

# Reconsidering the “Recognizable Psychiatric Illness” Requirement in Canadian Negligence Law

*Louise Bélanger-Hardy\**

*Courts have generally required litigants to prove that they have experienced a “recognizable psychiatric illness” (RPI) in order to be compensated for stand-alone mental harm resulting from negligent acts. This was not always the case. Before the 1970s, courts were traditionally content to work with the “no compensation for mere upsets” rule or to link mental harm to physical injury. But when the English Court of Appeal articulated the RPI requirement in *Hinz v Berry*, Canadian courts were quick to adopt it as the threshold for plaintiffs’ claims, and have relied on it ever since. In the author’s view, however, the term “recognizable psychiatric illness” was not intended to denote a new, higher threshold.*

*In the 2008 case, *Mustapha v Culligan of Canada Ltd*, the Supreme Court of Canada did not use the term “recognizable psychiatric illness” in commenting on the threshold for compensable mental harm. The author argues that by avoiding the term, the Supreme Court invited courts to reconsider the matter, perhaps by adopting the lower, more flexible threshold that the injury be “serious and prolonged”, or more likely, by reverting to the “mere upsets” threshold. At the very least, the author contends, the Court’s comments suggest that the RPI requirement is too high.*

*Subsequent jurisprudence reveals that courts have been reluctant to agree with the author’s view of the importance of *Mustapha*, due to the fact that the Supreme Court did not explicitly reject *Hinz* and another foundational case, *Guay v Sun Publishing*. The author argues that despite the iconic status of these two cases, neither one provides a compelling basis for the RPI requirement. Continuing to deny compensation to plaintiffs who cannot meet the RPI requirement is not only unfair but is also unsupported by precedent.*

---

\* Associate Professor, Faculty of Law, University of Ottawa. The author wishes to thank her research assistant, Caroline Quesnel, BA, MA, JD for her precious help. Funding for this article was provided by the Law Foundation of Ontario.

## Introduction

### I. *Mustapha* and the RPI Requirement

### II. A Review of Post-*Mustapha* Decisions

#### A. Endorsement of the RPI Requirement

#### B. Unquestioning Use of the RPI Requirement

#### C. Recognition of a More Flexible Threshold

#### D. A Preliminary Assessment: No Judicial Appetite for a Lower Threshold

### III. Exploring the Legal Roots of the Nature of Actionable Harm

#### A. The Historical Threshold: “More than Mere Upset”

#### B. Two Possible Lines of Authority for the RPI Requirement: *Guay* and *Hinz*

##### (i) *Guay v Sun Publishing*

##### (ii) *Hinz v Berry*

### IV. A New Look at *Mustapha*

## Conclusion

# Introduction

In 2008, after more than five decades of silence,<sup>1</sup> the Supreme Court of Canada in *Mustapha v Culligan of Canada Ltd*<sup>2</sup> addressed some of the thorny issues related to compensation for mental harm caused by a negligent act.<sup>3</sup> In *Mustapha*, the plaintiff developed a severe mental illness after seeing one fly and the remnants of another in a large sealed water container delivered to his home by the defendant, a bottled water manufacturer. Although the Supreme Court accepted that psychological injury can give rise to damages, the Court held that the injury in this case was too remote. *Mustapha* is best known for its analysis of the test for remoteness, but its comments on the threshold of actionable mental harm are also worthy of scrutiny.

---

1. The Supreme Court of Canada dealt with compensation for mental harm in the negligence context in three earlier cases. See *Vana v Tosta*, [1968] SCR 7, 66 DLR (2d) 97 (where the specific issue before the Court was the quantum of damages); *Guay v Sun Publishing Co*, [1953] 2 SCR 216, [1953] 4 DLR 577; *Toronto Railway Co v Toms* (1911), 44 SCR 268 (available on QL). The latter two are discussed below.

2. 2008 SCC 27, [2008] 2 SCR 114 [*Mustapha*, SCC].

3. Given the nature of the present inquiry, the expression “mental harm” has been retained because it is wide enough to include emotional, psychological or psychiatric injury. A similar definition was adopted by the Scottish Law Commission. See *Report on Damages for Psychiatric Injury* (2004) Scot Law Com No 196 (“any harm to a person’s mental state, mental function or mental well-being, whether or not the harm amounted to a medically recognised medical disorder”, recommendation 3(a)).

The search for a way to limit the nature of compensable mental harm is not unique to negligence law. Indeed, the issue has arisen in the context of other torts,<sup>4</sup> in contract law,<sup>5</sup> and within statutory compensation regimes.<sup>6</sup> However, this article focuses on the tort of negligence, specifically, on cases where the victim has suffered independent or stand-alone mental harm. That is, where mental harm is not ancillary to physical injury.<sup>7</sup> In these cases, the common view is that mental harm is compensable only if it manifests as physical symptoms (such as a miscarriage or heart attack) or as a recognizable psychiatric injury (RPI).<sup>8</sup>

Interestingly, despite the fact that the plaintiff in *Mustapha* suffered from an RPI, the Supreme Court did not specifically use this phrase. Instead, the threshold for compensable mental harm was discussed in

---

4. In particular, the tort of intentional infliction of mental harm, where one needs to establish the existence of “visible and provable illness”. See *Wilkinson v Downton*, [1897] 2 QB 57; Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham, Ont: LexisNexis, 2011) ch 11 at 55–56.

5. See e.g. *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30, [2006] 2 SCR 3 (insurance contract); *Honda Canada v Keays*, 2008 SCC 39, [2008] 2 SCR 362 (employment contract). See also SM Waddams, *The Law of Damages*, loose-leaf (consulted on 15 February 2013) (Toronto: Canada Law Book, 1983) ch 3 at 3.72–3.82.

6. In worker compensation regimes, the legislation usually identifies the threshold for compensation but *Mustapha* has been alluded to in some tribunal decisions. See e.g. (9 August 2010), WCAT-2010-02158, online: WCAT <<http://www.wcat.bc.ca>>; (17 December 2008) 2416/03, online: WSIAT <<http://wsiat.on.ca>>. Schemes for the compensation of victims of crime are similarly statute-dependent, and vary among provinces. See e.g. Ontario’s Criminal Injuries Compensation Board, *Fact Sheet—Mental and Nervous Shock Claims* (August 2011) online: Criminal Injuries Compensation Board <<http://www.cicb.gov.on.ca>> (providing that a claimant must have close ties of love and affection with the victim and must suffer psychiatric/psychological injury induced by the shock of being present at the scene of the crime or from coming upon the scene of the crime, as supported by medical evidence).

7. It is generally accepted that mental harm flowing from a physical injury is not subject to the same stringent limiting factors applied to independent or stand-alone mental harm cases. See e.g. *Deuji v District of Burnaby*, 1999 BCCA 599 at para 2, 180 DLR (4th) 205. See also Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2nd ed (Toronto: Irwin Law, 2008) at 214; Waddams, *supra* note 5, ch 3 at 3.69.

8. See Linden & Feldthusen, *supra* note 4 at 429. Note that even if the mental harm translates into a physical injury, such as a miscarriage or heart attack, the claim is still for mental harm. This must be distinguished from cases where the physical damage leads to and creates a mental condition.

more general and flexible terms. However, Canadian courts have been reluctant to depart from the RPI requirement.

Despite its potential to deny redress for serious mental injuries, there is a dearth of academic and judicial commentary on the RPI threshold.<sup>9</sup> In an effort to fill the gap, this article reviews how courts have relied on the requirement by surveying the jurisprudence leading up to and following *Mustapha*. Courts have been content to apply the stringent RPI standard without investigating its origins even though, as will be shown, the standard rests on questionable legal foundations.

A few preliminary definitions and boundaries should be identified at the outset. First, the phrase “recognizable psychiatric illness” is rarely defined in the case law. Canadian courts generally accept that a mental injury amounts to an RPI when a psychiatrist finds that the plaintiff’s injury is a diagnosable mental disorder,<sup>10</sup> usually by reference to diagnostic criteria found in texts such as the American Psychiatric Association’s DSM-IV-TR<sup>11</sup> or the World Health Organization’s ICD-10.<sup>12</sup> Second, the

---

9. See Desmond Butler, “Identifying the Compensable Damage in ‘Nervous Shock’ Cases”, online: (1997) 5:1 Torts LJ 67 at 67 (LexisNexis) [Butler, “Identifying”]; Des Butler, *Damages for Psychiatric Injury* (Annandale, New South Wales: The Federation Press, 2004) at 87–89, 132–44; D Spencer Campbell & Chris Montigny, “Psychological Harm and Tort Law: Reassessing the Legal Test for Liability” in Todd Archibald & Michael Cochrane, *Annual Review of Civil Litigation 2003* (Toronto: Carswell, 2003) 133 at 144ff; Peter Handford, *Mullany & Handford’s Tort Liability for Psychiatric Damage*, 2d ed (Sydney: Law Book Co, 2006) at ch 2, 4 [Handford, *Mullany & Handford*]; Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Liability* (Oxford and Portland: Hart Publishing, 2009); Rachael Mulheron, “Rewriting the Requirement for a ‘Recognized Psychiatric Injury’ in Negligence Claims” (2012) 32:1 Ox J Leg Stud 77.

10. See e.g. *Devji*, *supra* note 7 at paras 83–84; *Schulze v Strain*, 2010 BCSC 1516 (available on CanLII); *Healey v Lakeridge Health Corporation*, 2010 ONSC 725, 77 CCLT (3d) 261, *aff’d* in part 2011 ONCA 55, 103 OR (3d) 401 [*Healey*, CA] (where the motions judge defined “‘psychiatric illness’ as any mental disorder as described in the [DSM-IV], which is the authoritative diagnostic manual used by physicians and others to defined [sic] what is a recognizable psychiatric illness” at para 120). *Contra Ulmer v Weidmann*, 2011 BCSC 130 at para 24 (available on CanLII) (where the Court noted that reference to DSM-IV-TR was not “helpful”).

11. *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR*, 4th ed, text revision (Washington, DC: American Psychiatric Association, 2000) online: <<http://www.psych.org/practice/dsm>>.

