‘Recognisable Psychiatric Injury’ and Tortious Compensability for Pure Mental Harm Claims in Negligence

Saadati v Moorhead [2017] 1 SCR 543
(McLachlin CJ and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ)

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Since at least 1970, one of the constraints upon compensability for pure mental harm at common law has been that a plaintiff must have suffered not just adverse psychological consequences from negligence but a ‘recognisable psychiatric illness’. In a powerful unanimous decision, the Supreme Court of Canada in *Saadati v Moorhead* [2017] 1 SCR 543 has controversially removed this requirement. This paper reviews the reasoning in the decision and considers its ramifications, concluding that while it is likely to extend the liability of defendants, this will occur only in a small cross-section of cases where a plaintiff exhibits significant symptomatology of a mental disorder albeit falling short of sufficient for an unequivocal diagnosis within the meaning DSM-5 or ICD-10. It notes that in the post-Ipp reforms in Australia, a ‘recognised psychiatric illness’ has been statutorily enshrined as a prerequisite to recovery by plaintiffs, so statutory law reform would be required to implement the *Saadati* decision. While it welcomes the contribution of the *Saadati* approach to reducing the law’s discrimination against mental (as opposed to physical) injuries, it calls for close scrutiny of the actual effects of the *Saadati* decision.

Key Words: law reform; psychiatric injury; pure mental harm; recognisable psychiatric illness; recognised psychiatric illness foreseeability.

“... there is no legally cognizable right to happiness.”
Saadati v Moorhead [2017] 1 SCR 543
at [37]

Introduction

Internationally, the law has wrestled with the fear of opening floodgates or indeterminacy of litigation in relation to claims brought for mental injury, where that is the sole basis for the

claims – namely, where there is no physical injury sustained (‘pure mental injury claims’). Different systems at times have required a combination of ‘nervous shock’;¹ physical proximity to a traumatic incident;² consanguinity with the primary person injured or killed;³ that the plaintiff/claimant be a person of ordinary robustness or normal fortitude;⁴ and that the person suffer a recognised or recognisable psychiatric illness.⁵

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All of these requirements for pure mental harm claims have been over and above those demanded of plaintiffs claiming ‘only’ a physical injury or a physical injury with mental harm sequelae. This has led to a concern that the additional requirements for pure mental injury litigation are oppressive, discriminatory and lacking in conceptual justification. Echoes of Windeyer J’s apt statement that law on psychiatric harm was ‘marching with medicine though in the rear and limping a little’⁶ continue to be heard today, with David Schwartz recently describing the law of mental harm as ‘still limping’.⁷ Forster and Engel have critiqued criticised the current statutory requirements for further having magnified the distinction between physical and psychiatric injury.⁸ Similar sentiments have been expressed in the United Kingdom, with Nolan describing the state of the law governing psychiatric injury as ‘overly complex and inconsistent’, leading to the drawing of ‘arbitrary distinctions’.⁹

The 2017 decision of the Canadian Supreme Court in *Saadati v Moorhead*¹⁰ is a landmark innovation for international jurisprudence in the area. It is a bold jurisprudential experiment. The principal contribution of the *Saadati* decision lies in its removal at common law of the need for proof by a claimant of a ‘recognisable psychiatric illness’. For jurisdictions outside Canada, the question arises whether *Saadati* should be followed by the courts or by the formulation by legislatures of statutory requirements for compensability that remove the threshold requirement for proof of the sustaining of a recognisable mental illness.

This paper reviews the reasoning of the Canadian Supreme Court in *Saadati* and explores the practical and conceptual repercussions of the decision. It notes that the notion of ‘recognised psychiatric illness’ has been statutorily enshrined in a number of jurisdictions in Australia in the post-Ipp reforms and reflects on the opportunity that Australia and other countries have to learn from the ‘*Saadati* experiment’.

The Facts

On 6 July 2005, Mohsen Saadati was driving a tractor-truck in British Columbia. It was struck by a vehicle driven by Mr Moorhead (‘the second accident’). Mr Saadati’s truck sustained significant damage, but he appeared at the time not to have been injured. He went to a nearby hospital but was not admitted for observation.

A complicating factor was that the 2005 accident was the second in a series of five motor vehicle collisions involving Mr Saadati between 2003 and 2009. He had suffered chronic pain since the first accident, which was later aggravated by the third accident (which occurred later in 2005). In 2007, Mr Saadati sued in negligence for the second accident, seeking damages for non-pecuniary loss and past income loss. Two further accidents followed in 2008 and 2009. In 2010, he was declared mentally incompetent and his action was continued by a litigation guardian.

