DATE: 20061215
DOCKET: C43429

COURT OF APPEAL FOR ONTARIO

CRONK, BLAIR JJ. A. and THEN J. (*ad hoc)*

B E T W E E N :	)	
	)	
WADDAH MUSTAPHA (AKA MARTIN MUSTAPHA) and LYNN MUSTAPHA	)	**Hillel David and Lisa La Horey for the appellant**
	)	
	)	
Plaintiff (Respondent)	)	
	)	
- and -	)	
	)	
CULLIGAN OF CANADA LTD.	)	**Paul J. Pape for the respondent**
	)	
Defendant (Appellant)	)	
	)	
	)	**Heard: June 28, 2006**

On appeal from the judgment of Justice John H. Brockenshire of the Superior Court of Justice, dated April 7, 2005, with reasons reported at (2005), 32 C.C.L.T. (3d) 123.

R.A. BLAIR J.A.:

OVERVIEW

[1] The Mustaphas maintain a spotless home. Cleanliness and hygiene are matters of utmost importance to them. On November 21, 2001, an incident occurred that offended their sense of sanctity in the purity of their home, and shattered Mr. Mustapha's life. In the course of replacing an empty bottle of Culligan water on the dispenser provided by Culligan, he and his wife saw a dead fly, and part of another dead fly, in the fresh, unopened, replacement bottle.

[2] Neither Mr. Mustapha nor any member of his family drank from the bottle. He became obsessed, however, with thoughts about the dead fly in the water and about the

potential implications for his family's health of their having possibly been drinking unpurified water supplied in the past.

[3] The trial judge accepted the medical evidence that Mr. Mustapha suffers from a major depressive disorder, with associated phobia and anxiety – all triggered by the fly-in-the-bottle incident. In the result, Mr. Mustapha recovered judgment at trial in the total amount of $341,775, plus pre-judgment interest, for psychiatric injuries suffered because of the incident.

[4] Culligan of Canada Ltd. appeals the finding of liability against it and, in the alternative, seeks to reduce the amount of damages awarded.

[5] For the reasons that follow, I would allow the appeal and set aside the judgment below.

FACTS

[6] Mr. Mustapha emigrated from Lebanon to Canada in 1976 at the age of sixteen. After schooling and training as a hair stylist, he opened a business as Martin's Coiffure in 1986. By all accounts the business did well, expanding ultimately to two outlets – one in the Radisson Hotel in Windsor, and a second at Casino Windsor. He married Mrs. Mustapha in 1984. They have two daughters, Amanda and Martina, aged seven and three at the time of trial. Mrs. Mustapha was seven-months pregnant with Martina when the fly-in-the-bottle incident occurred.

[7] The Mustaphas had been using bottled Culligan water for personal consumption in their home since a Culligan representative persuaded Mr. Mustapha to adopt its use at his hair salon shortly after it opened in 1986. Based on Culligan's representations about the purity and healthy quality of Culligan water, including how it would benefit pregnant women and children, and how much better it was for someone than city water, Mr. Mustapha installed Culligan dispensers both in his salon and at home. He and his family used nothing but bottled Culligan water for consumption thereafter. Culligan regularly delivered jugs of water to their home and picked up the empty jugs.

[8] On November 21, 2001, Mr. Mustapha was replacing the bottle in the home dispenser at his wife's request. They were both present. As she always did, Mrs. Mustapha washed the neck of the new bottle to ensure there were no germs on the outside of it before the bottle was placed on the dispenser. As she was doing so, Mr. Mustapha observed something dark in the bottle. On closer examination, they both realized that what they were looking at was a dead fly. Mrs. Mustapha vomited immediately and afterwards held her stomach and complained of cramps and pain. Although Mr. Mustapha felt nauseous, he did not vomit at the time (he did so later). He also felt abdominal pain.

[9] Both Mr. and Mrs. Mustapha experienced ill effects as a result of this incident. The trial judge dismissed Mrs. Mustapha's claim because he was not satisfied that her reaction rose to the level of nervous shock or psychiatric illness sufficient to found a claim in negligence. He found, however, that Mr. Mustapha – unlike his wife – became afflicted with a "recognizable psychological injury" as a result of the incident.

[10] The evidence established that Mr. Mustapha could not get the fly in the bottle out of his mind in the aftermath of the incident. He became anxious over the possible effects on his family of drinking water that he no longer trusted to have been pure. Indeed, he became obsessed, believing that his health and that of his family had been compromised and that his trust in Culligan water had been betrayed.

[11] The trial judge succinctly summarized the effects of the incident on Mr. Mustapha at paras. 8 and 194 of his reasons:

> He pictures flies walking on animal feces or rotten food and then being in his supposedly pure water. The worst thought was that his wife would carefully sterilize a bottle, for the health and safety of his baby daughter but then would put into that bottle, formula made with Culligan water.
>
> …
>
> Mr. Mustapha's self description is that he could not get the fly in the bottle out of his mind, he had nightmares, he was only sleeping four hours or so a night, he has been unable to drink water since the incident, he has lost his sense of humour and instead become argumentative and edgy, he has been constipated, is bothered by revolting mental images of flies on feces etc., can no longer take long and enjoyable showers and instead, after lengthy treatment, can only take perfunctory showers with his head down so the water does not strike his face. It took lengthy treatment before he could drink coffee made with water. He has to take a variety of medications which he says leave him feeling that he is not in full control and draggy. He can't get up and get off to work in the mornings as he always used to. He has lost clients because of the changes in his personality and mood and also because of the reduction in his previous skills as a hairstylist. He has lost interest in, and ability to perform sexually. He had initial complaints of nausea and present complaints of constant, unexplained abdominal pain or discomfort.