12. *The ICD-10 Classification of Mental and Behavioural Disorders, 2010*, online: World Health Organization <<http://www.who.int>>.

need for an RPI is almost always mentioned in conjunction with the rule that there can be no compensation for “mere upsets or distress”.<sup>13</sup> Thus, in order to recover damages from a mental injury that does not manifest itself physically, a plaintiff must establish that the harm goes beyond the emotions that are part and parcel of human life, such as distress, grief and anxiety, and is, in fact, an RPI.<sup>14</sup> Part of the post-*Mustapha* debate revolves around whether the second proposition (the need to establish the existence of an RPI) necessarily flows from the first (no compensation for mere upsets).

The orthodox view treats mental harm as an either/or proposition, thus answering the above question in the affirmative. However, a negligent act can cause a wide spectrum of mental reactions, some of which rise above mere upset but fall short of an RPI. Some Canadian courts have recognized this middle ground,<sup>15</sup> which has been described as “suffering incapable of classification as a psychiatric disorder”.<sup>16</sup> However, as the law currently stands, mental harm short of being classified as an RPI is unlikely to be compensated. The question is then, whether the Supreme Court in *Mustapha* intended to change this rule, or at least, raise doubts about its continued primacy. In light of the judicial treatment of the nature of actionable mental harm in Canadian law since the early twentieth century, it will be argued that, although ambiguous, the Court’s preferred threshold does not require the identification of an RPI.

The analysis is divided into four parts. Part I summarizes the Supreme Court’s discussion in *Mustapha*. Part II surveys post-*Mustapha* decisions,

---

13. Early statements of this rule are discussed in Danuta Mendelson, *The Interfaces of Medicine and Law* (Aldershot, UK: Ashgate, 1998) at 29–35 [Mendelson, *Interfaces*].

14. See Mulheron, *supra* note 9 (describing this threshold as the “Traditional Rule” at 78).

15. See e.g. Southin JA’s decision in *Rhodes v Canadian National Railway* (1990), 75 DLR (4th) 248, 50 BCLR (2d) 273 (CA). She commented on the matter earlier in *McDermott v Ramadanovic Estate* (1988), 27 BCLR (2d) 45, 44 CCLT 249 (SC). See also *Cox v Fleming* (1993), 13 CCLT (2d) 305 (SC), *aff’d* (1995), 15 BCLR (3d) 201 (CA); *Mason v Westside Cemeteries Ltd* (1996), 135 DLR (4th) 361, 29 CCLT(2d) 125 (Ont Ct J (Gen Div)); *Anderson v Wilson* (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA).

16. Nicholas J Mullany & Peter R Handford, “Moving the Boundary Stone by Statute—The Law Commission on Psychiatric Illness” (1999) 22 UNSW LJ 350 at 366 [Mullany & Handford, “Moving the Boundary”]. See also Mulheron, *supra* note 9 (referring to *Hussain v West Mercia Constabulary*, [2008] EWCA Civ 1205 at para 20 (available on BAILII), where Maurice Kay LJ speaks of “not significantly abnormal manifestations of non-physical sequelae”, albeit in the context of the tort of misfeasance in public office at 96).

examining the extent to which they continue to rely on the RPI threshold. Part III explores the nature of actionable mental harm in Canadian jurisprudence from the beginning of the twentieth century to the early 1970s. This is done in order to support the later argument that there is a questionable legal foundation for the RPI requirement. Finally, Part IV revisits the Supreme Court's analysis in *Mustapha*, in the context of the conclusions drawn from the review of pre-1970 decisions.

In essence, this article explores the jurisprudential evolution of the RPI rule in order to suggest that the Supreme Court's decision in *Mustapha* can and should be seen as the basis for a more flexible threshold for compensable mental harm in Canadian negligence law. Although policy considerations are alluded to in this paper, its scope is limited to identifying the doctrinal basis for the RPI requirement. The policy arguments for and against it reside in a companion article.<sup>17</sup>

## I. *Mustapha* and the RPI Requirement

The *Mustapha* household had trusted Culligan of Canada Ltd to provide safe, clean drinking water for a number of years. One day, Mr. *Mustapha* saw a dead fly and the remnants of a second one in the sealed water bottle he was about to place on the dispenser in his home. After the incident, he developed a phobia of water and a major depressive disorder. He sued Culligan for negligence and was awarded approximately \$340 000 at trial. The judge concluded that there was ample evidence of mental harm amounting to an RPI.<sup>18</sup> The Ontario Court of Appeal overturned the decision on the basis that the trial judge had erred in finding that such harm was reasonably foreseeable.<sup>19</sup> *Mustapha* appealed to the Supreme Court.

---

17. See Louise Bélanger-Hardy, "Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis" 36 Dal LJ [forthcoming in 2013] [Bélanger-Hardy, "Thresholds"] (arguing that policy considerations support discarding the RPI requirement in favour of the lower "mere upsets" threshold).

18. *Mustapha v Culligan of Canada Ltd* (2005), 32 CCLT (3d) 123 at para 230 (available on QL) (Ont Sup Ct) (on the basis of evidence proffered by the plaintiff's family doctor, two psychologists and two psychiatrists).

19. *Mustapha v Culligan of Canada Ltd* (2006), 84 OR (3d) 457, 275 DLR (4th) 473 (CA).

Despite the fact that the case was the Supreme Court's first opportunity in many decades to deal squarely with the legal issues related to compensation for negligently inflicted mental harm, the Court rather laconically concluded that Culligan owed a duty of care to Mustapha and that this duty had been breached. Factual causation was confirmed, but the damage was considered too remote and so the appeal was dismissed. Mustapha's psychiatric injury was held not to be foreseeable in a "person of ordinary fortitude".<sup>20</sup>

Although the extent of Mustapha's mental injuries was not at issue, the Supreme Court did comment on the threshold for actionable mental harm. After noting that "the distinction between physical and mental injury is elusive and arguably artificial in the context of tort",<sup>21</sup> the Court went on to suggest that a distinction must be maintained between "psychological disturbance that rises to the level of personal injury" and "psychological upset":<sup>22</sup>

Personal injury at law connotes serious trauma or illness: see *Hinz v Berry*; *Page v Smith*; *Linden and Feldthusen*. 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. . . . Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.<sup>23</sup>

The Court then affirmed the trial judge's finding that Mustapha had "developed a major depressive disorder with associated phobia and anxiety" and noted the fact that his "psychiatric illness was debilitating and had a significant impact on his life", which qualified as a personal injury at law.<sup>24</sup> The crucial point is that the Court did not use the term "recognizable psychiatric illness", but rather referred to "serious and prolonged" mental harm rising "above the ordinary annoyances, anxieties and fears that are part of life".<sup>25</sup> The Court seemed to suggest that a

---

20. *Supra* note 2 at para 14.

21. *Ibid* at para 8.

22. *Ibid* at para 9.

23. *Ibid* [italics in original; citations omitted; emphasis added].

24. *Ibid* at para 10.

25. *Ibid* at para 9.

plaintiff could recover damages for a mental injury that did not rise to the level of an RPI, even though the injury in this case *did* rise to this level.

## II. A Review of Post-*Mustapha* Decisions

This section analyzes post-*Mustapha* jurisprudence in order to determine the extent to which Canadian courts have been tempted to move away from the RPI threshold in favour of a more flexible approach. The cases can be broadly organized into three categories. The first covers the judgments that provide a meaningful and thorough treatment of the Supreme Court's comments in *Mustapha*. The second (and largest) category consists of judgments where the RPI threshold is applied without scrutiny or without consideration of alternative thresholds. This category includes situations where the plaintiff is an indirect or "secondary" victim<sup>26</sup>—class action cases where the RPI issue is debated in the context of motions for certification or for settlement approval, and cases where the plaintiff has suffered physical as well as mental injury. The third category comprises the few decisions where courts appear to rely on the "serious and prolonged" threshold mentioned by the Supreme Court in *Mustapha*.

### A. Endorsement of the RPI Requirement

Only two cases have considered *Mustapha*'s treatment of the RPI requirement in any meaningful way, and they both show a reluctance to adopt a more nuanced approach without clearer direction on the matter. In the first case, *Kotai v Queen of the North (Ship)*,<sup>27</sup> passengers and their dependants sued British Columbia Ferry Services (BC Ferry) after a ferry sank while traveling from Prince Rupert to Vancouver Island. The passengers, including a number of children, were evacuated to lifeboats and taken to shore in rescue vessels, but not before some watched the ferry sink. Ultimately, BC Ferry admitted liability. The parties proceeded by

---

26. Canadian courts have rejected the distinction between direct or "primary" victims (those immediately affected by a tortfeasor's actions) and indirect or "secondary" victims (those whose injuries arise because of their relationship with the victim or because of their bystander status). See e.g. *supra* note 19 at paras 36–48.

27. 2009 BCSC 1405, 70 CCLT(3d) 221.



way of mini-trials to assess the quantum of damages for personal injuries, which in many instances consisted solely of stand-alone mental harm.<sup>28</sup> The plaintiffs argued that the proper test was whether the psychological injury was “serious and prolonged”. In their opinion, the RPI test applied only to “secondary victims”, if it applied at all. Accordingly, the British Columbia Supreme Court discussed the RPI threshold and, in particular, the Supreme Court of Canada’s decision in *Mustapha*.

After concluding that before *Mustapha* a plaintiff had to meet the RPI requirement, the trial court held that *Mustapha* did not change the law on the threshold level of mental harm; if the Supreme Court had intended to create a new test, it “would have addressed the issue more directly, would have expressly rejected [the RPI] test and would have provided reasons for doing so”.<sup>29</sup> The Court also expressed reservations about the “serious and prolonged” criterion on the basis that it would not offer “a particularly helpful benchmark for the court, lawyers or litigants”,<sup>30</sup> partly because of the difficulty in deciding what is “serious”. In contrast, the Court said the need to prove an RPI “introduced a degree of objectivity and certainty to the law through the mechanism of expert medical evidence”.<sup>31</sup> The Court also rejected the plaintiffs’ argument that the RPI requirement applied only to secondary victims (if at all), and it found no support for that distinction in *Mustapha*. In the end, compensation for mental harm was denied to most class members involved in the mini-trial.<sup>32</sup> Although a notice of appeal was filed, the plaintiffs did not prosecute the appeal and the matter was eventually settled.

---

28. *Kotai* was the first mini-trial within the action and involved a ten-year-old child and five adults.

29. *Ibid* at para 65.

30. *Ibid* at para 67.