The trial judge found that the second accident caused Mr Saadati psychological injuries, including personality change and cognitive difficulties. The basis for the finding was not an identified medical cause or expert evidence but arose from the testimony of friends and family members of Mr Saadati about the differences in him before and after the 2005 accident: ‘Once a funny, energetic, and charming individual, he had become sullen and prone to mood swings. Historically close relationships with family and friends had deteriorated. He complained of headaches’.¹¹ The trial judge also found that the mental injury caused by the second accident was indivisible from any injury caused by the third accident and awarded him \$C100,000 for non-pecuniary damages.

The British Columbia Court of Appeal allowed an appeal by the defendants, finding that the trial judge had erred in law by awarding damages for mental injury where Mr Saadati had not proved a medically recognised psychiatric or psychological illness or condition. It held that such an illness or condition

must be demonstrated by expert medical opinion evidence¹² and that there was an additional error in the trial judge making a decision on a basis neither pleaded nor argued for by Mr Saadati.

The Supreme Court Decision

The Supreme Court of Canada in a decision of Brown J, agreed with by McLachlin CJ and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ, allowed the appeal by Mr Saadati. It held that in claims for negligently caused mental injury, it is generally sufficient that the pleadings allege some form of such an injury. It found that this requirement had been satisfied by a broadly based claim for injuries and evidence from a psychiatrist who diagnosed Mr Saadati with mental disorders, as well as final submissions for Mr Saadati which contended amongst other things that if the court did not accept a proven concussion:

[T]he evidence still shows that the Plaintiff suffered from a change in mood/personality, memory loss, and cognitive difficulties as a result of the July 5 2005 accident.

If not caused by a concussion, then it must be caused by something. The only logical conclusion is that these were caused by a psychological reaction to the accident, new pains, or an aggravation of old pains.¹³

The Court held that the many allegations of a psychological/emotional/psychiatric reaction in the oral and written closing submissions for Mr Saadati, combined with the broad heads of damage claimed in the pleadings, provided ample evidence to the defendants of the claim they needed to answer. This meant that there had been no breach of procedural fairness.

The Court reviewed the history of recovery for negligently caused mental harm, commenting that: 'The early common law's posture

towards claims for negligently caused mental harm was one of suspicion and sometimes outright hostility, and was "virtually programmed to entrench primitive suspicions and prejudices about 'invisible', intangible harm". ... Mental injury was seen as "not derived through the senses, but [as] a product of the imagination".¹⁴ It noted that while the absolute bar to recovery for mental injury absent physical injury ('pure mental injury') was eventually lifted, the suspicion which originally impelled the bar persisted, and barriers additional to those existing for physical injuries were created, such as those articulated by Lord Wilberforce in *McLoughlin v O'Brian*:¹⁵ nervous shock and 'the class of persons whose claims should be recognized (often referred to as relational proximity), the proximity of such persons to the accident (locational, or geographical proximity), and the means by which the "shock" is caused (temporal proximity)'. The Court noted that in *Tame v New South Wales*¹⁶ the Australian High Court took a different path from that in England, preferring a more flexible foreseeability of harm test.

However, it observed that Canadian law had forged its own distinctive path in the area, (like Australia) not adopting the primary/secondary victim distinction¹⁷ or *McLoughlin v O'Brian*'s disaggregated proximity analysis.¹⁸ Rather, recoverability for mental injury came to be viewed as depending upon:

the claimant satisfying the criteria applicable to any successful action in negligence – that is, upon the claimant proving a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true 'damage' qualifying as mental injury, which is 'serious and prolonged' and rises above the ordinary emotional disturbances that will occasionally afflict any member of

civil society without violating his or her right to be free of negligently caused mental injury; and not all mental injury is caused, in fact or in law, by the defendant's negligent conduct.¹⁹

The Court emphasised that it identified the elements of the cause of action of negligence as furnishing 'principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury'.²⁰ It rejected the proposition that the courts should require something more is founded on policy, as against legal principle:

more particularly, on a collection of concerns regarding claims for mental injury (including those advanced in this appeal by the intervener Insurance Bureau of Canada) founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is 'subjective' or otherwise easily feigned or exaggerated; and that the law should not provide compensation for 'trivial matters' but should foster the growth of 'tough hides not easily pierced by emotional responses'.²¹

It identified as notorious that those with mental illness, including that caused by mental injury, face stigma 'often unjustly and unnecessarily impeding their participation, so far as possible, in civil society. While tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them'.²² Rather than resorting to imposition of additional barriers to compensability for mental harm, the Court rejected that a dual standard should exist, classifying as 'dubious' 'perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is "subjective" or otherwise easily feigned or exaggerated; and that the law should not provide compensation for "trivial matters" but should foster the growth of "tough hides not easily pierced by emotional responses"'.²³