[12] The trial judge accepted Mr. Mustapha's evidence. In addition, the expert medical testimony amply supports his finding that Mr. Mustapha developed a psychiatric/psychological illness – often referred to in legal parlance as "nervous shock"[1] – sufficient to support a claim in negligence, namely a major depressive disorder, with associated phobia and anxiety. Culligan does not contest the finding that the fly-in-the-bottle incident was a contributing cause of Mr. Mustapha's resulting illness.

[13] The trial judge also concluded that the psychiatric effect of the fly-in-the-bottle incident was due to Mr. Mustapha's particular sensibilities to such an event. Acknowledging that Mr. Mustapha's reaction was "objectively bizarre", the trial judge found that his background in the Middle East, "where the devotion to and concern for the family is at a higher level than is found in North America," combined with "the higher level of cleanliness and avoidance of insects practised by this family than is usual", predisposed the respondent to react as he did. At para. 227 of his reasons he said:

> Here, the resulting problems for Mr. Mustapha were unexpectedly severe, but in my view that was *because of his previous history and the particular circumstances of this case*. Because of cultural factors, he had an unusually high concern over the health and well being of his family. His wife maintained an unusually clean home, and was concerned about their health and the health of their children. He and his wife had planned a pregnancy, even though he knew their previous child was born prematurely, and that Mrs. Mustapha had reached an age where there was some concern over this pregnancy. In fact, the doctor had warned of high risk shortly before this incident. *All of these factors contributed to his obsessive thinking after seeing the fly, which progressed to the state diagnosed by his various experts*. [Emphasis added.]

[14] The trial judge made no reference to any evidence that Culligan was aware, or should have been aware, of any of these particular proclivities on the part of Mr. Mustapha.

THE POSITIONS OF THE PARTIES

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[1] The trial judge appears to use the terms "psychiatric illness" and "psychological illness" interchangeably. In *Vanek*, below, at paras. 62-68, this Court declined to reconsider the settled law in Ontario that recovery in cases of this nature cannot take place without the finding of a "recognized psychiatric illness". Counsel made no issue of this distinction in this case. I assume for purposes of deciding it, therefore, that Mr. Mustapha's illness, as found, is accepted as sufficient to justify recovery, whether characterized as "psychiatric" or "psychological" in nature. "Nervous shock" is the term most frequently employed in past jurisprudence to describe this type of illness. Recent authorities have recognized that the medical term "psychiatric illness" is more appropriate.

[15] On behalf of the appellant, Mr. David submits that, although the trial judge may have properly articulated the foreseeability test as set out in *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.), leave to appeal refused [2000] S.C.C.A. No. 50, he failed to apply it correctly because he did not take into account the objective requirement that the consequences of the tortfeasor's conduct must be reasonably foreseeable in a person of "reasonable fortitude and robustness". He argues that the trial judge never considered the objective question whether such a person would have sustained a recognizable psychiatric illness as a result of seeing a dead fly in a bottle of water from which no one had consumed anything. Mr. David also contends that the trial judge erred in basing his finding of liability on the foreseeable "possibility" – as opposed to a foreseeable "probability" – of damage, contrary to the established jurisprudence. Finally, he attacks the damages awarded by the trial judge as being inordinately high.

[16] In response, Mr. Pape argues that the objective component of the reasonable foreseeability test does not apply in the circumstances of this case because Mr. Mustapha is not a secondary victim or bystander. He submits that the English approach should apply and that foreseeability of nervous shock or psychiatric harm is not necessary where the plaintiff suffers those consequences directly from the conduct of the tortfeasor. In any event, he asserts that the trial judge correctly applied the *Vanek* test to the facts of the case, finding first that it was reasonably foreseeable that some degree of psychiatric harm would result and, secondly, that the psychiatric damage actually sustained resulted in a recognizable psychiatric illness. Mr. Pape says that the appellant's argument based on "possibility" versus "probability" is untenable and conflates probability of risk with magnitude of risk. Finally, he points out that Mr. Mustapha's claim is made in contract as well as in tort, and that damages for mental distress and nervous shock were reasonably foreseeable consequences – within the contemplation of the parties at the time of the contract – of the delivery of contaminated water to the Mustaphas. He supports the damages awarded by the trial judge.

ANALYSIS AND LAW

[17] The trial judge's conclusions with respect to liability and damages were summarized in para. 240, the penultimate paragraph of his reasons, as follows:

> For all of the foregoing reasons, I dismiss the claim of Mrs. Mustapha. I find that Mr. Mustapha has suffered a recognizable psychological injury as a result of seeing the fly in the Culligan bottle, that the bottle was contaminated during the bottling process, and before sealing at the company's premises, that it continued to be sealed until and after the viewing of the fly by Mr. and Mrs. Mustapha, that the contamination of Culligan water bottles by flies was known to

> be possible, that the occurrence of this type of contamination was a breach of a duty of care imposed by statute and the common law on the producers of products like drinking water, *that the possibility of damage, including psychological damage occurring as a result of such contamination was foreseeable in all of the circumstances, and that accordingly Mr. Mustapha was entitled to damages*, which damages are assessed as general damages of $80,000, past and future special damages of $24,174.58, and past and future economic damages of $237,600. The claim for aggravated damages is denied. [Emphasis added.]

A. Liability in Tort

[18] On the findings made by the trial judge, it is apparent that Mr. Mustapha suffered significant and lingering psychiatric injury as a result of the fly-in-the-bottle incident. Nothing I say in these reasons is intended to minimize or belittle the difficulties he has experienced.

[19] The trial judge also found, however, that "[t]he reaction of Mr. Mustapha to seeing a dead fly, and part of another, in a bottle of Culligan water was certainly, *and objectively* bizarre." [Emphasis added.] He concluded that this reaction, and the psychiatric injuries the appellant sustained, were a function of Mr. Mustapha's specific cultural background and personal sensibilities, and the particular circumstances of this case.

