

Upset and Angry? Not All Emotions are Compensable

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Are persistent feelings of frustration and anger, without more, a compensable mental injury? The Court of Appeal for Ontario recently grappled with this issue in *Bothwell v London Health Sciences Centre*.¹ While the Court's decision highlights the principles which must be considered when determining whether a plaintiff has suffered a compensable mental injury, it also demonstrates the challenges that can occur when a trial is bifurcated between liability and damages.

Background

In September 2011, Craig Bothwell - a paramedic by profession - was himself a patient at London Health Sciences Centre. While recovering from reverse ileostomy surgery, he overheard that one of the nurses had erroneously administered an anticoagulant rather than a blood volumizer. Thereafter, Mr. Bothwell experienced substantial internal bleeding and underwent further procedures to relieve abdominal cavity pressure. Understandably, Mr. Bothwell was "shocked, frustrated and angry". He sought compensation for a variety of physical and psychological injuries, which he claimed were caused by the medication error.

Trial Decision

The trial in this action was bifurcated. Typically, bifurcated trials separate liability (i.e., was there a breach of the standard of care) from damages (i.e., what injuries were caused by the defendant's negligence and how should those losses be quantified). But the defendants in *Bothwell* did not dispute that there had been a breach of the standard of care. Rather, they took the position that the error did not cause any injuries. As such, the first trial focussed on causation and asked whether the medication error caused the plaintiff to (i) hemorrhage and suffer physical injuries, and/or (ii) suffer a mental injury?²

As it relates to the psychological impact of the incident, Mr. Bothwell testified - and the trial judge accepted - that he was frustrated and angry and that those emotions continued through to the trial. He further explained that these negative feelings remerged when he attended the hospital in the course of his employment as a paramedic, although they did not interfere with his ability to do his job.

The trial judge went on to find that Mr. Bothwell's negative emotions were objectively and subjectively serious and that they rose beyond the level of ordinary annoyances. As such, the

¹ 2023 ONCA 323.

² *Ibid* para 9.

trial judge was satisfied that the psychological upset satisfied the standard set by the Supreme Court in *Mustapha v Culligan*³ and *Saadati v Moorhead*.⁴

Mental Injury vs Psychological Upset

The defendants appealed and argued that the trial judge erred in the application of the test when determining whether the plaintiff suffered a compensable mental injury or merely psychological upset. The Court of Appeal found that the trial judge had provided an incomplete list of principles for determining whether a plaintiff has suffered a mental injury. Failing to take into all relevant factors into account was an error in law to which no deference was owed.

The Court of Appeal summarized the applicable principles, the first four of which were considered by the trial judge:

1. Recovery for mental injury in negligence requires that the claimant satisfy the ordinary duty of care analysis (duty, breach of the duty, and whether the claimant sustained damage caused by the breach);
2. Liability for mental injury must be confined to claims which satisfy the proximity analysis within the duty of care framework and the remoteness of the inquiry;
3. The disturbance of a mental injury must be shown to be serious and prolonged, and rise above ordinary annoyances, anxieties, and fears;
4. While expert evidence can assist in determining whether a mental injury has been shown, it remains open to the court, on other evidence adduced, to find that the claimant has proven, on the balance of probabilities, the occurrence of a mental injury;
5. The trier of fact must consider not only the claimant's psychological upset but also how seriously the claimant's cognitive functions and participation in daily activities were impaired, the length of such impairment, and the nature and effect of any treatment sought and taken in relation to the psychological upset.⁵

Turning to the evidence, the Court of Appeal held that the plaintiffs (Mr. Bothwell and his wife) had not established that Mr. Bothwell had sustained a psychological injury. The Court accepted the trial judge's factual findings, including that he was a credible witness. However, there was no evidence in the record to demonstrate that his feelings of anger and frustration caused a cognitive impairment or impacted his participation in daily life. Similarly, there was no evidence that he participated in any therapy or psychological treatment due to the incident. Furthermore, the plaintiffs did not lead any expert evidence from a participant or litigation expert. The only evidence on this issue came from the plaintiffs themselves and did not address the degree to which his feelings interfered with his life.

³ 2008 SCC 27 [*Mustapha*].

⁴ 2017 SCC 28.

⁵ *Bothwell v London Health Sciences Centre*, 2023 ONCA 323, paras 27 - 32.