The Court classified concerns about subjectivity of symptoms or feigned or

exaggerated claims of mental injury as questions of fact best entrusted to the 'good sense of triers of fact' – like most matters of credibility.²⁴

It noted that the obligation on the part of a plaintiff to establish that they have sustained a 'recognisable psychiatric illness' had its origins in a speech by Lord Denning MR in 1970:

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 a recognisable psychiatric illness caused by the breach of duty by the defendant.²⁵

The Court noted that a range of expressions to a similar effect have been used by courts – 'genuine', 'recognised', 'recognisable' and 'positive'.²⁶ However, it found that it has been far from clear whether Lord Denning intended to impose upon claimants the burden of showing a positive psychiatric diagnosis. In practice, these requirements have manifested in the vesting in the discipline of psychiatry the identification and naming of the law's boundaries for recoverability, generally by reference to disorders recognised and identified in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ('DSM') or the World Health Association's *International Statistical Classification of Diseases and Related Health Problems* ('ICD'). The Court held that confining compensable mental injury to conditions that are identifiable by such tools is 'inherently suspect as a matter of legal methodology':

[T]here is no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme. As Thomas J. observed in *van Soest* (at para. 100), a negligent defendant need only be shown to have foreseen injury, and not a particular psychiatric

illness that comes with its own label. In other words, the trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not to whether a label could be attached to them. Downloading the task of assessing legally recoverable mental injury to the DSM and ICD therefore imports an arbitrary control mechanism upon recovery for mental injury, conditioning recovery not upon any legally principled basis directed to the alleged *injury*, but upon conformity with a legally irrelevant classification scheme designed to facilitate identification of *particular conditions*.²⁷

It denounced as rationalisations resort to the DSM or the ICD to foster objectivity, certainty and predictability of outcomes and to prevent indeterminate liability, an issue raised by the Australian High Court in *Tame v New South Wales*.²⁸ It categorised as overstated the proposition that the requirement of a psychiatric diagnosis provides objectivity, certainty or predictability, noting the fact that diagnoses can be controversial within the profession of psychiatry and that they are in ongoing flux – as to their existence and their criteria. It concluded that:

Rather than fostering objectivity, certainty and predictability of outcomes, then, tethering determinations of legal liability to these iterative diagnostic tools relegates the law of negligence to following a sometimes meandering path as it is cleared by the cutting edge of *au courant* thinking in modern psychiatry – wherever it may lead, or from wherever it may retreat.²⁹

In terms of the indeterminacy issue, it held that robust application of the elements of the cause of action of negligence should be sufficient to address concerns – in particular, the proximity analysis within the duty of care framework (which focuses on the relationship between the parties), and the remoteness inquiry (which asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable). It concluded that the

forms of constraint imposed by negligence law on claimants alleging physical injury would be sufficiently effective also in relation to unworthy claims for mental injury – 'It is therefore not only undesirable, but unnecessary to distort negligence law by applying the mechanism of a diagnostic threshold for proving mental injury'.³⁰

The Court affirmed previous authority,³¹ highlighting the elusiveness of the arbitrary delineation between mental and physical injury and held that to require a particular classificatory label accords unequal, namely less, protection to victims of mental injury without any principled justification.

However, the Court acknowledged that mental injury has distinctive characteristics – in particular, it is not always as readily demonstrable as physical injury. The Court noted that it is not open for claimants to recover for 'mere psychological upset' as it does not bear the 'requisite degree of disturbance'. It accepted that while expert evidence on the issue is not required as a matter of law, it will often have the potential to assist in determining whether or not a mental injury has been established:

In assessing whether the claimant has succeeded, it will often be important to consider, for example, 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. ... To the extent that claimants do not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short.³²

Thus, the Court held that while a lack of a diagnosis is not on its own dispositive, it is a consideration that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.

This led the Court to find no fault with the trial judge's conclusion that the accident caused Mr Saadati to suffer psychological

injuries, including personality change and cognitive difficulties such as slowed speech leading to a deterioration of his close personal relationships with his family and friends. It found that his symptoms fitted well within the parameters of mental injury and that, while there was no expert testimony associating them with a condition identified in the DSM or ICD, 'what matters is substance – meaning, those symptoms – and not the label. And, the evidence accepted by the trial judge clearly showed a serious and prolonged disruption that transcended ordinary emotional upset or distress'.³³

Discussion

The decision of the Supreme Court of Canada in *Saadati* is extremely important internationally in relation to the compensability of 'mental injury' or 'pure psychiatric injury'. It follows logically from its decision in *Mustapha* and constitutes a substantive acceptance of the arguments made in academic analyses by Mulheron and Bélanger-Hardy.³⁴