[20] The issue of tort law raised on this appeal is whether a defendant may be liable for damages for psychiatric harm where the harm, by any objective measurement, consists of an exaggerated reaction by an obsessive person of particular sensibilities to what, in reality, is a relatively minor or trivial incident – the sight of a dead fly in a bottle of consumer water. In my view, the answer to this question is no.

The Evolution of Liability for Psychiatric Injury

[21] The common law with respect to liability in tort for nervous shock or psychiatric harm has evolved over the past century. Initially, psychiatric injury was considered too remote, and therefore noncompensable, unless accompanied by physical injury or impact inflicted on the plaintiff: see *Victorian Railways Commissioners v. Coultas* (1888), 13 App. Cas. 222 (P.C.); *Toronto Railway Co. v. Toms* (1911), 44 S.C.R. 268; Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham: Butterworths, 2001). In the breakthrough decision of *Dulieu v. White & Sons*, [1901] 2 K.B. 669 (K.B.), damages for nervous shock were awarded for psychiatric injury arising out of an immediate fear of personal injury to the plaintiff, despite the absence of any physical injury or impact on the

plaintiff. Subsequently, the law has developed to permit recovery for psychiatric injury caused out of fear for the safety of someone else – usually a spouse, child or a person with a close relationship to the plaintiff – resulting from witnessing an accident or its immediate aftermath: see *McLoughlin v. O'Brian*, [1983] 1 A.C. 410 (H.L.); *Duwyn v. Kaprielian* (1978), 22 O.R. (2d) 736 (C.A.); *Bechard v. Haliburton Estate* (1991), 5 O.R. (3d) 512 (C.A.); *Nespolon v. Alford* (1998), 40 O.R. (3d) 355 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 452.

[22] In the United Kingdom, at least, the common law has divided the types of cases in which damages may be recovered for nervous shock or psychiatric injury into two broad categories: "those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others": *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310 at 407 (H.L.), *per* Lord Oliver. The former type of case is referred to as a "primary victim" case, whereas the latter is known as a "secondary victim" or "bystander" case.

[23] This distinction was crystallized in *Page v. Smith*, [1996] A.C. 155 (H.L.), and is important for the different test of foreseeability that applies, depending upon the category in which the plaintiff's case is found to fall. In *Page*, the House of Lords held that in primary victim cases a plaintiff seeking damages for psychiatric harm need only establish reasonable foreseeability of *physical* injury in order to recover; reasonably foreseeable psychiatric injury of some form is not necessary in such situations, even where there has been no actual physical harm. In secondary victim or bystander cases, on the other hand, a plaintiff seeking damages for psychiatric harm must show that some form of psychiatric illness in a person of normal fortitude was reasonably foreseeable before being entitled to recover.

[24] The distinction between primary and secondary victim cases – and the different tests for liability for psychiatric injury flowing from it – has not yet been adopted in Canada. Whether it should be is an issue on this appeal, because Mr. Pape submits on behalf of Mr. Mustapha that he is not a bystander and, therefore, that the requirement of foreseeability of psychiatric harm has no relevance for the disposition of this case. I shall return to the primary victim/secondary victim dichotomy after completing this brief overview of the jurisprudence respecting liability for psychiatric injury.

[25] There has been considerable debate in the authorities, and amongst academics, about whether the basis for liability for psychiatric harm is found in the notion of reasonable foreseeability by itself, or whether – for policy reasons – foreseeability alone is insufficient and must be accompanied by certain control mechanisms. See for example, the conflicting opinions in *McLoughlin*, *supra* (Lord Bridge and Lord Scarman arguing for the principled position of reasonable foreseeability alone; Lord Wilberforce

and Lord Edmund-Davies holding that there is a need for public policy limitations on liability in addition to the reasonable foreseeability requirement; Lord Russell favouring the latter position but finding it was unnecessary to decide in the circumstances of the case). See also the discussions in Louise Bélanger-Hardy, "Nervous Shock, Nervous Courts: the *Anns/Kamloops* Test to the Rescue?" (1999), 37 Alta. L. Rev. 553, and in Justice Kenneth C. Mackenzie, "'Oh, What a Tangled Web We Weave': Liability in Negligence for Nervous Shock" (2002), 17 Sup. Ct. L. Rev. (2d) 125. The progression of the law respecting damages for psychiatric harm, including the evolution of the foregoing debate, was thoroughly canvassed by McEachern C.J.B.C. in *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205 (B.C.C.A.), leave to appeal refused [1999] S.C.C.A. No. 608.

[26] In the United Kingdom the debate on this question has been settled by the decision of the House of Lords in *White v. Chief Constable of South Yorkshire*, [1999] 2 A.C. 455 (H.L.), following on its earlier ruling in *Alcock*, *supra*.[2] Reasonable foreseeability plus policy carried the day. *White* confirmed that in addition to reasonable foreseeability of psychiatric injury in a person of normal fortitude, it was necessary for a plaintiff seeking damages for psychiatric illness to establish a relationship of proximity between the plaintiff and defendant. The House of Lords acknowledged that the requirement of proximity was a "control mechanism" designed to limit the ambit of the remedy in such cases. Where the plaintiff was personally involved in the incident – a primary victim case – the majority said, proximity is easily demonstrated. Where psychiatric injury is caused out of fear for the safety of someone else, however – a "bystander" case – foreseeability of injury by shock is insufficient. Rather, the law in the United Kingdom requires the following proximity indicators – factors intended to control the spectre of indeterminate liability in tort – be satisfied: (i) close ties of love and affection must exist between the plaintiff and the victim (called "relational proximity"); (ii) the plaintiff must have been present at the accident or its immediate aftermath (called "locational proximity"); and (iii) the psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath, and not after hearing about it from someone else (called "temporal proximity").[3]