31. *Ibid* at para 68. According to the Court, the present RPI requirement ensures that a plaintiff’s injuries are assessed according to criteria developed by the medical community, which provides a court “with evidence that enables it to judge the seriousness of the disturbance and its longevity” (*ibid*).

32. *Ibid* at para 102 (where the child was denied compensation due to insufficient medical evidence of a psychological or emotional injury, which the Court noted would not even have met the “serious and prolonged” threshold). Interestingly, settlement discussions initiated after a notice of appeal was filed led to some plaintiffs receiving a small sum (\$500) for the mere “upset” the event caused. See *Kotai v Queen of the North (Ship)*, 2010 BCSC 1180 (available on CanLII).

The Ontario Court of Appeal came to a similar conclusion in *Healey*.<sup>33</sup> The case involved class actions against two physicians and against Lakeridge Health Corporation (Lakeridge), a public hospital, by a large number of patients who received notices of potential exposure to tuberculosis. The allegations were that Lakeridge and the two physicians were negligent in the diagnosis of two patients and in containing the spread of the tuberculosis infection. The Court of Appeal decision dealt with the claims of the uninfected persons class (who had received notice of possible infection but did not contract the disease) and the derivative claims of their family members. One of the issues was whether the motions judge had erred in concluding that an RPI had to be proven. Since no one in the uninfected persons class had formally been diagnosed with an RPI, the question of the threshold for compensable harm was squarely before the appeal court.

The plaintiffs argued that *Mustapha* had significantly lowered the threshold for compensation and that the harm they had suffered met the “serious and prolonged” threshold.<sup>34</sup> After surveying pre- and post-*Mustapha* case law in Canada and elsewhere, the Court of Appeal concluded that a strong line of authority required the plaintiffs to prove an RPI.<sup>35</sup> Echoing the reasoning in *Kotai*, the Court doubted that *Mustapha* intended to introduce a fundamental change to a “well-established, though at times contested, rule”.<sup>36</sup> The Court held that an objective threshold was required and set forth that there were “strong policy reasons for imposing some sort of threshold . . . [g]iven the frequency with which everyday experiences cause transient distress, the multi-factorial causes of psychological upset, and the highly subjective nature of an individual’s

---

33. *Healey*, CA, *supra* note 10.

34. For instance, a plaintiff, who was a breast cancer survivor, was exposed to TB while accompanying her mother to the oncology clinic at Lakeridge. She was overwhelmed by the testing process and felt “confused, paranoid, guilty, depressed, sleepless, fearful, angry, frustrated and helpless” for months. She was prescribed anti-depressant medication before and after the notification. However, no medical evidence linked her various conditions to the notification. See *Healey*, *supra* note 10 at paras 150–51.

35. See e.g. *Duwyn v Kaprielian* (1978), 22 OR (2d) 736, 94 DLR (3d) 424 (CA); *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263; *Kotai*, *supra* note 27; *Frazer v Haukioja*, 2010 ONCA 249, 101 OR (3d) 528 (where the harm was both mental and physical).

36. *Healey*, CA, *supra* note 10 at para 61.

reaction to such stresses and strains”.<sup>37</sup> The conclusion was that, although the possibility of a reformulated threshold could not be foreclosed, this was not the appropriate case for such a change in the law.

### *B. Unquestioning Use of the RPI Requirement*

Most of the post-*Mustapha* cases surveyed relied on the RPI threshold without acknowledging the possibility of a more flexible approach.<sup>38</sup> For instance, in *Ulmer*,<sup>39</sup> the plaintiff arrived on the scene of a serious accident in which her spouse’s motorcycle was hit by the defendant’s car. Soon afterwards, her spouse died in hospital. A British Columbia Supreme Court judge awarded her \$10 000 for the post-traumatic stress disorder (PTSD) she experienced during the six months following her spouse’s death. The court noted that one of the applicable principles was:

[A] claimant must prove not just psychological disturbance or upset as a result of the defendant’s negligence but also that his/her psychological disturbance rises to the level of a recognizable psychiatric illness. Mere grief or sorrow caused by a person’s death is not sufficient to support any compensation.<sup>40</sup>

*Mustapha* was mentioned but not discussed in detail.<sup>41</sup>

The nature of actionable mental harm has also received cursory treatment in a number of class actions against health authorities based on the fear of contracting a disease or of being harmed by medical devices.

---

37. *Ibid* at para 65.

38. See e.g. *Thompson v Webber*, 2010 BCCA 308, 320 DLR (4th) 496, leave to appeal to SCC refused, 33825 (December 23, 2010). A father sued the police for negligence in the investigation of incidents of violence within his family. He argued that the police’s failure to respond to his complaint contributed to his subsequent estrangement from his two children. In *obiter*, the Court, quoting *Mustapha*, concluded that the plaintiff’s emotional pain, flowing from the feelings of alienation and estrangement, did not fall “within the concept of compensable damages” (*ibid* at para 34).

39. *Supra* note 10.

40. *Ibid* at para 99.

41. See *ibid* at para 224 (the Court did not insist on reference to the DSM-IV-TR but relied on a psychologist and two psychiatrists’ clinical judgment). For another indirect victim case, see *Mujagic v State Farm Automobile Insurance* (2009), 95 OR (3d) 624, 71 CCLI (4th) 93 (Sup Ct), aff’d *Mujagic v State Farm Mutual Automobile Insurance* (2009), 97 OR (3d) 474, 78 CCLI (4th) 179 (Div Ct).

For instance, in *Burnett v St Jude Medical*,<sup>42</sup> the plaintiffs alleged that the defendants negligently designed and manufactured Silzone-coated mechanical heart valves. The British Columbia Supreme Court rejected the first settlement because the psychological injury claims had not been properly investigated and assessed.<sup>43</sup> An amended settlement agreement was then opposed on the basis that the psychological harm claims had not been properly investigated and that the amount of the settlement was too low.<sup>44</sup> The Court noted that the proposed settlement was “based on an interpretation of *Mustapha* that requires proof of a recognized psychiatric disorder”, which it concluded was the “reasonable, and likely the correct, interpretation” of that case.<sup>45</sup> Since few of the class members were likely to meet the RPI threshold, the settlement was approved. In other class action suits of this nature, Canadian courts have more or less assumed that *Mustapha* did not modify the need to prove an RPI.<sup>46</sup>

In another set of post-*Mustapha* cases, the plaintiffs had suffered a form of physical injury in addition to mental harm. As noted above, mental harm which occurs as a consequence of physical injury is compensable. For the most part, post-*Mustapha* cases have followed this rule and have distinguished mental harm flowing from physical injury from “independent” mental harm, awarding damages for the former without requiring an RPI.<sup>47</sup> An example of a situation where mental harm was deemed “independent” and thus subject to the RPI threshold is provided

---

42. 2009 BCSC 82 (available on CanLII) [*Burnett No 1*]. In Ontario, see *Andersen v St Jude Medical*, 2012 ONSC 3660 (available on CanLII).

43. *Burnett No 1*, *supra* note 42 at paras 214–15.

44. *Burnett Estate v St Jude Medical*, 2009 BCSC 1651 at para 17 (available on CanLII). The Amended Settlement Agreement provided for a fund of \$50 000 to cover all psychological claims. This sum was to be distributed *pro rata* to each class member according to a schedule based on mild, moderate or severe psychological harm (*ibid* at para 9).

45. *Ibid* at para 77.

46. See e.g. *Gay v Regional Health Authority 7*, 2012 NBQB 88 (available on CanLII) (where the Court stated that the Supreme Court in *Mustapha* “did not intend to change the law with respect to the threshold level of psychological or psychiatric injury required to be compensable” at para 51). See also *Doucette v Eastern Regional Integrated Health Authority*, 2010 NLTD 29, 294 Nfld & PEIR 13; *Bruce Estate v Toderovich*, 2010 ABQB 709, 42 Alta LR (5th) 377. In both those cases, the threshold of actionable mental harm was discussed in very general terms.

47. See *supra* note 7.

by *Schulze v Strain*,<sup>48</sup> where a four-year-old child suffered minor physical injuries and some form of mental harm following a motor vehicle accident.<sup>49</sup> Liability was admitted and the only question before the court was whether the plaintiff had to prove an RPI. Plaintiff's counsel argued that because the child had incurred physical injuries following the accident and his mental harm flowed from the injuries, the RPI threshold should not be applied. Alternatively, if the mental harm was deemed "independent" of the physical injuries, the Court was invited to adopt the "serious and prolonged injury" test alluded to in *Mustapha*. The Court concluded that the mental harm was indeed independent of the physical injuries and was "significant and far above being trivial", without amounting to an RPI or a "serious and prolonged injury".<sup>50</sup> Despite the reference to the more flexible threshold, the Court firmly endorsed *Kotai* and the need to prove an RPI. Modest damages were awarded to the child for his physical injuries.<sup>51</sup>

### *C. Recognition of a More Flexible Threshold*

The last category alludes to a less demanding threshold than the RPI requirement, but the cases again fail to provide a thorough analysis of alternate criteria such as that of a "serious and prolonged" injury. *Lodge*

---

48. *Supra* note 10.

49. The child was frightened, had nightmares and was reluctant to get in the family car. Most of his symptoms subsided after about six months. *Ibid* at paras 11–18.

50. In his testimony, the child's doctor alluded to PTSD but the Court rejected his diagnosis because, as the only medical witness at trial, he was not qualified to make a diagnosis of an RPI. *Ibid* at para 21.

51. One hopes that *Schulze* does not announce a trend towards the artificial differentiation between physical and mental harm in order to impose a threshold where none was required before. See also *Gregory v Penner*, 2010 BCSC 22 (available on CanLII). The plaintiff sought \$35 000 for emotional distress in addition to non-pecuniary losses related to a ruptured implant, increased migraines and other soft tissue injuries resulting from a motor vehicle accident. The plaintiff testified to feeling depressed and distressed following the accident, however, this was not supported by psychiatric evidence. The Court concluded the plaintiff could not recover damages for the mental harm distinct from the non-pecuniary losses related to her injuries, absent evidence that her emotional distress met the RPI threshold. Here, there is less concern of a possible expansion of the RPI requirement since the plaintiff was compensated for the mental harm flowing from the physical injuries through the award of damages for non-pecuniary losses.