When juxtaposed with the decision of the Australian High Court in *Tame v New South Wales*,³⁵ which rejected the existence of the preconditions for the plaintiffs' recovery of nervous shock, physical proximity, consanguinity and 'ordinary robustness/normal fortitude' (the last of which has been reinstituted in the statutory jurisdictions),³⁶ it constitutes 'the next step' in aligning recovery for mental injury with recovery for physical injury harm. In principle, the removal of the discrimination against mental disorders in this area of tort law is to be applauded. What is more difficult is appreciation of when and how the decision will liberalise the availability of compensation for pure mental harm plaintiffs.

The most significant characteristic of the decision is its rejection of the conceptual legitimacy or need for the imposition of a distinction between physical and mental injury. In particular, it rejected the defendant's argument that a failure to give adequate recognition to the distinction would generate indeterminate

liability for those found to have breached their duty of care. There is much to be said in favour of the need to reduce or even eliminate discrimination in tort law against mental injury. However, it is inescapable that there is the distinction between physical and mental injuries that the latter can be difficult to prove. This creates challenges for plaintiffs.³⁷ The associated problem is the contentious issue of the potential for plaintiffs to exaggerate or even fabricate mental injury symptomatology, especially in relation to post-traumatic stress disorder. Forster and Engel have acknowledged this concern but correctly contend that diagnosing psychiatric injury is not dissimilar to diagnosing some physical conditions (such as back pain) in that patients need to be asked to relate symptoms to their medical practitioners and those reports in turn need to be evaluated.³⁸ Further, compensation can be sought for a number of other intangible harms such as pain and suffering, loss of enjoyment of life and loss of reputation without imposing as high limitations as apply to psychiatric injury claims.³⁹

The Canadian Supreme Court has pronounced itself sanguine that the orthodox fetters on compensability, if applied rigorously – proximity and remoteness – will be adequate to protect against what it has described as 'unworthy claims'.⁴⁰ It has accepted that generally expert evidence will be highly relevant, but found that in determining whether a claimant has proven a mental injury, expert opinions are not required as a matter of law: "Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury". And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry.⁴¹

There is a lengthy jurisprudence about recoverability for conditions falling short of 'recognised psychiatric injuries'. An example

is the dictum by Windeyer J in *Mount Isa Mines v Pusey*⁴² that ‘Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover damages for a “shock”, however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening’.⁴³

The Canadian Supreme Court in *Saadati* maintained an adverse stance against plaintiffs recovering for ‘mere’ upset, affirming the *Mustapha* position that there must be the suffering of a disturbance that is ‘serious and prolonged’ and rises above ‘ordinary annoyances, anxieties and fears’ that are part of living in civil society. It postulated that evidence can be adduced about the seriousness of impairment of a claimant’s cognitive functions and participation in daily activities, the length of such impairment and the nature and effect of any treatment provided to the claimant/plaintiff. Thus the discrimen of a diagnosed DSM or ICD disorder is removed, and the focus shifts to the impairment (as against the label attributed) suffered, its duration and any treatment provided.

The difficult question is as to the extent of the difference that this recalibration of tortious liability for mental injury makes. The answer is probably relatively little. Generally a claim will be buttressed by expert evidence from a psychiatrist and perhaps a psychologist, focusing upon the deleterious impact of a breach of duty, and generally providing a diagnosis and a prognosis in light of treatment provided. It will be a rare claim that succeeds without expert evidence, although the factual matrix of *Saadati* provides an example. It remains unlikely that the requisite mental injury will be found when the injury is relatively transient or when it is no more than grief, distress or upset. How courts after *Saadati* will differentiate between mental injuries that rise ‘above the ordinary annoyances, anxieties, and fears that come with living in civil society’ and others which do not remains to be seen.⁴⁴

The *Saadati* decision though becomes important where the claim is that the life of the

claimant has been significantly impaired and yet the diagnostic process establishes no more than symptoms of a mental disorder within the terms of the DSM or the ICD, those symptoms falling short of what is required for diagnosis of the disorder. This is likely to occur especially in the context of post-traumatic stress disorder, adjustment disorders and, to a lesser extent, anxiety disorders and mood disorders. It appears that *Saadati* opens a door (which had previously been closed) to such claims but that they will relatively rarely succeed on the basis of sufficient disturbance and impairment not being able to be proved.