The Canadian and Ontario Experience

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[2] The leading English authorities of *White*, above, and *Alcock*, above, are companion cases arising out of a disaster that occurred at the Hillsborough stadium in England after spectators were permitted to enter an already crowded soccer stadium through negligently opened gates. About ninety people were crushed to death and several hundred were injured. The plaintiffs in *Alcock* were relatives of victims, who were either at the stadium or had witnessed the tragedy on live television and suffered post-traumatic stress syndrome as a result. Their claims foundered on one or another of the proximity tests later confirmed in *White*. The plaintiffs in *White* were police officers who had been at the scene and also suffered post traumatic stress as a result. They argued that their situations were different from those of the *Alcock* plaintiffs because they were employees of the Chief Constable and because they were rescuers. Their claims also failed.

[3] *White*, above, at p. 502, *per* Lord Hoffman.

[27] Until *Alcock, Page,* and *White,* Canadian courts generally had followed the English evolution in terms of granting relief for psychiatric injury in negligence. Professor Bélanger-Hardy, *supra*, at pp. 559-560, suggests that the Canadian authorities generally fall into three categories: (a) those that limit their inquiry to reasonable foreseeability, tending "to shroud social policy considerations behind the veil of foreseeability": see *Macartney v. Islic* (1996), 34 C.C.L.I. (2d) 119 (Ont. Ct. J. (Gen. Div.)), varied (1996), 29 O.R. (3d) 720 (Ct. J. (Gen. Div.)), varied (2000), 46 O.R. (3d) 669 (C.A.); *Ashley Estate v. Goodman*, [1994] O.J. No. 1672 (Ct. J. (Gen. Div.)); (b) those that refer to the debate, without indicating whether they prefer the reasonable foreseeability *simpliciter* approach or the reasonable foreseeability plus policy control mechanisms approach: see *Haliburton Estate, supra*; *Szeliga Estate v. Vanderheide*, [1992] O.J. No. 2856 (Ct. J. (Gen. Div.)); and (c) those that tend to emphasize the control mechanism of proximity in some fashion or another: see *Beecham v. Hughes* (1988), 52 D.L.R. (4th) 625 (B.C.C.A.); *Rhodes v. Canadian National Railway* (1990), 75 D.L.R. (4th) 248 (B.C.C.A.), leave to appeal refused [1991] S.C.R. xiii.

[28] No provincial appellate court in Canada has considered or approved the primary victim/secondary victim distinction established in *Page, supra*. Nor has the Supreme Court of Canada.[4] Canadian courts have not explicitly adopted the reasonable foreseeability plus proximity paradigm prescribed in *Alcock* and *White* either, although various decisions have alluded to the notion of resorting to policy considerations to place some boundaries on the foreseeability rule: see, for example, *Haliburton Estate*, *supra*; *Szeliga Estate, supra*. In *Devji, supra*, McEachern C.J.B.C. said that the control mechanism methodology of *White* was not part of the law of British Columbia, and noted that, in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, and subsequent cases, the Supreme Court of Canada has adopted the approach to liability in negligence enunciated in *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.).

[29] In Ontario – within the context of bystander situations, but without overtly referring to the dichotomy between primary victim and bystander cases – this Court has stated clearly that "reasonable foresight of nervous shock to the plaintiff is the touchstone of liability" for damages for nervous shock: *Haliburton Estate, supra*, at p. 518. See also *Duwyn, supra*, at pp. 754-755; *Nespolon, supra*, at pp. 364-366; and *Vanek, supra.*

[30] In *Vanek, supra*, at para. 25, MacPherson J.A. accepted this proposition and summarized the general law respecting liability in cases of psychiatric harm in the following fashion:

> In Canadian law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two

[4] Trial courts in British Columbia and Nova Scotia have held, or implied, that the *Page v. Smith* requirements are consistent with the law in those Provinces. See *Falbo v. Coutis*, 2000 BCSC 434; *G.A.D. v. British Columbia Children's Hospital*, 2003 BCSC 443; *Joudrey v. Swissair Transport Co.* (2004), 225 N.S.R. (2d) 156 (N.S.S.C.).

> propositions – first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness: see Linden, *Canadian Tort Law*, *supra*, at pp. 389-92.

[31] Foreseeable consequences, however, as noted in *Vanek* at para. 45, are consequences that the "event and its aftermath might engender *in the reasonable person*." [Emphasis in original.] At para. 58, MacPherson J.A. adopted the following passage from the speech of Lord Griffiths in *White*, *supra*, at pp. 462-463, as "a particularly succinct and useful statement on the foreseeability issue in this type of case":

> There is a further requirement in the bystander case and that is that psychiatric injury was reasonably foreseeable as a likely consequence of exposure to the trauma of the accident or its immediate aftermath. *The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals*. This is not to be confused with the "eggshell skull" situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected. It is a threshold test of breach of duty; before a defendant will be held in breach of duty to a bystander he must have exposed them to a situation in which it is reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury. [Emphasis added.]

[32] *Vanek* is close to the case at bar in a factual sense, although it is clearly a "bystander" case. Mr. and Mrs. Vanek's eleven-year old child drank a small amount from a juice bottle containing toxic fluids at school. She noticed the drink had a foul taste and regurgitated some of it, although she did not vomit or lose consciousness. The parents were called to the school, and took the child to the hospital. At the hospital, the child was examined and the parents were assured that she had not been poisoned and would suffer no long-term effects. The parents subsequently received the same assurances from different government and health authorities. The child showed no further symptoms from the incident and returned to her normal life. The parents, however, became obsessed with the possibility that the child might suffer harm in the future. They sued the distributor of the drink and its manufacturer. At trial, they recovered moderate damages for anxiety and distress.