*v Fitzgibbon*<sup>52</sup> is illustrative of this point. A pathologist misdiagnosed the plaintiff's melanoma and the correct diagnosis was only made years later, at which time the plaintiff experienced serious mental harm. The defendant pathologist and hospital, relying on *Mustapha*, argued that the mental harm did not amount to an RPI. As in *Mustapha*, a psychologist testified that the plaintiff developed recognizable psychiatric illnesses (depression and PTSD) due to the seriousness of her health issues and fear of dying. In spite of this, the Court made no mention of the RPI requirement. Quoting *Mustapha*, it concluded that the plaintiff's "psychological disturbance" was "much more than an upset; it clearly [rose] above 'the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept'".<sup>53</sup>

#### *D. A Preliminary Assessment: No Judicial Appetite for a Lower Threshold*

A few preliminary conclusions can be drawn from this survey of post-*Mustapha* cases. First, if the Supreme Court's decision in *Mustapha* invited courts to rethink the ambit of actionable mental harm, few have taken up the invitation. There are meaningful discussions of the decision in *Kotai* and *Healey*, but only three other cases acknowledge the possibility of a lower threshold before endorsing the RPI requirement.<sup>54</sup> Most judges have simply assumed that *Mustapha* did not change the law and that that proof of an RPI is needed. Second, although the cases in the "flexible threshold" category appear to endorse a lower threshold, few squarely

---

52. 2011 NBQB 226, 378 NBR (2d) 202.

53. *Ibid* at para 99. See also *Signorello v Khan*, 2010 BCSC 1448 at para 38, 14 BCLR (5th) 151 (referring to the "serious and prolonged" threshold, without reference to the RPI requirement); *Cardy v Trapp*, [2008] OJ no 4547 (QL) (Sup Ct) (where the court noted in *obiter* that the plaintiff's mental injury was a "compensable injury" according to *Mustapha*, as "his emotional trauma rises above ordinary upset, agitation, anxiety and distress" at para 47); *Kappell v Brown*, 2012 BCSC 113 (available on CanLII) (where a trial decision to award the plaintiff damages for stress and anxiety was overturned as there was insufficient evidence of a "psychological disturbance approaching the intensity or duration described in *Mustapha*" at para 58).

54. See *Schulze*, *supra* note 10 (alluding to the "serious and prolonged" test but endorsing *Kotai*); *Burnett Estate*, *supra* note 44 (following *Kotai*); and *Gay*, *supra* note 46 (following *Healey* and explicitly finding that the Supreme Court in *Mustapha* did not intend to change the law).

address the issue.<sup>55</sup> Except for *Lodge*,<sup>56</sup> where the Court of Queen's Bench of New Brunswick worked with the "no compensation for mere upsets" threshold, the value of these cases as precedents is limited. In sum, there is little judicial appetite for a threshold lower than that of an RPI.

The trend in Canadian decisions mirrors the situation in England, Australia and New Zealand, where courts have also placed limits on the nature of actionable mental harm. In English law, as noted by Mulheron, the need to prove a "recognized psychiatric illness" has been repeatedly confirmed by the House of Lords and applied by lower courts.<sup>57</sup> In Australia, the same rule was noted in the well-known 1970 decision of the High Court, *Mount Isa Mines Ltd v Pusey*,<sup>58</sup> and affirmed in 2002.<sup>59</sup> The picture is identical in New Zealand.<sup>60</sup> Although there are some who disagree,<sup>61</sup> generally speaking the "no compensation for mere upsets" rule is, in Mullany and Handford's words, "accepted as inviolate . . . [and] frequently stated as a truism without explanation of any kind".<sup>62</sup>

*Kotai* and *Healey* both asserted that if the Supreme Court meant to lower the threshold for compensable mental harm, it would have done so explicitly and would have provided reasons to substantiate its new

---

55. See e.g. *Signorello*, *supra* note 53. Here, the court apparently accepted the "serious and prolonged" test. However a number of factors dilute this apparent endorsement of a lower threshold, namely the absence of submissions by counsel and the brevity of the judge's comments on the matter; the "contractual flavour" of the claim, which was based mostly on damage to property; and the lack of evidence of any mental harm (*ibid* at paras 159–60).

56. *Supra* note 52.

57. *Supra* note 9 at 78. House of Lords cases include *McLoughlin v O'Brian*, [1983] 1 AC 410 at 43 (HL), *Bridge LJ*; *Alcock v CC of South Yorkshire Police*, [1992] 1 AC 310 at 422.

58. (1970), 125 CLR 383 at 394, [1971] 45 ALR 86 (HCA).

59. *Tame v New South Wales*, [2002] HCA 35 at paras 193–94, 191 ALR 449, Gummow and Kirby JJ. In some Australian jurisdictions, the RPI threshold has been incorporated to legislation applicable to compensation for civil wrongs. See e.g. the *Civil Liability Act 2002* (NSW), s 31. See also Handford, *Mullany & Handford*, *supra* note 9 at 36, n 47.

60. See *van Soest v Residual Health Management Unit*, [2000] 1 NZLR 179 (CA) (discussing the RPI threshold). See also Stephen Todd et al, *The Law of Torts in New Zealand*, 5th ed (Wellington, NZ: Brookers, 2009) at 182–83.

61. See e.g. "Damages recoverable for shock on seeing spouse's injuries: *Whitmore and Another v Euroways Express Coaches Ltd and Others*" *The Times* (4 May 1984) A4; *van Soest*, *supra* note 60 at paras 97–107, Thomas J dissenting. See also Mulheron, *supra* note 9; Teff, *supra* note 9; Mullany & Handford, "Moving the Boundary", *supra* note 16.

62. *Ibid* at 368.

approach.<sup>63</sup> However, this article proposes another viewpoint: that the Court in *Mustapha* appears to have consciously avoided relying on the RPI threshold. Indeed, the Court wrote that it “would not purport to define compensable injury exhaustively”,<sup>64</sup> and in that context, its objective may have been to initiate a debate on the appropriate threshold to be met in cases of mental harm.

### III. Exploring the Legal Roots of the Nature of Actionable Harm

This section traces the evolution of the discourse on the nature of actionable mental harm to show that the courts’ trust in the RPI requirement as the appropriate threshold is misplaced. In order to establish this point, early twentieth century Canadian decisions will be considered and then two jurisprudential paths will be examined. The first is *Guay*,<sup>65</sup> which was cited by the Supreme Court in *Odhavji Estate v Woodhouse* to support the requirement that a “recognizable physical or psychopathological harm” must be proven to claim compensation for psychiatric injury.<sup>66</sup> The second path leads to *Hinz v Berry*,<sup>67</sup> a 1970 English decision that is mentioned in *Mustapha*, *Kotai* and *Healey*, and is generally seen as the modern source of the RPI requirement (at least in Canada). A closer look at these cases is necessary because they are often relied on to support the RPI requirement.

---

63. The decisions also took note of the fact that the comments were in *obiter* since *Mustapha* clearly suffered from an RPI. Although this is true, *obiter* by the Supreme Court of Canada can acquire greater status. See *R v Henry*, 2005 SCC 76 at para 57, [2005] 3 SCR 609.

64. *Supra* note 2 at para 9.

65. *Supra* note 1.

66. *Supra* note 35 at para 74. Similar language was used regarding misfeasance in public office (*ibid* at para 41). In *Odhavji*, the court also cited *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 (which dealt with the tort of intentional infliction of nervous shock, and accordingly, is inappropriate as a precedent for the RPI threshold in the negligence context).

67. [1970] 2 QB 40, [1970] 1 All ER 1074 (CA) [cited to All ER].



A. *The Historical Threshold: "More than Mere Upset"*

Mental harm jurisprudence evolved largely in the context of railway injuries, which were common in late-nineteenth-century England and Canada.<sup>68</sup> When those early "nervous shock" cases were decided, both medical and legal actors were navigating an emerging field of knowledge. Harvey Teff speaks of the "almost surreal nature of the law's attempts to address the issue".<sup>69</sup> The crux of the debate focussed on two competing conceptions of mental harm: one, which was based on medical theory, saw nervous shock as a physical condition caused by a violent shock or collision; the other saw it as a purely mental phenomenon, albeit a poorly understood one.<sup>70</sup> After the infamous 1888 decision in *Victorian Railways Commissioners v Coultas*,<sup>71</sup> only nervous shock as a physical condition

---

68. See Mendelson, *Interfaces*, *supra* note 13 at 36–56; Sandra L Bloom, "A History of Disaster Mental Health" in James Halpern & Mary Tramontin, eds, *Disaster Mental Health: Theory and Practice* (Belmont: Brooks/Cole, 2007) 46 at 49; Danuta Mendelson, "English Medical Experts and the Claims for Shock Occasioned by Railway Collisions in the 1860s: Issues of Law, Ethics and Medicine" (2002) 25 Int'l J L & Psychiatry 303 at 304, n 4 [Mendelson, "Experts"] (explaining how railway companies hired their own teams of surgeons and physicians who, through their testimonies before the courts as experts, shaped some of the judicial attitudes about mental harm).

69. *Supra* note 9 at 43.

70. See Mendelson, "Experts", *supra* note 68 at 313; Butler, "Identifying" *supra* note 9 at 1–2; *Toronto Railway*, *supra* note 1 at 270, Fitzpatrick CJC:

[Mental harm is a] disturbance of the nervous system . . . [that] may well be the result of a derangement of the relation existing between the bones, the sinews, the arteries and the nerves. In any event the resultant effect is the same. The victim is incapacitated and in consequence suffers damages, whether the incapacity results from the physical injury alone or the physical injury with the nervous shock superadded.

See also *Hogan v City of Regina*, [1924] 2 DLR 1211, [1924] 2 WWR 307 (Sask CA) (where Martin JA speaks of "fright . . . affect[ing] the nervous structure of the body in such a way as to cause injury to health" at 319).