The Recognised Psychiatric Illness Requirement in Australia

Under the post-Ipp reforms there is statutory recognition of the ‘recognised psychiatric illness’ requirement in the formulation of the duty. The Ipp report recommended in 2002 that there be no liability for pure mental harm unless it consists of a recognised psychiatric illness⁴⁵ and observed that:

[T]he lack of suitable forensic criteria of mental illness is a serious cause of dissatisfaction with the current law amongst various interested groups. For this reason, the Panel recommends that a panel of experts, including experts in forensic psychiatry and psychology, be appointed to develop a set of guidelines, for use in legal contexts, for the assessing whether a person has suffered a recognised psychiatric illness. These guidelines should be given formally recognised status.⁴⁶

As a result, legislative provisions were introduced into a number of jurisdictions to require foreseeability of a ‘recognised mental illness’. For instance, s 72 of the *Wrongs Act 1958* (Vic) provides that:

A person (the defendant) does not owe a duty to another person (the plaintiff) not to cause the plaintiff pure mental harm unless the defendant foresaw or ought to

have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.⁴⁷

In addition, under s 75:

A court cannot make an award of damages for economic loss for mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.⁴⁸

Thus, the prerequisite of ‘recognised psychiatric illness’, which is not relevantly different from ‘recognisable psychiatric illness’, is statutorily enshrined in a number of Australian jurisdictions. Following *Saadati* would require statutory amendments overturning the Ipp report recommendations, for which there is unlikely to be political appetite.

In a number of Australian jurisdictions, if *Saadati* were applied, there are some additional considerations. In Victoria, for instance, impairment of at least 10% under the terms of the fourth edition of the *American Guides to Permanent Impairment* needs to be established by the plaintiff in a pure psychiatric injury case (as opposed to 5% for physical injuries) in order to bring an action in the County Court or the Supreme Court.⁴⁹ A stated aspiration of the system and of the post-Ipp reforms was to reduce the incidence of small claims brought by plaintiffs.⁵⁰ Reaching the required level of impairment in the absence of a DSM or ICD diagnosis is highly unlikely (although technically possible) – the percentile requirement is burdensome.

Rachael Mulheron has argued in favour of removing the ‘recognised psychiatric injury’ threshold, contending that the need for the threshold should be rethought, as strict reliance on medical criteria is legally and medically problematic.⁵¹ Mulheron contends that usual negligence elements apply in legal proceedings; hence the imposition of a duty of care is not automatic.⁵² Further, lesser *damage* equates to lesser *damages*, but this does not necessarily mean that *all* injuries would be compensated.⁵³ For instance, minor and

transient upsets that are part of life should not be compensable, such as being trapped in a hospital lift⁵⁴ or an incorrect diagnosis of coeliac disease affecting enjoyment of life.⁵⁵ Finally, to some extent, civil procedure obligations of practitioners would also assist to prevent the bringing of frivolous claims.⁵⁶

Hafeez-Baig and English assert that the court in *Saadati* shied away from creating a workable test. Thus, they advocate for the clarification and interpretation of the test to broaden the number of deserving claimants it captures.⁵⁷ In their view, *Saadati* rests on plaintiffs demonstrating a compensable ‘serious and prolonged’ illness, yet this requires trial judges to bear the burden of making such an assessment.⁵⁸ Hafeez-Baig and English stress the necessity of finding a middle ground between ordinary grief, sorrow and emotion on the one hand and a high threshold of ‘recognised psychiatric illness’ on the other. Their proposal is to retain the threshold yardstick because it creates an objective standard but to broaden the entry point to allow claims that do not presently satisfy the DSM or ICD criteria.⁵⁹

Louise Bélanger-Hardy acknowledges that the ‘recognised psychiatric illness’ threshold has assisted to maintain predictability in compensation, but argues that consideration ought to be given to broader issues of access to justice and fairness.⁶⁰ Bélanger-Hardy proposes the removal of all barriers to mental harm claims to bring recovery of compensation in psychiatric claims in line with other torts, including general negligence and intentional torts.⁶¹ The requirement for plaintiffs to demonstrate a ‘serious and prolonged’ illness and imposition of a ‘no compensation for mere upsets’ preclusion would assist to minimise fears of indeterminate liability.⁶²

Donal Nolan identifies that a potential path for reform is to equate physical and psychiatric injury, an advantage of this being simplicity, combined with the recognition by the law that psychiatric injury is equally devastating as physical injury.⁶³ However, courts may continue to give recognition to policy concerns by

strictly applying the foreseeability test which may ultimately lead to the same restrictions. In Victoria, at the very least, consideration ought to be given to lowering the thresholds to equate psychiatric injury with physical injury – currently a discrepancy exists as the legislation requires a plaintiff only to satisfy a significant injury of permanent impairment of ‘more than 5 per cent’ of the whole person.⁶⁴