[33] The judgment was reversed on appeal. Writing for the Court, MacPherson J.A. concluded that the parents' reaction to what was, in effect, a minor mishap of the type

that frequently occurs in schools and in family life, was not that of an average concerned parent. He further found that the defendants could not have reasonably foreseen the parents' highly unusual reaction and the psychiatric damages engendered by it. After noting the passage from the speech of Lord Griffiths in *White*, cited above, and observing that the actual event witnessed by the Vaneks was neither "distressing in the extreme" (*McLoughlin, supra*) nor "horrifying or gruesome" (*Haliburton Estate, supra*) – the same may be said in the case at bar – MacPherson J.A. determined as follows at para. 60:

> In conclusion, the juice incident on June 16, 1993 was the type of incident that happens, in schools and in family life, every day. A minor mishap occurs.… Life goes on. Unfortunately, for the Vaneks normal life did not go on. They became obsessed with the incident. In doing so, they were not acting like the average concerned parent. They were displaying a "particular hypersensitivity" (*Duwyn v. Kaprielian*); they lacked the "reasonable fortitude and robustness" (*White v. Chief Constable of South Yorkshire* [*Police*]) that the law expects of all its citizens, including concerned parents.

[34] Why should the same principles not apply to the claim of Mr. Mustapha? Mr. Pape says: because Mr. Mustapha was not a bystander but a primary participant and this rendered reasonable foreseeability of psychiatric harm unnecessary. He submits that it was reasonably foreseeable that a purchaser or consumer of Culligan water would be injured in some fashion if Culligan distributed contaminated bottled water, and that this foreseeability is sufficient for the purpose of Mr. Mustapha's claim.

[35] I do not accept that argument.

"Primary Victims" vs. "Secondary Victims": Should the Distinction be Adopted in Ontario?

[36] For the reasons that follow, I would not adopt the distinction between primary victim and secondary victim or bystander cases, articulated in *Page, supra*, or the different tests for foreseeability emerging from that distinction, as part of the law of Ontario.

[37] The *Page v. Smith* dichotomy has been the subject of considerable criticism, both in the House of Lords and by academics: see for example, *White, supra*, *per* Lord Goff; Lewis N. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson, Canada 2003) at 432; Louise Bélanger-Hardy, *supra*; Justice Kenneth C. Mackenzie, *supra*.

[38] Essentially, the criticisms are threefold. First, removal of the requirement for foreseeability of the *type* of harm incurred, in relation to the primary victim cases, runs contrary to the fundamental principle of tort law as established in *The Wagon Mound No. 1*[5] and *The Wagon Mound No. 2*[6] (the particular type of injury must be foreseeable). In Lord Goff's view, in *White*, *supra*, at pp. 474-475, "Lord Lloyd [in *Page*] dethroned foreseeability of psychiatric injury from its central position as the unifying feature of this branch of the law." Secondly, the distinction between primary victims and secondary victims is an artificial one that camouflages the policy choices that have to be made and moreover, is problematic in application. The case at bar is a good example of this problem, as I shall explore in a moment. As Bélanger-Hardy, *supra*, at p. 564, notes,[7] the distinction "allows artificial criteria to displace the more natural question: should the defendant be liable to the plaintiff in all the circumstances?" Finally, the critics observe that the majority in *Page* have misunderstood the thinskull plaintiff principle, which relates only to quantum of damages once liability has already been established. As Lord Wright explained in *Bourhill v. Young*, [1943] A.C. 92 (H.L.) – a seminal nervous shock case – at 109-110:

> No doubt, it has long ago been stated and often restated that if the wrong is established the wrongdoer must take the victim as he finds him. That, however, is only true … on the condition that the wrong has been established or admitted. The question of liability is anterior to the question of the measure of the consequences which go with the liability.

[39] I find these criticisms persuasive. In particular, the view that the *Page v. Smith* distinction is artificial and not always easy to apply resonates in this case. Is Mr. Mustapha indeed a "primary victim", or is he a bystander or "secondary victim"? Is he both? Or neither? An argument can be made that he falls into any of these four categories.

[40] He was a "participant" in the event giving rise to the claim. He was present and observed the dead fly in the bottle, saw his wife's reaction to it, and experienced his own. Arguably, then, he is a primary victim. On the other hand, the "primary victim" rationale, as developed in the English authorities, is based upon the premise that the participant is "within the range of foreseeable *physical* injury": *Page*, *supra*, at p. 184, *per* Lord Lloyd [emphasis added]. Once that is established, it matters not whether the

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[5] *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound.)*, [1961] A.C. 388 (H.L.) [*The Wagon Mound No. 1*].

[6] *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty.*, [1967] 1 A.C. 617 (P.C.) [*The Wagon Mound No. 2*].

[7] Citing H. Teff, "Liability For Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" (1998) 57(1) Cambridge L.J. 91 at 113.

actual harm sustained is physical or psychiatric. Here, however, Mr. Mustapha was never within a range of foreseeable physical injury. Nobody drank anything from the bottle. It remained sealed. There can be no physical harm from merely *seeing* a dead fly in a bottle of water. The Law Lords in *Page* do not seem to have contemplated a situation where, as here, although the victim is a "participant" in the event giving rise to the claim, and consequently suffers direct psychiatric harm, there is no reasonable foreseeability of physical harm. On this argument, then, Mr. Mustapha cannot be said to be a "primary victim"

[41] Is he a "secondary victim"? The bystander cases are premised on a psychiatric reaction resulting from the plaintiff having seen a traumatic event causing injury to someone else (or having learned of the injury in the aftermath of the event). Here, Mr. Mustapha's reaction was based primarily on his concern about the impact that consuming contaminated water may have had on his family's welfare – on its face, a bystander type of situation. Yet, no other member of his family sustained physical or psychiatric injuries as a result of the incident. Mr. Mustapha simply became obsessed with the possibility that they might have sustained such injuries in the past or might in the future. Is that sufficient to bring him within the "bystander" category?

