopted in *Healey* and *Frazer*.

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