An alternative avenue for reform is to have regard to the compensation framework operating in other Australian jurisdictions. In South Australia and Queensland, recovery is permitted by reference to a spectrum. Queensland uses a sliding scale between 0 and 100 to allocate a point value for injuries.⁶⁵ The point value then determines the level of compensation payable. In South Australia, a point value between 0 and 60 is applied.⁶⁶ In South Australia, claimants are first required to show they have sustained an injury warranting non-economic loss damages.⁶⁷ Next, the court assesses severity of injury, and compensation is determined pursuant to the sliding scale. Scaled measures of damages for non-economic loss arguably yield fairer awards of damages than ‘significant injury thresholds’ because they do not automatically eliminate the awarding of damages for all smaller claims.⁶⁸ Jurisdictions such as Queensland and South Australia arguably present exemplar models that the Victorian jurisdiction could emulate. Were *Saadati* to be applied in Victoria, it might enable some additional, relatively low-level claims but is unlikely to lead to indeterminate liability, given plaintiffs will have an ongoing requirement to satisfy standard elements of negligence, including a compensable injury. Post-*Saadati* jurisprudence suggests that not all claims for psychiatric harm or emotional distress will succeed if they do not satisfy a level of compensable injury.⁶⁹

Concluding Observations

The *Saadati* decision is a significant landmark in aligning somatic and mental injuries. For

plaintiffs in Canada, there is an important easing of what is a somewhat arbitrary constraint on compensability which is dependent upon the latest labelling vogue within psychiatry – the Supreme Court was very pointed about the changing fashions in psychiatry in relation to matters such as homosexuality and the criteria for PTSD. However, the spectre of floodgates and indeterminacy has not been wholly banished internationally by the decision. Whether reasonable foreseeability, proximity and remoteness are sufficient safeguards against the challenges of identification of embellishment and fabrication of diffuse psychiatric symptomatology, which always has a significant basis in patient self-report, remains to be seen. Canada will now function as a psycho-legal laboratory for the remainder of the common-law world to identify whether unmeritorious cases choke the system and whether plaintiffs with pathology falling short of conditions recognised by the principal texts of psychiatric nosology succeed in law where they have failed to satisfy psychiatrists that they have unequivocally established mental disorders. Jurisdictions such as the United Kingdom and Australia have the opportunity to observe and learn from the jurisprudence that evolves in the aftermath of the ‘*Saadati* experiment’.

Notes

1. *Victorian Railway Commissioners v Coultas* (1888) 13 App Cas 222; *Dulieu v White* [1901] 2 KB 669.
2. *Mount Isa Mines v Pusey* (1970) 125 CLR 383.
3. *Jaensch v Coffey* (1985) 155 CLR 549. In England, the House of Lords permitted recovery of damages in similar circumstances in *McLoughlin v O'Brian* [1983] 1 AC 410.
4. *Tame v NSW; Annetts v Australian Stations P/L* (2002) 211 CLR 317.
5. *Annetts v Australian Stations P/L* 329. Gleeson CJ stated, ‘save in exceptional circumstances, a person is not liable, in negligence, for being a cause of distress,