[42] Based on the same analysis, is he neither a primary nor a secondary victim, then? Or is he both?

[43] Why should it matter in principle? I can see no convincing rationale for concluding that the test for foreseeability in a psychiatric harm case should depend upon the outcome of the exercise of determining whether the plaintiff is a primary or secondary victim. Instead, I prefer the reasoning of the dissenting opinions in *Page* rejecting the distinction between primary and secondary victims, and concluding that even a plaintiff who was involved in the incident must demonstrate reasonable foreseeability of psychiatric illness in order to recover in tort. Lord Jauncey said at p. 175:

> I reject this submission[8] for two reasons. In the first place in none of the judgments was it suggested that the need to prove foreseeability of nervous shock was other than a general requirement applicable to all cases where damages therefor were claimed…. In the second place foreseeability of injury is necessary to determine whether a duty is owed to the victim. Unless such injury can be foreseen the victim is not a neighbour within the celebrated dictum of Lord Atkin in *Donoghue v. Stevenson*….

[8] i.e., the submission that the bystander cases do not apply where the plaintiff is directly involved in the collision (as was the case in *Page*, above).

[44] Lord Jauncey also rebuffed the notion that, because a defendant must take the victim as the victim is found, there is no requirement in a primary victim case that the plaintiff be of normal fortitude. At p.178 he observed:

> I am satisfied that in determining whether a tortfeasor should have foreseen that either a participant or a bystander would suffer nervous shock as a result of his negligent act the proper test is to assume that the victim is of reasonable fortitude and susceptibility unless, of course, the tortfeasor has special knowledge of the victim's unusual condition.

[45] It seems to me that the primary victim/secondary victim distinction is another example of a mechanism constructed and deployed by the courts to put limits, for policy reasons, on the scope of recovery in psychiatric harm cases. This objective is accomplished in other ways in Canada.

[46] Although I would not apply the *Page v. Smith* dichotomy to the determination of liability for psychiatric harm, I nonetheless accept that the authorities support an approach to liability in such cases that involves a consideration of policy issues in addition to reasonable foreseeability alone. This is consistent with the two-part *Anns* test as adopted in *Kamloops, supra,* namely, (i) whether there is a sufficiently close relationship of proximity or neighbourhood between the parties, such that in the reasonable contemplation of the alleged wrongdoer, carelessness on his or her part may be likely to cause damage to the defendant; and, if so (ii) whether there are any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise. This test clearly imports both the notion of reasonable foreseeability and policy limitations on the scope of liability even where the harm was foreseeable.[9]

[47] Whether – and, if so, to what extent – the control mechanisms of relational, locational and temporal proximity, as outlined in *Alcock* and *White*, are integral to the *Anns* approach, as adopted in Canada, is not a question that needs to be decided on the facts of this case. Canadian courts have resorted to all of them, in some fashion, on occasion. It is clear that Mr. Mustapha satisfies those criteria in any event. The concerns driving his obsession about the dead fly in the bottle were centred on the possible impact the consumption of contaminated water had, or might have in the future, on his family

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[9]The *Anns* test was subsequently rejected by the House of Lords in *Murphy v. Brentwood DC,* [1990] 2 All E.R. 908, but the Supreme Court of Canada has adopted and applied it as a general approach to determining duty of care questions in negligence cases, including personal injury cases. See *Barratt v. The Corporation of the District of North Vancouver,* [1980] 2 S.C.R. 418; *Hall v. Hebert,* [1993] 2 S.C.R. 159; *Swinamer v. Nova Scotia (Attorney General),* [1994] 1 S.C.R. 445; *Brown v. British Columbia (Minister of Transportation and Highways),* [1994] 1 S.C.R. 420; *Galaske v. O'Donnell,* [1994] 1 S.C.R. 670; *Stewart v. Pettie,* [1995] 1 S.C.R. 131; *Lewis (Guardian ad litem of) v. British Columbia,* [1997] 3 S.C.R. 1145.

(relational proximity), and he was present at the event itself and witnessed the fly in the bottle (locational and temporal proximity).

[48] The policy consideration that applies in this case, however, is the following: what is the ambit of liability in psychiatric harm cases where the harm suffered (a) is significantly disproportionate to the relatively inconsequential nature of the incident in question, and (b) is a function of the particular sensibilities of the plaintiff rather than a function of the sensibilities that a person of normal fortitude would demonstrate? This concern is accommodated, in my view, by factoring the "person of normal fortitude and robustness" principle into the reasonable foreseeability equation, as this Court did in *Vanek*.

The Test in Ontario

[49] Reasonable foreseeability of harm is the hallmark of tort liability. In my opinion, the test for the existence of a duty of care – and, therefore, for liability – in cases of psychiatric harm is whether it is reasonably foreseeable that a person of normal fortitude or sensibility[10] is likely to suffer some type of psychiatric harm as a consequence of the defendant's careless conduct. That is what *reasonable* foreseeability means. This test, which is the foreseeability test enunciated in *Vanek*, applies regardless of the distinction between "primary victim" and "secondary victim" cases.