71. (1888) 13 App Cas 222 (PC). In that case, a gate-keeper erroneously signalled to the driver of a buggy to enter a crossing while a train was approaching. A collision was narrowly avoided but the plaintiff, who was sitting inside the buggy, was frightened to such an extent that she suffered a form of mental shock and miscarried shortly afterwards. On appeal, the Privy Council reversed the decision to award damages, and in so doing, wrote, "[d]amages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances . . . be

was recoverable under negligence law.<sup>72</sup> As a result, a number of early-twentieth-century cases went to some length to distinguish the decision. This was done in one of three ways: by finding ways the mental harm arose as the result of a physical impact;<sup>73</sup> by identifying the existence of physical harm, even if it was slight;<sup>74</sup> or by concluding that the mental harm suffered had led to physical manifestations such as a miscarriage or a heart attack.<sup>75</sup> Desmond Butler suggests that this practice lasted for six decades.<sup>76</sup>

---

considered a consequence which, in the ordinary course of things, would flow from the negligence" (*ibid* at 225).

72. See *Henderson v Canada Atlantic Railway* (1898), 25 OAR 437 (available on QL) (CA) aff'd on other grounds (1899), 29 SCR 632 (available on QL); *Geiger v Grand Trunk RW* (1905), 10 OLR 511, 6 OWR 482 (Div Ct); *Miner v Canadian Pacific Railway* (1911), 3 Alta LR 408, 18 WLR 476 (CA); *Taylor v British Columbia Electric Railway* (1912), 16 BCR 109, 17 WLR 470 (CA); JC McRuer, "Damages Recoverable for Nervous Shock", [1923] 1 DLR 1 (commenting on these cases and the influence of *Coultas*). See also *Purdy v Woznesensky*, [1937] 2 WWR 116 (available on QL) (Sask CA); *Bielitski v Obadisk*, [1921] 3 WWR 229, 15 Sask LR 153 (KB). These cases are sometimes discussed in the case law in relation to the nature of actionable mental harm, but it is important to note that they both deal with intentional mental harm, a context quite different than the one studied here.

73. See e.g. *Toronto Railway*, *supra* note 1. In that case, the Supreme Court of Canada allowed a plaintiff to recover damages for severe mental harm (traumatic neurasthenia) on the basis that it was connected to the physical injuries in the form of slight bruising; the 68-year-old plaintiff was riding in a street car when a train collided with it, knocking him over his seat. The Court distinguished the case from *Coultas* on the basis that there had been no actual impact between the train and Ms. Coultas' buggy.

74. See *Ham v Canada Northern Railway*, [1912] 1 DLR 377, 20 WLR 359 (Man KB). In that case, the Court distinguished the case from *Coultas* and allowed the plaintiff to recover damages for mental harm (neurasthenia) on the basis that his injury was not only mental but physical; similar to *Toronto Railway*, the plaintiff had slight physical injuries as a result of a train colliding with the street car he was riding. See *supra* note 1. See also *Hogan*, *supra* note 70.

75. See *Lapointe v Champagne* (1921), 64 DLR 520, 50 OLR 477 (Sup Ct (HC Div)). *Coultas* was distinguished on the grounds that there was no physical impact. In this case, the pregnant plaintiff was involved in a minor accident between a motorcar and the buggy she was riding. She was not struck by the motorcar and did not appear injured at the time of the accident but she miscarried two weeks later. At trial, she testified to feeling ill and nervous but her physician testified that it was "very hard" to determine that the accident was the cause of the miscarriage. Nevertheless, the jury found for the plaintiff and the judge agreed, finding that the miscarriage was a physical injury (even if it flowed from the shock of the accident).

76. "Identifying", *supra* note 9 at 4.

During that period, courts often relied on the presence of some element of physical injury to delineate meritorious cases from the others. Where a court was unable to conclude that a plaintiff had suffered “physical” injuries without making absurd inferences, other limiting principles were employed, namely fear for oneself<sup>77</sup> (later expanded to fear for others).<sup>78</sup> Eventually, as the courts’ focus turned to duty and remoteness, factors such as foreseeability and proximity took over this policing function.<sup>79</sup>

Because few early Canadian courts used the nature of actionable harm as a limiting device, the matter received “cursory treatment” by courts.<sup>80</sup> An exception is *Miner v Canadian Pacific Railway*,<sup>81</sup> a 1911 case where a mother claimed damages from a railway company for, among other things, mental harm flowing from delays in the delivery of her son’s remains. The Alberta Court of Appeal overturned the trial judge’s award of \$300 for “wounded feelings”.<sup>82</sup> The Court quoted Kennedy J’s words in *Dulieu v White & Sons*<sup>83</sup> as standing for the proposition that if “[the defendant’s] negligence has caused me neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constituent of a right of action for negligence is lacking”.<sup>84</sup> In addition, Thomas Beven’s text on negligence law was cited for the rule that “mental pain or anxiety alone, unattended

---

77. See *Dulieu v White & Sons*, [1901] 2 KB 669. In Canada, see *Toronto Railway*, *supra* note 1.

78. See *Hambrook v Stokes Bros*, [1925] 1 KB 141 (CA). In Canada, see *Austin v Mascarin*, [1942] OR 165 (available on WL) (H Ct J).

79. See *Pollard v Makarchuk* (1959), 16 DLR (2d) 225, 26 WWR 22 (Alta SC); *Abramzik v Brenner* (1967), 65 DLR (2d) 651, 62 WWR 332 (Sask CA); *Marshall v Lionel Entreprises*, [1972] 2 OR 177, 25 DLR (3d) 141 (H Ct J); *Bourhill v Young*, [1943] AC 92 (HL). See also Teff, *supra* note 9 at 55–57. Teff also provides an overview of the evolution of the limiting devices other than the thresholds of actionable harm (*ibid* at 59–96).

80. *Ibid* at 52.

81. *Supra* note 72. See also *Walker v Broadfoot*, [1958] OWN 173 (available on WL) (H Ct J) (dealing with compensation for mental harm but not with the threshold of actionable harm).

82. *Miner*, *supra* note 72 at 418.

83. *Supra* note 77 at 673.

84. *Miner*, *supra* note 72 at 421.

by any injury to the person, cannot sustain an action".<sup>85</sup> Ultimately, the Court denied the claim because there was no legal precedent for it.<sup>86</sup>

*Miner* illustrates how courts approached liability via the nature of actionable mental harm: they either relied on the lower "no compensation for mere upsets" threshold or insisted on the existence of physical harm. There was no mention of a higher threshold, such as an RPI. Although many plaintiffs presented medical evidence to reinforce their claims, the cases show that courts did not require proof of a *recognizable psychiatric injury*.<sup>87</sup> It is true that scientific knowledge about the mind/body relationship was in an early stage, and the nomenclature for diagnostic

---

85. Thomas Beven, *Negligence in Law*, 3d ed, vol 1 (London: Stevens and Haynes, 1908) at 67.

86. See Cecil A Wright, "Comment on *Owens v Liverpool*" (1939) 17 Can Bar Rev 56. *Miner* is referenced in support of this statement at 58:

Mere emotional upsets, no matter how distressing, are not alone sufficient to found a cause of action. . . . [c]ertainly in negligence cases, physical harm or physical damage to property, seem to be requisite to found an action. With the progress of medical science it is, of course, quite possible to find that actual physical damage in the sense of damage to the nervous system is as much physical harm as any other more visible type of damage.

Wright later writes that "mere emotional disturbance is not sufficient unless it results in some manifest or objectively ascertainable injuries" (*ibid* at 65). When taken in context, it seems clear that the qualification "manifest and objectively ascertainable" is meant to refer to the physical manifestation of emotional harm, not the need to prove a *psychiatric injury*.

87. See especially *Horne v New Glasgow*, [1954] 1 DLR 832 (available on QL) (NSSC). In that case, a plaintiff recovered for mental harm suffered as a result of the defendant city employee driving a truck through her living room; the plaintiff was in a different area of the house and was not physically harmed but her doctor testified at trial that she suffered from a nervous condition for which he had prescribed a sedative. The Court held that there was "some physical disturbance in the plaintiff's system; some physical injury due to nervous shock. The plaintiff suffered more than a mere temporary upset. . . . She suffered an illness that although not severe enough to prevent her from carrying out her ordinary daily duties, continued in some degree over a period of 2 months or thereabouts" (*ibid* at 841). *Horne* provides important insight into the courts' reasoning at the time. The judge

categories of mental illnesses did not appear until the early 1950s.<sup>88</sup> However, courts were clear on what did not amount to harm: “normal” human emotions such as mere grief, distress, anxiety and fear.<sup>89</sup>

*B. Two Possible Lines of Authority for the RPI Requirement: Guay and Hinz*

Against the above backdrop of early cases on the nature of actionable mental harm, this section now turns to two lines of decisions from the 1950s to 1970s, which are often cited to support the RPI threshold as it is now used by Canadian courts.

(i) *Guay v Sun Publishing*

In *Guay*,<sup>90</sup> the Supreme Court of Canada considered whether a newspaper owed a duty of care to a plaintiff who experienced mental harm after reading a false news report of the death of her husband and children. In a split decision, two of the three judges writing for the majority concluded that the newspaper did not owe a duty of care to the plaintiff. The third judge, Estey J, agreed in the result but based his decision mostly on the nature of the harm suffered by the plaintiff. Justice Estey quoted from the 1951 edition of *Pollock’s Law of Torts*:

A state of mind such as fear or acute grief is not in itself capable of assessment as measurable temporal damage. But visible and provable illness may be the natural consequence of violent

---

went to some length to canvass precedents, especially *Toronto Railway*, *supra* note 1 at 276-77, and some doctrinal works before noting at 844:

[I]t is, of course, essential that the injuries, whether nervous or physical, should be the natural and reasonable result of the defendant’s negligence, but the mere fact of these injuries being physical or nervous cannot affect the liability. The ease with which in the one case the damages are capable of being ascertained, and the difficulty which in the other case may frequently arise, cannot be made the test of liability. That test must be based upon the negligence causing the collision or accident, and the proof of the alleged injuries being a natural and reasonable result from such negligence.

88. See Mitchell Wilson, “DSM-III and the Transformation of American Psychiatry: A History” (1993) 150:3 *Am J of Psychiatry* 399.