In the absence of evidence of impairment, the Court of Appeal found that Mr. Bothwell had not sustained a mental injury. As such, he was not entitled to any compensation despite the undisputed medication error.

The Future of Frustration

It is unknown whether the Court of Appeal for Ontario will have the last word on the issue.⁶ In any event, the Court's decision should not be taken as a statement that anger and frustration can never be compensable injuries. Anger and frustration can be components in recognized psychiatric illnesses. For example, anger is a major criterion in five diagnoses within DSM-5: Intermittent Explosive Disorder, Oppositional Defiant Disorder, Disruptive Mood Dysregulation Disorder, Borderline Personality Disorder and Bipolar Disorder.⁷ It can also be considered in the diagnosis of post-traumatic stress disorder (PTSD), in which a person suffers marked change in arousal and reactivity due to a traumatic event as shown by angry outbursts.

Persistent feelings of anger following a deeply disturbing or traumatic event are insufficient to establish an injury. As a medical diagnosis is not required, plaintiff counsel must focus on the degree to which that anger and frustration interferes with the plaintiff's activities of daily living. Defendants will undoubtedly respond by arguing that these feelings of anger are merely the "ordinary annoyances, anxieties and fears that come with living in civil society".⁸

Parties Must Carefully Craft Bifurcated Trials

This case also demonstrates the importance of framing the issues before the court on a bifurcated trial. In *Saadati*, the defendant admitted liability for a motor vehicle collision but took the position that the plaintiff had not suffered any compensable injuries. The issues left for trial were (i) what injuries, if any, were caused by the defendants' negligence; and (ii) what damages should be awarded to compensate for those injuries. In effect, it was the second part of a bifurcated trial with the focus on *causation and damages*. With only one trial, Mr. Saadati's family members and friends were able to testify about how the accident had changed his personality and deteriorated close relations.

By contrast, causation was a part of the *liability* phase of the trial in *Bothwell*. There could be no dispute that Mr. Bothwell had suffered significant physical injuries after the medication error; whether that breach of the standard of care caused these serious physical injuries was the question to be determined. If the trial judge had found in favour of the plaintiffs on the issue of physical injury causation, a second trial would be required to determine the specifics of Mr. Bothwell's physical injuries and the quantum of damages. Because the issue of physical

⁶ The time within which the plaintiffs may seek leave to appeal to the Supreme Court of Canada has not yet expired as of the time of publication.

⁷ E. Fernandez and S. Johnson, "Anger in psychological disorders: Prevalence, presentation, etiology and prognostic implications" (2016) 46 Clin Psychol Rev 124.

⁸ *Mustapha*, *supra* note 3, para 9.

injury causation had to be determined first, it is on that basis that the first trial could be considered a “liability trial”.

The division between liability and damages in the context of Mr. Bothwell’s alleged mental injury was different. The plaintiffs did not need a factual finding that the medication error caused the internal bleeding to establish a compensable claim for mental injury. Rather, this injury was allegedly caused by the medication error itself. As such, the first trial in *Bothwell* on the mental injuries more closely aligns with *Saadati* than his own claim in respect of physical injuries - the defendant admitted a breach of the standard of care but denied that the plaintiff suffered an injury. One questions whether the plaintiffs in this action intended to lead expert evidence about the degree to which Mr. Bothwell’s anger and frustration interfered with his participation in daily life in the second phase of the trial. Perhaps the plaintiffs would have led different evidence from Mrs. Bothwell or presented testimony from a cast of family and colleagues, as was done in *Saadati*.

Ultimately, it would have been preferable for the court to have determined only the question of general causation for Mr. Bothwell’s physical injuries during the liability phase of the trial. A finding in favour of the plaintiffs would have yielded a “damages trial” in which the court could have determined the specifics of both Mr. Bothwell’s physical and mental injuries.

Conclusion

The Court of Appeal’s decision in *Bothwell* serves as a reminder that hurt feelings and anger are insufficient to warrant compensation. Plaintiffs must lead evidence about the degree to which such emotions impair their daily life before these injuries can be compensable. Parties should also be particularly careful when framing issues of causation in a bifurcated trial. In some instances, causation will be most appropriately addressed in the liability phase but in others it should be left to the damages trial.