Application of the Test in this Case

[50] The trial judge was alert to the principle of Canadian tort law that "reasonable foresight of nervous shock to the plaintiff is the touchstone of liability": *Haliburton Estate*, *supra*, at p. 518. He was also aware of Lord Griffith's statement in *White*, at p. 463, to the effect that it must be "reasonably foreseeable that a person of reasonable robustness and fortitude would be likely to suffer psychiatric injury", and of the fact that this Court adopted that principle in *Vanek*. At paras. 226-227 of his reasons, he distinguished *White*, on the basis that "[h]ere, we are not dealing with South Yorkshire Police constables. We are dealing with an urban, and urbane, hair stylist", and concluded as follows:

> Moreover, we are dealing with a person with the sensitivities that, in my view, would make him what he was – a good and faithful customer of the Culligan company for some 15 years, buying and using their water both at his home and at his business. He was very concerned over the purity and healthfulness of the water that he and his family consumed,

[10] This is sometimes characterized as "the normal fortitude and robustness" that the law requires of its citizens: *Vanek*, above; *White*, above. Or as "the average sensitive" person: *Haliburton Estate*, above. Or as the person "of ordinary phlegm": *Page*, above, *per* Lord Lloyd; *McLoughlin*, above, *per* Lord Russell. Or, as "a normal standard of susceptibility": *Bourhill*, above, *per* Lord Wright.

> and was convinced, by the Culligan representatives, that their water was better, purer and safer than the water supplied by the city public utility system. Given that, it in my view was clearly foreseeable to Culligan that if it supplied a water bottle with dead flies floating around in it, Mr. Mustapha, and other customers like him, would suffer "some degree" of nervous shock. In my view, in the particular circumstances of this case, the foreseeability test has been met.
>
> Here, the resulting problems for Mr. Mustapha were unexpectedly severe, but in my view that was because of his previous history and the particular circumstances of this case. Because of cultural factors, he had an unusually high concern over the health and well being of his family. His wife maintained an unusually clean home, and was concerned about their health and the health of their children. He and his wife had planned a pregnancy, even though he knew their previous child was born prematurely, and that Mrs. Mustapha had reached an age where there was some concern over this pregnancy. In fact, the doctor had warned of high risk shortly before this incident. All of these factors contributed to his obsessive thinking after seeing the fly, which progressed to the state diagnosed by his various experts. Although his wife's subsequent problems, and eventual premature delivery were no doubt very stressful, and contributed to his eventual condition, there is no indication that those stresses, absent the fly in the bottle, would have developed into the psychological illness from which he presently suffers.

[51] These paragraphs represent the nub of the trial judge's reasoning respecting foreseeability on the facts of the case. It is apparent that he was focused primarily, if not exclusively, on the peculiar impact seeing the dead fly in the bottle had on Mr. Mustapha arising from "his previous history", his "unusually high concern over the health and well being of his family", the "unusually clean home" maintained by Mrs. Mustapha, and his concerns over the risks of her pregnancy. The trial judge's comment that it was foreseeable to Culligan "that if it supplied a water bottle with dead flies floating around in it, Mr. Mustapha, and other customers like him, would suffer 'some degree' of nervous shock", must be viewed in that light. The reference to "other customers *like him*" turns the analysis right back to the subjective specific sensibilities of Mr. Mustapha.

[52] All of the medical evidence characterized Mr. Mustapha's reaction in individualistic terms and, in varying ways, as unique and strange. Dr. Chung said, "[H]e had never seen anything quite like the symptomatology described by Mr. Mustapha, and he felt it was highly unusual." Dr. Rai testified that the appellant's fear was "a rational fear *for that particular individual*" [emphasis added]. Dr. Litman said that Mr. Mustapha displayed a "very individual response, depending on the vulnerabilities of the particular individual." The experts were not asked to comment on the objective component of the *Vanek* test, namely, whether a person of normal fortitude would be likely to suffer psychiatric injury from having seen a dead fly in a bottle of water from which no water had been consumed.

[53] Moreover, the trial judge made no finding – nor was there evidence to support one – that Culligan was made aware of, or ought to have known, anything about the particular sensibilities of Mr. Mustapha and his family. The appellant's reaction to the fly-in-the-bottle incident was "abnormal", a product of his "particular hypersensitivity" (*Duwyn*); it was not the response of the "average sensitive" person (*Haliburton Estate*); nor was it the response of a person of "reasonable fortitude and robustness" (*White* and *Vanek*). These objective elements are essential to the psychiatric harm analysis. Respectfully, the trial judge erred in failing to take into account the objective component of the test for reasonable foreseeability in such circumstances, focusing entirely, instead, on the individual characteristics and vulnerabilities of the appellant.

[54] I am satisfied, as well, that the trial judge erred in considering, as illustrated in para. 240 of his reasons, whether there was a foreseeable "*possibility* of damage, including psychological damage" [Emphasis added] arising as a result of seeing the dead fly in the bottle of water, rather than considering whether there was a foreseeable "probability" of such damage. As Abella J.A. observed, in *Nespolon*, *supra*, at pp. 363-364:

> A duty of care will only be found where the resultant harm is reasonably foreseeable. In order to determine whether the harm was or ought to have been foreseeable, one examines the proximity of the relationship between the parties and the *probability* of the harm actually occurring [citations omitted].
>
> In his text *The Law of Torts in Canada*, Professor G.H.L. Fridman confirms this nexus as follows: "Foreseeability of harm is a necessary ingredient of a relationship that is apt to give rise to a duty of care" (vol. 1 (Toronto: Carswell, 1989) at p. 235). Foreseeability, in other words, arises where the harm resulting from the conduct of the defendant was, or ought to have been contemplated by the alleged wrongdoer as a *probable consequence* of his or her actions (at p. 238).

> As characterized by Fridman, "[o]nly if what happened is considered to be a natural and *probable* result of what the defendant did or omitted to do will the defendant be regarded as having behaved so unreasonably as to be guilty of negligence, i.e. of conduct falling short of the standards of the ordinary reasonable man" [citations omitted]…. [Emphasis added.]

[55] I would therefore give effect to this ground of appeal.