89. See Butler, “Identifying”, *supra* note 9 at 6.

90. *Supra* note 1.

emotion, and may furnish a ground of action against a person whose wrongful act or want of due care produced that emotion. . . . In every case the question is whether the shock and the illness were in fact natural or direct consequences of the wrongful act or default; if they were, the illness, not the shock, furnishes the measurable damage, and there is no more difficulty in assessing it than in assessing damages for bodily injuries of any kind.<sup>91</sup>

The reference to “visible and provable illness” has found its way into subsequent judgments, most notably in the Supreme Court’s decision in *Odhavji*.<sup>92</sup>

The excerpt from *Pollock’s* has to be considered in its proper historical context. It was taken from a passage expressing doubts about the wisdom of the 1888 decision in *Coultas*,<sup>93</sup> and suggested that while damages were unavailable for emotions such as fear, they would be awarded where an illness flowed from the emotion and a causal link was present. In other words, *Pollock’s* appeared to view the expression “visible and provable illness” as describing the need for a concrete manifestation of mental harm. This was in line with the jurisprudence at the time. There is nothing to suggest that it was a conscious attempt to set a higher threshold.

Even if this argument is not compelling, it would be inappropriate to rely on *Guay* as the source of the RPI requirement. *Guay* was about the duty of care for negligent misstatements,<sup>94</sup> and Estey J was the only member of the Court who dealt with the nature of actionable damage. He did not rely on any jurisprudence in support of a higher threshold for mental harm, nor did he analyze the phrase “visible and provable”.<sup>95</sup> He merely quoted *Pollock’s* and concluded that the evidence failed to establish

---

91. PA Landon, ed, *Pollock’s Law of Torts*, 15th ed (London: Stevens & Sons, 1951) at 37–38.

92. *Supra* note 35 at para 74.

93. *Supra* note 71. Recall that the decision required that the mental harm manifest itself as a physical condition.

94. See Handford, *Mullany & Handford*, *supra* note 9 at 629–33 (where *Guay* is referred to in the chapter on “bad news” and in the context of their discussion of whether there is a duty of care not to cause mental harm by a negligent statement). See also MM MacIntyre, “A Novel Assault on the Principle of No Liability for Innocent Misrepresentation” (1953) 31:7 Can Bar Rev 770.

95. The only precedent mentioned by Estey J in *Guay*, *supra* note 1 is *Wilkinson*, *supra* note 4 at 238. However, that case pertains to the tort of intentional infliction of mental harm and his reference to it is limited to a few words on the absence of evidence of predisposition to “nervous shock” (*ibid* at 238).

“physical illness or other injury consequent upon shock or emotional disturbance”.<sup>96</sup>

Although it is difficult to see how *Guay* can be relied on as the source of the RPI requirement, a few lower Canadian courts have quoted from the decision, although none of them discuss the nature of actionable mental harm in any significant way.<sup>97</sup> For instance, in *Radovskis v Tomm*,<sup>98</sup> a mother suffered a form of mental harm after her five-year-old daughter was raped. The mother did not testify and no medical evidence was presented. Relying on *Guay* and the above passage from *Pollock’s*, the Manitoba trial court found “no visible and provable illness within the meaning of this quotation”.<sup>99</sup> This was the extent of the discussion on the threshold. Like *Guay*, and for the same reasons, *Radovskis* should have little precedential value.

## (ii) *Hinz v Berry*

If *Guay* provides no strong jurisprudential basis for the RPI threshold, does the 1970 decision of the English Court of Appeal in *Hinz* fare any better? *Hinz* was a very tragic case: a mother of eight children saw the

---

96. *Guay*, *supra* note 1 at 238. See also Cecil A Wright & Allen M Linden, *The Law of Torts: Cases, Notes and Materials*, 5th ed (Toronto: Butterworths, 1970) (where Estey J’s comments are explained as follows: “he refused to decide whether there could ever be recovery for physical illness or other injury caused by shock consequent upon negligent misstatements. Assuming such a duty he found there was no physical harm, apart from grief or shock, and this he considered essential to a cause of action” at 483). If *Guay* had been a clear precedent for the RPI rule surely these authors would have noted this fact in their text. Instead, they highlight the “no compensation for mere upsets” lower threshold.

97. Other than *Odhavji*, post-*Guay* cases where Estey J and *Pollock’s* are specifically quoted (but without much discussion) include: *Enge v Trerise* (1960), 26 DLR (2d) 529, 33 WWR 577 (BCCA); *Strutz v Ellingson*, [1977] 2 AR 485 (available on QL) (SC (TD)), rev’d [1978] AJ no 429 (QL) (CA); *Corcoran v MacKay* (1986), 58 Nfld & PEIR 263, 174 APR 263 (PEISC); *Young v Borzoni*, 2007 BCCA 16, 277 DLR (4th) 685 (for the context of intentional infliction of nervous shock). See also *Pollard*, *supra* note 79 (where *Guay* was correctly rejected as a precedent because it was an “absence of duty” case rather than a mental harm case); *Abramzik*, *supra* note 79 (where *Guay* is mentioned not for Estey J’s viewpoint but for Cartwright J’s discussion of duty and reasonable foreseeability).

98. (1957), 65 Man R 61, 9 DLR (2d) 751 (QB).

99. *Ibid* at 756.

defendant's car crash into her family's parked vehicle, hitting nearly all of the children and killing her spouse who was standing nearby. At trial, the plaintiff was awarded damages for mental suffering. The only issue before the Court of Appeal was the quantum of damages. In dismissing the appeal, the Court described the case as the first one it had heard on "the problem of assessing damages of this kind".<sup>100</sup> The passage repeated most often in subsequent cases comes from Lord Denning's judgment:

In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are however recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant.<sup>101</sup>

These words, and especially the last sentence, almost immediately found their way into Canadian judgments, albeit with little explanation or justification.<sup>102</sup> Courts began to insist that alleged mental harm must rise to a level which was recognized as an illness in the psychiatric literature.<sup>103</sup> *Hinz* heralded a judicial shift toward a higher threshold for liability.<sup>104</sup>

---

100. *Hinz*, *supra* note 67 at 1076, Pearson LJ.

101. *Ibid* at 1075.

102. See e.g. *Brown v Hubar* (1974), 3 OR (2d) 448, 45 DLR (3d) 664 (H Ct J); *Duwyn*, *supra* note 35 at 754; *Beaulieu v Sutherland* (1986), 35 CCLT 237 (available on QL) (BCSC); *Heighington v Ontario* (1987), 60 OR (2d) 641, 41 DLR (4th) 190 (H Ct J), *aff'd* (1989), 69 OR (2d) 484, 61 DLR (4th) 190 (CA) (comments on RPI by HCJ but not by CA); *Vanek v Great Atlantic & Pacific Co of Canada* (1999), 48 OR (3d) 228, 180 DLR (4th) 748 (CA) (comments in *obiter*); *Rhodes*, *supra* note 15, per Southin JA, but with disapproval; *Kotai*, *supra* note 27 at para 40; *Healey*, CA, *supra* note 10 at para 45 also referred to *Hinz*.

103. Decisions reveal that the need to prove an RPI is tightly associated with psychiatric evidence and the need to show concordance with formal classifications such as the DSM-IV-TR. See cases mentioned in *supra* note 10. See also *Renwick Estate v Cook Estate*, [1976] BCJ no 243 (QL) (SC) (where the Court held "[t]his is a case where the medical evidence, although of assistance, falls short of determining the question in issue [the cause of psychiatric illness]" at para 15); *Duwyn*, *supra* note 35, (where the Court mentions "little medical evidence and none which contains the opinion that she was suffering from any recognizable psychiatric illness" at para 60); *Beaulieu*, *supra* note 102; *Graham v MacMillan*, 2003 BCCA 90, 10 BCLR (4th) 397 (where despite the family physician's testimony at trial, the Court noted that "there was no psychiatric evidence" and the plaintiff could not be compensated at para 4).

104. See Mulheron, *supra* note 9 at 100 (where, in English law, the shift is attributed to *McLoughlin v O'Brian*, *supra* note 57) and Teff, *supra* note 9 at 56.



If mental harm amounted to more than mere upset but to less than a recognized psychiatric illness, it appeared not to ground liability.

Remarkably, although *Hinz*'s doctrinal authority has been criticized at times,<sup>105</sup> the decision has rarely been the subject of close analysis. Therefore, understanding the evolution of the law on actionable harm in Canada requires a thorough look at the reasoning of the Court of Appeal in this case. At the outset, several points must be made about Denning MR's judgment. First, he provided no supporting authority for his reasoning.<sup>106</sup> Second, *Hinz* was a case about the quantum of damages, so any comments about the nature of actionable harm were not strictly necessary. Third, and more important, there are ambiguities in Denning MR's reasoning. At first glance, in the passage quoted above, he appears to intend the phrase "recognizable psychiatric injury" as the medical equivalent of "nervous shock". Then, a few sentences later, in comparing "sorrow and grief for which damages are not recoverable" to "nervous shock and psychiatric illness for which damages are recoverable",<sup>107</sup> he seems to draw a distinction between nervous shock and psychiatric illness,<sup>108</sup> thereby suggesting two different concepts. In any event, what Denning MR meant by nervous shock in this context is not entirely

---

105. See especially *Rhodes*, *supra* note 15 (where Southin JA stated that the meaning given to "nervous shock" by Lord Denning was not "a meaning which anyone would have recognized at least until the decision in *King v. Phillips*" at 311). See also *van Soest*, *supra* note 60 (where Thomas J wrote that "no deliberative consideration seems to have accompanied the use of the expression. . . . Subsequent Courts have adopted the phrase and embedded it in the law" at para 98). See also Teff, *supra* note 9 ("given that the ambit of 'nervous shock' had been vague and ill-defined from its inception, and that, even by the early 1960's, a cryptic finding of 'slight shock' or 'slight illness' could satisfy the [courts], the introduction, only a few years later, of a much narrower formulation—'recognizable psychiatric illness'—requires explanation" at 52–53).

106. See *ibid* at 53. Two cases were mentioned but were quickly dismissed as unhelpful. See *Hinz*, *supra* note 67 at 1075. The two cases were: *Schneider v Eisowitch*, [1959] 2 QB 430, [1960] 1 All ER 169 (where the plaintiff recovered damages not only for her physical injuries but also for the "consequences of shock" caused by hearing of her husband's death); "Saw Husband Killed: Tregoning v. Hill" *The Times* (2 March 1965) A7 (the Court awarded £750 for the fact that the plaintiff saw her husband killed). Neither case refers to a threshold such as an RPI.

107. *Hinz*, *supra* note 67 at 1075.

108. The use of the conjunction "and" in the latter part of the quote was noted by Teff, *supra* note 9 at 53.

clear,<sup>109</sup> and his words are not necessarily an endorsement of a new, higher threshold.

