

A Fly in the Water Bottle: The Supreme Court Defines Reasonable Foreseeability in Negligence Actions

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On May 22, 2008, the Supreme Court of Canada rendered its decision in a case involving the notion of reasonable foreseeability in negligence actions. This judgment, written by the Chief Justice, confirms that tort law must compensate harm done on the basis of reasonable foresight, and must not be considered as insurance.



The Court of Appeal held that in order to succeed, Mr. Mustapha had to prove that his injuries were foreseeable to arise in a person of “reasonable fortitude and robustness”. The record before the court did not include evidence to allow Mr. Mustapha to meet this test. In the result, the Court of Appeal held that Culligan owed no duty of care to the injured party.

The Facts

While replacing a water bottle in his home water cooler, the Appellant, Waddah Mustapha, noticed a dead fly and part of another dead fly in the unopened water bottle. Obsessed with the event and its consequences on the health of his family, who had been drinking water supplied by Culligan for the previous 15 years, Mr. Mustapha developed a serious psychiatric illness.

Mr. Mustapha sued Culligan, the supplier and manufacturer of the water bottle, for compensation for his psychiatric injuries, which were a major depressive disorder with associated phobia and anxiety.

The Trial Decision

The Superior Court of Ontario awarded Mr. Mustapha damages of more than \$350,000.00 plus interest and costs. With respect to liability, the trial judge held that it was reasonably foreseeable to the manufacturer that if it supplied a water bottle with dead flies floating around in it, Mr. Mustapha and other patients like him would suffer ‘some degree’ of nervous shock.

In coming to that conclusion, the trial judge relied upon a presumption of negligence arising if an injurious substance is found in a product. He held that in this case, the presumption was not rebutted.

The Court of Appeal

The Ontario Court of Appeal allowed the appeal and set aside the trial judgment. The Court of Appeal found that the trial judge erred in failing to take into account the objective component of the test for reasonable foreseeability.

The Supreme Court of Canada Decision

The Supreme Court dismissed Mr. Mustapha’s appeal. It held that the damages he suffered were too remote to allow recovery. In dismissing the appeal, the court relied on different reasoning from the Court of Appeal with respect to the required elements the plaintiff needs to prove in a tort claim. As identified by the Supreme Court, these elements are:

1. Culligan owed the plaintiff a duty of care;
2. Culligan’s behaviour breached this requisite standard of care;
3. Mr. Mustapha sustained damages; and
4. The damages were caused in fact and in law by the defendant’s breach of the applicable duty of care.



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The Supreme Court found, Mr. Mustapha cleared the first three hurdles, but not the fourth.

The Court held Culligan owed a duty of care to Mr. Mustapha and did not meet the applicable standard of care due to him. It found that a supplier of drinking water must ensure that the water it supplies is not contaminated by foreign elements.

With respect to the third criteria, the Supreme Court affirmed that for an injury to be compensable at law, it must be serious, prolonged and rise above the ordinary annoyances, anxieties and fears the people in society typically accept. Minor upsets do not amount to injury and do not give rise to damages. The court accepted that Mr. Mustapha developed a major depressive disorder and associated phobias and anxiety which it described as constituting compensable personal injury at law.

The Court held that Culligan's breach of standard of care caused injury in fact but not in law. In other words, the damage suffered by Mr. Mustapha is too remote to give rise to compensation. The Supreme Court held that it's not reasonably foreseeable that a person of "ordinary fortitude and robustness" will suffer injury by seeing dead flies in a water bottle. The Court stated:

"To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance."

The damages suffered by Mr. Mustapha due to Culligan's breach of standard of care were found too remote to warrant recovery. The court adopted the reasoning of the House of Lords in *White v. Chief Constable of South Yorkshire Police*, 1988 W.L.R. 1509 (H.L.) "the law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals".

It is important to note that the "reasonable foreseeability test" must not be confused with the "thin-skull" doctrine, which dictates that a defendant must take the victim as (s)he finds him. The reasonable foreseeability test is the first step to determine whether liability exists for the type of injury suffered. Once liability is established, then the "thin-skull" doctrine can be applied in cases where, had it not been for the plaintiff's "thin-skull" condition, the damages would not have been so great.

In this case, the Supreme Court restated the objective nature of the causation in law test, which will have significant effect in cases of psychological harm. In order to prove causation, the plaintiff must now prove that the prejudice complained of is foreseeable in a person of reasonable fortitude and robustness. Otherwise, the plaintiff should not succeed.

Conclusion

Even though Mr. Mustapha had a contract with the supplier and manufacturer Culligan, he sued them in both contract and tort, which is not permitted in Quebec but is permitted in Ontario and other common law jurisdictions. The Supreme Court of Canada's analysis was based completely on tort law principles.

Is this Supreme Court decision, founded on common law principles, applicable in Quebec? In the facts of this case, Quebec law would have required Mr. Mustapha to sue in contract (art. 1730 C.c.Q.). In that Quebec's contract law requires a plaintiff to prove that the damages claimed are foreseeable (art. 1613 CCQ), it is likely the result would have been the same if this case had arisen in Quebec.

On the other hand, if the facts were different and Mr. Mustapha could not rely on a contract, he would likely have sued Culligan in civil responsibility due to a safety defect (art. 1469 CCQ). Québec law does not require that a plaintiff suing in civil responsibility prove that his damages were foreseeable but only that they were the direct and immediate result of the defendant's fault. Therefore, the effect of this decision in Québec is open to doubt when the parties are not in a contractual relationship.

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