B. Contract Liability

[56] Mr. Mustapha also seeks to recover in contract. In oral argument Mr. Pape stressed that this was a contract case.

[57] I am reluctant to decide this appeal on the basis of breach of contract. Although damages in contract and/or tort are claimed in the statement of claim, and although Culligan is alleged to have been negligent and to have breached its contract in certain particulars, the case simply was not presented to the trial judge as a contract case. The contract, itself, is nowhere to be found in the record. Its terms are not pleaded, and we do not know what they are. We do not know whether the contract contained any written representations about the quality of the product, any exclusion of oral representations, or any particular terms with respect to the expectations of the parties concerning the use and consumption of the bottled water at Mr. Mustapha's home or business premises. Moreover, Mr. Mustapha's counsel at trial did not argue the case on the basis of contract; he focussed on negligence and the foreseeability of psychiatric harm. Defence counsel responded in the same fashion.

[58] In any event, on this record I am not persuaded that Mr. Mustapha is entitled to succeed in contract.

[59] Following oral argument of the appeal, the Supreme Court of Canada released its decision in *Fidler v. Sun Life Assurance Co. of Canada* (2006), 39 C.C.L.I. (4th) 1 (S.C.C.), dealing with the issue of damages for mental distress in cases of breach of contract. The Court overruled a longstanding tradition in contract law prohibiting such damages, with certain exceptions (contracts promising pleasure, relaxation or peace of mind), and held that damages for mental distress – as with other types of contractual damages – are to be determined by the basic principles enunciated long ago in *Hadley v. Baxendale* (1854), 156 E.R. 145 (Ex. Ct.).

[60] *Fidler* involved a claim for recovery on a disability insurance contract, which the insurer had refused to pay in spite of evidence in its possession that the plaintiff was not capable of returning to work. We invited counsel to make written submissions respecting

the implications of the decision for the case at bar, and they did so. We have considered those submissions.

[61] In *Fidler*, the Supreme Court said, at para. 54:

> It follows that there is only one rule by which compensatory damages *for breach of contract* should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one…. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. [Emphasis in original.]

[62] In paras. 27 and 29, the Court outlined "the rule" in *Hadley v. Baxendale*, as articulated in that case:

> Damages for breach of contract should, as far as money can do it, place the plaintiff in the same position as if the contract had been performed. However, at least since the 1854 decision of the Court of Exchequer Chamber in *Hadley v. Baxendale* [citations omitted], it has been the law that these damages must be "such as may fairly and reasonably be considered either arising naturally … from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties"….
>
> In *Hadley v. Baxendale*, the court explained the principle of reasonable expectation as follows:
>
> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, <u>from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, *as the probable result of the breach* of it</u>. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract,

> which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaching the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would *arise generally, and in the great multitude of cases* not affected by any special circumstances, from such a breach of contract. [Underlining in original. Italics added.]

[63] These principles are dispositive of the contractual aspects of this appeal, in my view. It cannot be said that it was in the reasonable contemplation of Culligan and Mr. Mustapha, at the time the contract was entered into, that psychiatric harm flowing from *seeing* a dead fly in a bottle of delivered water (with no consumption of the water) would be "the *probable* result" of Culligan's breach.

[64] This is not a "special circumstances" case because, as noted above, there is no evidence that Culligan was ever made aware of Mr. Mustapha's particular hypersensitivies or that it ought to have been aware of them. Psychiatric harm is not the type of harm – in the words of *Hadley, supra* at p. 151, – that "would arise generally, and in the great multitude of cases" from the delivery of a bottle of water with a dead fly in it and the observation by the plaintiff of that state of affairs.

[65] Mr. Mustapha relies on the fact that Culligan's agents represented to him that its water was pure and healthy, a benefit to pregnant women, and much better than city water. Assuming such an oral representation to be actionable,[11] I do not see how it would assist the appellant here. It simply does not follow from such a representation, and any reliance upon it, without more, that the parties would reasonably contemplate that Mr. Mustapha would suffer psychiatric harm if Culligan delivered an unopened bottle of water with a dead fly in it. There is nothing more, on the facts here. As MacPherson J.A. said in *Vanek, supra* at para. 60: "Life goes on."

[66] Both tort law and contract law import an objective element into the notion of reasonable foreseeability. Foreseeability alone is not enough; only "reasonable" foreseeability will suffice. Tort law requires that the psychiatric harm suffered be reasonably foreseeable in a person of normal fortitude and sensibilities. As noted by the

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[11] No such representation was pleaded, and we do not know whether the contract negatived such a representation. The case was not presented on the basis that it was a pre-contractual representation: see *Sodd Corporation Inc. v. Tessis* (1977), 17 O.R. (2d) 158 (C.A.).

Court in *Hadley*, *supra*, at p. 151, contract law requires – absent special circumstances communicated to the party breaching the contract – that the harm is the probable result of the breach and that it be the type of injury that "would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

[67] Here, on the case as presented to the trial judge, I am not able to say that the contract between Culligan and Mr. Mustapha was one in which damages for mental distress were in the reasonable contemplation of the parties at the time the contract was entered into, or thereafter.

[68] I therefore reject the contract argument.

C. Damages

[69] Given the disposition that I would make in this case, it is unnecessary to deal with the issues concerning damages raised on the appeal.

DISPOSITION

[70] Accordingly, the appeal is allowed, the judgment below is set aside, and in its place judgment is granted dismissing the plaintiff's action.

[71] The appellant is entitled to its costs of the appeal, fixed at $30,000.00, inclusive of fees, disbursements and GST. The costs of the trial are remitted to the trial judge to be fixed.

"R.A. Blair J.A."
"I agree E.A. Cronk J.A."
"I agree Edward Then J. (ad hoc)

RELEASED: December 15, 2006