- alarm, fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric illness’.
6. *Mount Isa Mines Ltd v Pusey* (n 2) 395.
 7. D Schwartz, ‘Still Limping: The Ongoing Development of the Law on Pure Psychiatric Injury’ (2017) 138 *Precedent* 32.
 8. C Forster and J Engel, ‘Reinforcing Historic Distinctions Between Mental and Physical Injury: The Impact of the Civil Liability Reforms’ (2012) 19(3) *Journal of Law and Medicine* 593, 608; I Freckelton, ‘Employers’ Liability for Bullying-Induced Psychiatric Injuries’ (2008) 16 *Journal of Law and Medicine* 9; I Freckelton, ‘Employers’ Responsibilities for Foreseeable Psychiatric Injuries’ (2008) 15(1) *Psychiatry, Psychology and Law* 17.
 9. D Nolan, ‘Psychiatric Injury at the Crossroads’ (2004) *Journal of Personal Injury Law* 1, 17. See also P Handford, ‘Psychiatric Injury Resulting from Medical Negligence’ (2002) 10 *Tort Law Review* 38; D Butler, ‘An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence’ (2002) 10 *Torts Law Journal* 13; N Mullany, ‘English Psychiatric Injury Law: Chronically Depressing’ (1999) 115 *Law Quarterly Review* 30.
 10. [2017] 1 SCR 543.
 11. *Saadati v Moorhead* [2017] 1 SCR 543 at [5].
 12. *Saadati v Moorhead* (2015) 390 DLR (4th) 63.
 13. *Saadati v Moorhead* [2017] 1 SCR 543 at [11].
 14. *Saadati v Moorhead* [2017] 1 SCR 543 at [14].
 15. [1983] 1 AC 410 at [419]–[421].
 16. (2001) 211 CLR 317.
 17. The Australian legal provisions depart from the British position where victims who have sustained mental harm are categorised as either a ‘primary victim’ or a ‘secondary victim’: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 407. In the United Kingdom, primary victims are individuals who have developed psychiatric conditions associated with physical bodily harm, whereas secondary victims have sustained pure mental harm as a result of witnessing the death or injury of another individual.
 18. In *McLoughlin v O’Brian* [1983] 1 AC 410, the plaintiff sustained nervous shock after being informed her husband and three children had been involved in a serious accident. Mrs McLoughlin received the news hours after the occurrence of the accident and away from the scene. Mrs McLoughlin in satisfying Lord Wilberforce’s test for recovery of damages, consisting of: (1) the need for a close familial relationship; (2) temporal and physical proximity to persons involved in the accident; and (3) the means by which the shock is caused.
 19. *Saadati v Moorhead* [2017] 1 SCR 543 at [19], applying *Mustapha v Culligan of Canada Ltd* [2008] 2 SCR 114.
 20. *Saadati v Moorhead* [2017] 1 SCR 543 at [21].
 21. *Saadati v Moorhead* [2017] 1 SCR 543 at [21].
 22. *Saadati v Moorhead* [2017] 1 SCR 543 at [21].
 23. *Saadati v Moorhead* [2017] 1 SCR 543 at [21].
 24. *Saadati v Moorhead* [2017] 1 SCR 543 at [22].
 25. *Hinz v Berry* [1970] 2 QB 40 at [42].
 26. See R Mulheron, ‘Rewriting the Requirement for a “Recognized Psychiatric Injury” in Negligence Claims’ (2012) 32(1) *Oxford Journal of Legal Studies* 77.
 27. *Saadati v Moorhead* [2017] 1 SCR 543 at [31].
 28. (2002) 211 CLR 317 at [193]–[194].
 29. *Saadati v Moorhead* [2017] 1 SCR 543 at [33].
 30. *Saadati v Moorhead* [2017] 1 SCR 543 at [34].
 31. In particular, *Mustapha v Culligan of Canada Ltd* [2008] 2 SCR 114 at [8].
 32. *Saadati v Moorhead* [2017] 1 SCR 543 at [38].
 33. *Saadati v Moorhead* [2017] 1 SCR 543 at [40].
 34. L Bélanger-Hardy, ‘Reconsidering the “Recognizable Psychiatric Illness” Requirement in Canadian Negligence Law’ (2013) 38 *Queen’s LJ* 583; L Bélanger-Hardy, ‘Thresholds of Actionable Mental Harm in Negligence: A Policy-based Analysis’ (2013) 36 *Dalhousie Law Journal* 103; P Handford, ‘The Brave New World of Psychiatric Injury in Canada’ (2018) 25(3) *Tort Law Review* 136.
 35. (2002) 211 CLR 317 at [193]–[194].
 36. *Civil Law (Wrongs) Act 2002* (ACT) s 34; *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 1936* (SA) s 33; *Civil Liability*