Alternatively, Denning MR's words can be taken as affirming the "more than mere upset threshold"—that is, the threshold as it stood at the time. Consider the concurring reasons of the other two members of the Court. For his part, Pearson LJ explained that the harm the plaintiff had suffered as a reaction to her spouse's death (grief and sorrow, anxiety about the children, financial stress and the need to adjust to a new life) could not be compensated in English law. Only the shock of witnessing the accident was "a proper subject for compensation".<sup>110</sup> Indeed, the notion of shock was at the heart of his decision: in his words, damages could be awarded "only for that additional element which has been contributed by the shock of witnessing the accident, and which would not have occurred if she had not suffered that shock".<sup>111</sup> Lord Pearson noted that the plaintiff was "in a positively morbid state. There is a recognisable psychiatric illness".<sup>112</sup>

The third member of the Court, Sir Gordon Willmer, was also careful to circumscribe the ambit of his decision. He insisted that the plaintiff had witnessed the tragedy. He wrote, "the medical evidence is exceptionally strong to show that the state of depression and anguish to which the plaintiff has been reduced over the past five years goes far beyond what one would ordinarily expect in the case of a lady deprived of her husband as the result of the accident".<sup>113</sup> He added: "It is important to bear in mind that what has resulted is described by the psychiatrist who gave evidence as a 'recognisable psychiatric illness'".<sup>114</sup> This supports Teff's suggestion that in using the RPI phrase, the judges, including Denning MR, were simply repeating the words of the two medical experts who testified at trial.<sup>115</sup> Neither of the other judges took the position that an RPI had to be proven in all instances of mental harm. They simply confirmed what was obvious to all: that this particular plaintiff suffered from a serious mental illness.

---

109. It is argued here that "nervous shock" refers to mental harm materializing into a physical injury.

110. *Hinz*, *supra* note 67 at 1076.

111. *Ibid* at 1077.

112. *Ibid*.

113. *Ibid* at 1078.

114. *Ibid*.

115. *Supra* note 9 at 53.

Yet another possibility is that Denning MR used the words “recognizable psychiatric injury” as a loose synonym for “nervous shock”, to refer to any injury above the “more than mere upset” threshold, but without any intent to set out a specific higher threshold.<sup>116</sup> In other words, on this interpretation, the RPI would have been a new label to describe “compensable reactions to traumatic stress”.<sup>117</sup> It is revealing that two articles on Canadian law—by James Rendall in 1962<sup>118</sup> and by Jeremy S Williams in 1968<sup>119</sup>—both mentioned the lower threshold but did not suggest any need to prove an RPI. Rendall spoke of “relatively serious nervous shock injury” while Williams referred only to the “no compensation for mere upsets” threshold.

An analysis of extrajudicial writing for the years before and after *Hinz* shows that the decision did add the phrase “recognizable psychiatric illness” to the tort vocabulary. A 1970 casebook by Wright and Linden<sup>120</sup> did not discuss the nature of compensable harm in any significant way. However, the next edition,<sup>121</sup> written in 1975, refers to a 1972 book by Linden where the RPI threshold is discussed and *Hinz* is cited as the source.<sup>122</sup> Indeed, prior to *Hinz*, one is hard pressed to find any statement

---

116. See Peter Handford, “Recovery for Psychiatric Illness in Canada: A Tale of Two Cases” (2011) 19:1 Tort L Rev 18 (suggesting that Denning MR was “restat[ing] the requirement in more acceptable medical terms” at 21).

117. See Butler, “Identifying”, *supra* note 9 at 5; Teff, *supra* note 9 at 53, 144.

118. “Nervous Shock and Tortious Liability” (1962) 2:3 Osgoode Hall LJ 291 (where the author gives a comprehensive overview of English and Canadian cases and discusses the limits devised by the courts to limit compensation, yet makes no mention of the need to prove a *psychiatric* injury).

119. “Tort Liability for Nervous Shock in Canada” in Allen M Linden, ed, *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 139. As would be expected of an article written in the late 1960s, it deals with issues of foreseeability and provides a fairly detailed review of the cases dealing with that limiting device. Little is said on the nature of the mental harm required and there is no mention of the need to prove an RPI.

120. *Supra* note 96 at 464, n 1 (alluding to the nature of mental harm through a few brief questions asking whether emotional upsets, loss of sleep or fright amount to physical injuries).

121. Cecil A Wright & Allen M Linden, *The Law of Torts: Cases, Notes and Materials*, 6th ed (Toronto: Butterworths, 1975) at 441–42, n 4.

122. Allen M Linden, *Canadian Negligence Law* (Toronto: Butterworths, 1972) (“courts refused steadfastly to allow tort damages for every emotional upset and insisted upon some physical symptoms, like a heart attack or a miscarriage, or some ‘recognizable psychiatric illness’, like schizophrenia or morbid depression” at 313). See also GHL Fridman,

in a decision or in the extrajudicial literature to the effect that mental harm requires proof of a *psychiatric illness* recognized by the medical profession.<sup>123</sup>

Nevertheless, courts continue to rely on *Hinz* for the proposition that nothing which does not meet the RPI threshold will suffice.<sup>124</sup> They often do so mechanically, with little analysis of *Hinz* or of the higher threshold

---

*Introduction to the Law of Torts* (Toronto: Butterworths, 1978) (where there is no mention of the need to prove an RPI; the short discussion on victims of mental harm focuses on foreseeability and duty of care at 131-33).

123. Although this article does not cover other common law jurisdictions to any extent, a general overview of English texts confirms a similar before- and after-*Hinz* pattern. See e.g. Harry Street, *The Law of Torts*, 3d ed (London: Butterworths, 1963) (where the short section on “nervous shock” does not include anything on the nature of actionable harm at 113). But see 5th ed (London: Butterworths, 1972) (which contains the following few lines: “Even though duty and breach are proved, nervous shock does not cover grief, anxiety about the welfare of one’s children and financial stress, but a recognisable psychiatric illness is within the definition of nervous shock” at 115). See also John A Jolowicz & T Ellis Lewis, *Winfield on Tort*, 8th ed (London: Sweet & Maxwell, 1967) (where the authors refer to a “definite illness” at 118-19). *Contra* 9th ed (London: Sweet & Maxwell, 1971) (where *Hinz* and RPI are referred to at 119, n 6). To complete comments on doctrinal works, a word must be said about John G Fleming’s well-known tort text *The Law of Torts* (Sydney: Law Book Co, 1957, 1965 (3rd ed) and 1971 (4th ed)). In the first edition Fleming writes about an “outright refusal to permit recovery for mental suffering, unaccompanied by physical symptoms”. *Supra* note 123 at 169. By the third edition in 1965, one reads “in the absence of such external trauma, emotional shock must at least have resulted either in some organic damage, like a miscarriage, coronary thrombosis or stroke, or in severe psychic damage like hysteria or neurosis”. *Supra* note 123 at 155. Similar language is used in the fourth edition. *Supra* note 123 at 149. Note that no sources are provided for any of the 1965 and 1971 references, and in the latter case, *Hinz* is not discussed. Three cases are given as precedents for the principle that “mere fright or anguish is deemed too trivial or easily faked to merit legal cognizance”: *Guay*, *supra* note 1; *McPherson v Commissioner for Government Transport* (1959), 76 WN 352 (NSWSC); *Behrens v Bertram Mills Circus*, [1957] 2 QB 1.

124. Not all pre-*Mustapha* cases mention *Hinz* or *Guay*, however those cases cite precedents that do. Inevitably, the trail leads back to one of the two decisions. For instance, one case often cited as a precedent is *Durwyn*, *supra* note 35. In that case, the Ontario Court of Appeal denied compensation to a plaintiff who sought to recover damages after witnessing a car accident, in part based on *Hinz* and the fact that her mental harm did not amount to an RPI. There is very little analysis of the threshold—four short paragraphs.

and its consequences.<sup>125</sup> This is perhaps understandable in light of the fact that in the latter part of the twentieth century, courts relied on the duty of care and the remoteness stages of negligence law (as the Supreme Court did in *Mustapha*) in order to limit the scope of recovery for compensable mental injury.<sup>126</sup> Before *Hinz*, it may be that reference to the “no liability for mere upsets” threshold in the case law connoted the requirement of an RPI, but that was never made explicit. Even if the lower threshold did require medical evidence, the courts did not take the further step of insisting on a specific psychiatric diagnosis.

Whatever Denning MR may have intended, the fact remains that the phrase “recognizable psychiatric illness” has since acquired a restricted meaning—one that cannot appropriately be attributed to *Hinz*. As Butler has said, “[t]o the extent that the term ‘nervous shock’ was capable of accommodating a range of responses to traumatic stress, any more precise definition of compensable damage chosen by the courts reflected a policy decision”.<sup>127</sup> The relevant policy considerations have been spelled out more fully elsewhere.<sup>128</sup> For the purposes of this paper, it is enough to note that the courts have very seldom articulated a policy justification for a threshold as high as an RPI.

#### IV. A New Look at *Mustapha*

Although there are enough doubts about *Hinz* to suggest that it should not be seen as having raised the threshold for actionable mental harm to that of an RPI, Canadian courts have treated it as having done so. Therefore, after *Mustapha*, courts had to come to grips with the possibility that the law in that regard has again been changed—this time, by the lowering of the threshold from that of an RPI to something less,

125. For instance, there is little discussion of the problems associated with the reliance on DSM-IV-TR and ICD-10. See Mulheron, *supra* note 9 at 86–95. See also Bélanger-Hardy, “Thresholds”, *supra* note 17.

126. Almost all the key post-*Hinz* appeal decisions in Canada focus on duty or remoteness and the related concepts of foreseeability and proximity. See e.g. *Heighington*, *supra* note 102; *Rhodes*, *supra* note 15; *Bechard v Haliburton Estate* (1991), 5 OR (3d) 512, 84 DLR (4th) 668 (CA); *Nespolon v Alford* (1998), 40 OR (3d) 355, 161 DLR (4th) 646 (CA); *Devji*, *supra* note 7; *Vanek*, *supra* note 102.