- Act 2002 (Tas) s 34; Civil Liability Act 2002 (WA) s 5S; Wrongs Act 1958 (Vic) s 72.* The common law continues to apply in Queensland and the Northern Territory.
37. This very issue was acknowledged by the Ipp Panel at the time of making recommendations for the implementation of statutory reforms pertaining to mental harm: Panel of Eminent Persons to Review the Law of Negligence, *Review of the Law of Negligence Report*, Second Report, Canberra, October 2002 (*Ipp Report*) 135. The report states: ‘the existence and extent of mental harm may be difficult to diagnose objectively and to prove for legal purposes’ at [135].
 38. Forster and Engel [n 8] 49.
 39. Forster and Engel [n 8] 49.
 40. *Saadati v Moorhead* [2017] 1 SCR 543 at [2], [34].
 41. *Saadati v Moorhead* [2017] 1 SCR 543 at [38].
 42. (1970) 125 CLR 383.
 43. See further *Lynch v Knight and Wife* (1861) 81HL347 at [61]–[62]; D Mendelson, ‘The Defendants’ Liability for Negligently Caused Nervous Shock – Quo Vadis?’ (1192) 18 *Monash University Law Review* 16.
 44. See P Dabiran-Zohoory, ‘Saadati v Moorhead’ (20 November 2017) *McGill Journal of Law and Health* <<https://mjlh.mcgill.ca/2017/11/20/saadati-v-moorhead-2017-scc-28/>>.
 45. DA Ipp, P Cane, D Sheldon and I Macintosh, *Review of the Law of Negligence* (September 2002) <https://static.treasury.gov.au/uploads/sites/1/2017/06/R2002-001_Law_Neg_Final.pdf> para 9.28, recommendation no 34.
 46. DA Ipp, P Cane, D Sheldon and I Macintosh, *Review of the Law of Negligence* (September 2002) <https://static.treasury.gov.au/uploads/sites/1/2017/06/R2002-001_Law_Neg_Final.pdf> para 9.7.
 47. See also *Civil Law (Wrongs) Act 2002 (ACT) s 34; Civil Liability Act 2002 (NSW) s 32; Civil Liability Act 1936 (SA) s 33; Civil Liability Act 2002 (Tas) s 34, Civil Liability Act 2002 (WA) s 5S.*
 48. See also *Civil Law (Wrongs) Act 2002 (ACT) s 35; Civil Liability Act 2002 (NSW) s 31; Civil Liability Act 1936 (SA) s 53(3); Civil Liability Act 2002 (Tas) s 33; Civil Liability Act 2002 (WA) s 5T.*
 49. In Victoria, in order to recover damages for non-economic loss (comprising pain and suffering, loss of amenity of life and loss of enjoyment of life), plaintiffs are required to satisfy a ‘significant injury’ threshold: *Wrongs Act 1958 (Vic) s 28LF*. The legislation stipulates that ‘in the case of psychiatric injury, impairment of 10 per cent or more’ must be satisfied: *Wrongs Act 1958 (Vic) s 28LB*.
 50. At the time of implementation, former Victorian Premier Steve Bracks explained that imposition of thresholds would reduce damages in small claims of \$50,000 or less and thus alleviate the pressure on businesses and professionals concerned about facing successive minor claims: Victoria, *Parliamentary Debates*, Legislative Assembly, 21 May 2003, 1782 (Steve Bracks, Premier).
 51. Mulheron (n 26) 87. Mulheron explains that the diagnostic classifications were not intended for legal or forensic use but for research and clinical diagnostic purposes.
 52. Mulheron (n 26) 108–109.
 53. Mulheron (n 26) 109.
 54. *Reilly v Merseyside HA* (1994) 23 BMLR 26 (CA).
 55. *Younger v Dorset and Somerset HA* [2006] Lloyd’s Rep Med 489 (Southampton CC).
 56. *Younger v Dorset and Somerset HA* (n 54). See the overarching obligations in the *Civil Procedure Act 2010 (Vic)* ss 16–26.
 57. MJ Hafeez-Baig and J English, ‘Re-thinking the Requirement for a “Recognisable Psychiatric Illness” in the Law of Negligence’ (2017) 25(2) *Tort Law Review* 92.
 58. Hafeez-Baig and English (n 56) 97.
 59. Hafeez-Baig and English (n 56) 97–98.
 60. Bélanger-Hardy, ‘Thresholds of Actionable Mental Harm in Negligence’ (n 34) 103.
 61. Bélanger-Hardy, ‘Thresholds of Actionable Mental Harm in Negligence’ (n 34) 124–25.
 62. Bélanger-Hardy, ‘Thresholds of Actionable Mental Harm in Negligence’ (n 34) 125–31.
 63. Nolan (n 9) 12.
 64. *Wrongs Act 1958 (Vic) s 28LB*.
 65. *Civil Liability Act 2003 (Qld) s 61*. See also A Stickley, ‘Scale of General Damages – Civil Liability Regulation 2003’ (2004) 25(1) *Queensland Lawyer* 9.
 66. *Civil Liability Act 1936 (SA) s 52(2)*.
 67. *Civil Liability Act 1936 (SA) s 3*.
 68. *Civil Liability Act 1936 (SA) s 52(1)*. In South Australia, a claimant is only required to

demonstrate their ability to lead a normal life was significantly impaired by the injury for a period of at least seven days or that their medical expenses meet the minimum prescribed threshold.

69. See, eg, *MacKenzie v John Doe*, 2018 BCSC 104 at [123] (Maisonville J), where no evidence was adduced with respect to the plaintiff's mood fluctuations and irritability having a medical cause apart from the

plaintiff's testimony: 'I appreciate that with pain will come some mood irritability; however, there has been no expert evidence called connecting this to the accident. Consequently, on a balance of probabilities, I do not find that the plaintiff has proven this aspect. I accept that the plaintiff has mood and irritability problems, but not to the extent that they are a psychological injury. Nor was this seriously pressed'.