127. Butler, “Identifying”, *supra* note 9 at 8.

128. See Bélanger-Hardy, “Thresholds”, *supra* note 17.

such as a “serious and prolonged injury”. As evidenced by the reasons in *Kotai* and *Healey*, the possibility of a lower threshold was rejected. Rather, both courts viewed the phrase “serious and prolonged injury” as merely articulating the RPI requirement.<sup>129</sup>

Although their interpretation is understandable from a post-*Hinz* perspective, the courts’ preference for upholding the RPI requirement appears to ignore everything the Supreme Court said in *Mustapha* in favour of a less stringent standard. The Court started with a reminder that “psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset”,<sup>130</sup> and went on to say that “[p]ersonal injury at law connotes serious trauma or illness”.<sup>131</sup> The lower threshold was then set out more explicitly: “The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury”.<sup>132</sup> Then what follows is perhaps the clearest evidence against the RPI requirement: the Court’s words that it “*would not purport to define compensable injury exhaustively*”,<sup>133</sup> and would only 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. . . . Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage”.<sup>134</sup> Crucially, the judgment made no mention of any need to prove an RPI. Its use of the

129. See *Kotai*, *supra* note 27 (where the court noted the respondent’s argument that the Supreme Court in *Mustapha* had “merely state[d] the test in different words” at para 60). In *Healey*, the motion judge found that the reference to *Hinz* in *Mustapha* “suggests that [the Supreme Court] was equating a psychological disturbance that rises to the level of personal injury to a psychiatric illness recognizable to the medical profession”. *Supra* note 10 at para 63. This passage was quoted with approval by the Court of Appeal. See *Supra* note 10 at 417–18. Moreover, the Court of Appeal in *Healey* appears to suggest that its earlier decision in *Frazer v Haukioja* interpreted the use of the expression “mental injury” in *Mustapha* as equivalent to RPI. See *Frazer*, *supra* note 35. The court’s comment in *Frazer* was made in the context of a discussion on remoteness; it was not commenting on actionable harm as indeed, the plaintiff clearly developed an RPI. More importantly, the comment in *Frazer* is incorrect: the Supreme Court never intimated that application of the ordinary fortitude requirement demanded foreseeability of an RPI. Rather, what must be foreseen in a person of ordinary fortitude is a *mental injury*. See *Mustapha*, SCC *supra* note 2 at paras 15–16.

130. *Ibid* at para 9.

131. *Ibid*.

132. *Ibid*.

133. *Ibid* [emphasis added].

134. *Ibid* [emphasis in original].

adjective “psychological” rather than “psychiatric” with reference to the type of disturbance that would rise to an actionable level might also be of some significance, although it is not clear whether the Court’s choice of words in this regard was deliberate.<sup>135</sup>

Rather than viewing *Mustapha* as affirming the RPI requirement, could the decision be interpreted as confirming the “no compensation for mere upsets” rule? Before this question can be answered, two matters must be considered: the thrust of the precedents cited by the Supreme Court in *Mustapha*, and the Court’s reference to “serious and prolonged” compensable injury. Three supporting authorities appear after the phrase “personal injury at law connotes serious trauma or illness”: Linden and Feldthusen,<sup>136</sup> the English case of *Page v Smith*<sup>137</sup> and *Hinz*. The *Vanek* case is also cited at the end of the paragraph. Linden and Feldthusen essentially quote *Hinz*, thereby reflecting the law as stated by lower Canadian courts since 1970. *Page* does not deal with the nature of actionable mental

---

135. In common parlance the terms “psychological” and “psychiatric” are used interchangeably. However, technically, they have a different meaning. *The Oxford English Dictionary*, 3rd ed, *sub verbo* “psychiatry” and “psychology,” online, defines psychiatry as “the branch of medicine concerned with the causes, diagnosis, treatment, and prevention of mental illness” while psychology is defined as “the branch of science that deals with the (human or animal) mind as an entity and in its relationship to the body and to the environmental or social context, based on observation of the behaviour of individuals or groups of individuals in particular (ordinary or experimentally controlled) circumstances”. This suggests the psychological harm may encompass a wider range of mental conditions.

136. *Supra* note 4.

137. [1996] 1 AC 155 (HL).

harm and therefore has limited impact as a precedent in Canada.<sup>138</sup> As for *Hinz*, as argued above, the decision could allow for a more flexible interpretation of the threshold of actionable mental harm. Finally, *Vanek* is cited to support the notion that upsets of life do not constitute mental harm at law. This supports the suggestion that the Supreme Court's true focus was on the lower threshold. In any event, none of these sources create an insurmountable barrier to changes in the law, and in fact all of them can be used to support the "no compensation for mere upsets" limit.

As to the reference to "serious and prolonged" compensable injury, as noted above, the Court's intent is unclear. One possibility, which was alluded to in *Kotai* and *Healey*, is that the phrase was not intended to change the law but essentially to confirm the status of the RPI threshold without using exactly that terminology. This interpretation does not seem particularly plausible, as it is difficult to explain why the Supreme Court would have avoided the term "recognizable psychiatric illness" when it is so embedded in the jurisprudence.

If *Mustapha* cannot be interpreted as affirming the RPI requirement, it would have to be taken to support one of two other lower thresholds—the "serious and prolonged injury" threshold or the "no mere upset" rule. The Court did use the phrase "serious and prolonged", and this more flexible threshold can be conceptualized as a middle ground between the mere upset rule and the RPI requirement. This interpretation makes sense if *Mustapha* is seen as an attempt to correct the post-*Hinz* assumption that the nature of actionable mental harm requires proof of a psychiatric disorder as set out in the DSM-IV-TR. However, the "serious and

---

138. *Ibid.* The case is known for its extensive discussion of the direct versus indirect victim dichotomy, and for its conclusion that a distinction between the two types of victims is essential. In *Mustapha*, the Supreme Court refers specifically to page 189 of the decision, which discusses the control mechanisms applied to indirect victims. The RPI threshold is briefly mentioned at 189:

As for bogus claims, it is sometimes said that if the law were such as I believe it to be, the plaintiff would be able to recover damages for a fright. This is not so. Shock by itself is not the subject of compensation, any more than fear or grief or any other human emotion occasioned by the defendant's negligent conduct. It is only when shock is followed by recognisable psychiatric illness that the defendant may be held liable.

No precedents are discussed or quoted. This is not to say that English courts have not adopted the RPI limit. See Mulheron, *supra* note 9 at 80–81. *Page* is simply not a strong enough precedent to justify an endorsement of the criterion.



prolonged” test is not without its own problems.<sup>139</sup> In addition, as noted in *Kotai* and *Healey*, the Court would probably have elaborated on that formula if it had intended to reverse a well-established legal threshold.

The second interpretation, and the one which is more compelling, is that *Mustapha* sought to affirm the lower threshold—the “mere upset” rule. On this interpretation, use of the phrase “serious and prolonged” simply provided another way of defining the lower threshold. The mere upset rule is consistent with how the law developed before *Hinz* and, as argued above, neither that case nor *Guay* provides persuasive authority for departing from that rule.

Ultimately, although it may not be possible to discern the Supreme Court’s true intent in *Mustapha*, it is unlikely the Court intended to endorse the RPI requirement. What *Mustapha* appears to have done is to reiterate the historical threshold—that compensable mental harm must amount to more than mere emotional upset—and to invite the possibility of a flexible middle-ground threshold. The Court’s assertion that it “would not purport to define compensable injury exhaustively” supports this view.<sup>140</sup>

## Conclusion

Since the 1970s, Canadian courts have usually insisted that a plaintiff who has suffered mental harm as a result of a negligent act must establish that the harm flows from physical injuries or that it amounts to an RPI narrowly defined by reference to well-known diagnostic tools such as the DSM-IV-TR or the ICD-10. In 2008, the Supreme Court of Canada’s decision in *Mustapha* invited consideration of the need to prove an RPI, but few courts have since taken up the challenge.

This article surveyed how Canadian law has evolved since *Mustapha*, and analyzed the case law which lower courts have depended on to justify their continued reliance on the high RPI threshold. The analysis reveals that courts were historically content to work with the “no compensation for mere upsets” rule or to link mental harm to a physical injury, no matter how slight. As a result, the two cases most often associated with

---

139. The limits of relying on a “serious and prolonged” criterion are discussed elsewhere. See Bélanger-Hardy, “Thresholds”, *supra* note 17.

140. *Supra* note 2 at para 9.

the RPI requirement in contemporary jurisprudence—*Guay* and *Hinz*—should be accepted with caution. In the case of *Guay*, there is less than solid ground on which to base the RPI rule. As for *Hinz*, there is no doubt that it is the catalyst for introducing the phrase “recognizable psychiatric illness” in Canadian tort vocabulary. Yet a detailed examination of the concurring judgments raises serious doubts as to the Court’s intent to affect a dramatic change in the law. However, what is clear is that from the beginning of the 1970s, Canadian courts have relied on the RPI formula to circumscribe mental harm claims no matter how strong the arguments have been for a more flexible approach.<sup>141</sup> As noted above, this is not altogether surprising, given that the RPI threshold offers readily verifiable criteria for circumscribing hard-to-measure damage claims in an area where there is a deeply engrained concern for the prospect of unlimited liability.

This paper has traced the evolution of the threshold for compensating mental harm in negligence actions. More specifically, the study was meant to serve as a first step in reconsidering the nature of actionable mental harm in negligence. The second step is an evaluation of the policy considerations underlying the limitation of compensable injury and the proposal of a new threshold.<sup>142</sup> Well-engrained assumptions about the need for an RPI requirement need to be revisited in order to lay the groundwork for a change in the law. It is no longer sustainable to insist that mental harm must reach the level of a psychiatric illness as confirmed by mental health professionals, *vis-à-vis* reference to well-known diagnostic tools such as the DSM-IV-TR. This article suggests that the decision in *Mustapha* effectively endorses the lower threshold—“no compensation for mere upsets”. This is the direction in which Canadian courts must move if the law is to evolve in a way that is balanced but fair to victims of negligent acts.

---

141. See *supra* note 15 for some of the Canadian cases suggesting more flexibility.

142. See Bélanger-Hardy, “Thresholds”, *supra* note 17. See also Butler, “Identifying” *supra* note 9; Des Butler, “An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting From Negligence” online: (2002) 10:1 TLJ 13 (LexisNexis); Mulheron, *supra* note 9; Mullany & Hanford, “Moving the Boundary”, *supra* note 16; Linden & Feldthusen, *supra* note 4 at 426–427; Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 85.