RE-THINKING THE REQUIREMENT FOR A "RECOGNISABLE PSYCHIATRIC ILLNESS" IN THE LAW OF NEGLIGENCE

Mohammud Jaamae Hafeez-Baig* and Jordan English**

INTRODUCTION

In *Saadati v Moorhead*,[1] the Supreme Court of Canada redefined the limits of legally compensable mental harm in negligence by removing the requirement that a claimant establish that he or she has suffered a "recognisable psychiatric illness". The Court held that a finding of legally compensable mental harm need not rest, in whole or in part, on proof of a recognisable psychiatric illness, and that while expert evidence may be of assistance, it is not a legal requirement. The Court did not, however, go so far as to suggest that damages may be awarded for mere emotional or mental distress; a claimant must still show that that the disturbance is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" experienced by all members of society.[2] In this note we examine the decision and the arguments for abolishing the "recognisable psychiatric illness" requirement. We argue that one shortcoming of the decision in *Saadati* is that the Court did not put forward a workable test for delineating the degree of distress that may or may not be the subject of a claim, other than to rely on the trial judge's idiosyncratic perceptions of mental harm. The modest proposal we make is not to abandon the existing requirement in its entirety, but to clarify its interpretation and application so as to broaden the number of deserving claimants it captures.

BACKGROUND

The appellant, Mr Saadati, brought proceedings against the respondents in negligence after a tractor-truck he was driving was struck by the first respondent, Mr Moorhead. At trial, the respondents admitted liability for the accident but contended that the appellant had suffered no damage. The trial judge ultimately concluded that the appellant had not suffered any physical damage, but found that the appellant had suffered "psychological injuries, including personality change and cognitive difficulties".[3] This finding was not based upon any identified medical cause, but upon the testimony of friends and family. The trial judge awarded the appellant damages, assessed at $100,000.

In the British Columbia Court of Appeal, the respondents argued that the trial judge had erred in awarding damages for mental injury in circumstances where the appellant had not proven a "medically recognized psychiatric or psychological illness or condition".[4] The Court of Appeal agreed and allowed the appeal, setting aside the order of the trial judge.[5] The Court of Appeal also found that the trial judge had denied the respondents procedural fairness by deciding the case on a basis neither pleaded nor argued by the appellant, namely that the appellant had suffered a mental injury. The appellant appealed.

DECISION

In the Supreme Court the primary issue was "whether it is strictly *necessary*, in order to support a finding of legally compensable mental injury, for a claimant to adduce expert evidence or other proof of a recognized psychiatric illness".[6] The Court ultimately answered this question in the negative. Justice Brown (with whom McLachlin CJ, and Abella, Moldaver, Karakatsanis, Wagner, Gascon,

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1* LLB (Hons I) (University of Queensland), LLM candidate (University of Queensland), GDLP candidate (Queensland University of Technology).

** LLB (Hons I)/BCom (Accounting) (University of Queensland), GDLP Candidate (College of Law). We are indebted to Lauren Bourke and Samuel Hickey for their comments on an earlier draft of this note. The usual caveat applies.

1 2017 SCC 28 ('*Saadati*').

2 *Saadati* 2017 SCC 28 at [9].

3 *Saadati* 2017 SCC 28 at [5].

4 *Saadati* 2017 SCC 28 at [7].

5 2015 BCCA 393.

6 *Saadati* 2017 SCC 28 at [13].

Côté and Rowe JJ agreed) held that a finding of legally compensable injury need not rest, in whole or in part, on the claimant proving a recognisable psychiatric illness.

A preliminary issue concerned the Court of Appeal's conclusion that there had been a breach of the rules of procedural fairness. While acknowledging the fundamental rule of natural justice that each party is entitled to know the case it has to answer, Brown J explained that in claims for negligently caused mental injury it is "sufficient that the pleadings allege some form of such injury".[7] In his written and oral submissions at trial the appellant, without any objection from the respondents, had made various arguments regarding "psychological", "emotional" and "psychiatric" reactions to the accident.[8] In these circumstances, combined with the fact that the appellant had pleaded his heads of damage broadly, his Honour was satisfied that the respondents had been given ample notice, and therefore that there had not been a breach of procedural fairness.

Turning to the primary issue, his Honour commenced by explaining the common law's traditional hostility towards claims for negligently inflicted mental harm. The common law's scepticism of such harm originally manifested as an absolute bar to recovery for mental injury, absent physical injury.[9] While the bar was eventually lifted, that same suspicion survived in the form of a requirement that the claimant had a reasonable fear of injury to themselves or their family at the material time.[10] In time this limit too was removed, but English law continued to deploy liability-limiting devices to restrict the scope of compensable mental injury. In *McLoughlin v O'Brian*[11] Lord Wilberforce referred to three limiting factors: relational proximity, geographical proximity, and temporal proximity. Justice Brown also referred to the distinction drawn in *Alcock v Chief Constable of South Yorkshire Police*[12] between "primary" and "secondary" victims.[13] His Honour noted the criticisms of this distinction, namely that it was difficult to apply and lacked any foundation in principle, and quoted Lord Hoffman's acknowledgment in *White v Chief Constable of South Yorkshire Police*[14] that "in this area of law, the search for principle was called off in *Alcock*."

His Honour also surveyed the approach taken in other Commonwealth jurisdictions, noting that the primary/secondary victim distinction has been rejected in Australia,[15] not definitively considered in New Zealand,[16] and not adopted in Canada.[17] Indeed in *Mustapha v Culligan of Canada Ltd*,[18] the leading Canadian case on negligently-inflicted mental injury, recovery of damages was said only to depend on the claimant satisfying the general requirements of the cause of action: duty, breach, damage, and causation (both factual and legal).[19] In his Honour's view it followed from this that the elements of the cause of action of negligence provided "principled and sufficient barriers" against unmeritorious or trivial claims for mental injury.[20] The requirement for "something more" was not a requirement based on legal principle, but on legal policy, and in particular, "dubious perceptions of, and postures towards, psychiatry and mental illness in general".[21] In a powerful statement, his Honour said that "[w]hile tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them".[22]

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7 *Saadati* 2017 SCC 28 at [10].
8 *Saadati* 2017 SCC 28 at [11]-[12].
9 *Saadati* 2017 SCC 28 at [14].
10 *Saadati* 2017 SCC 28 at [15].
11 [1983] 1 AC 410.
12 [1992] 1 AC 310.
13 *Saadati* 2017 SCC 28 at [16].
14 [1999] 2 AC 455 at 511.
15 *Tame v New South Wales* (2002) 211 CLR 317 ('*Tame*').
16 Stephen Todd et al, *The Law of Torts in New Zealand* (Thomson Reuters, 5th ed, 2009) at 182-184.
17 *Saadati* 2017 SCC 28 at [19]. See also *Mustapha v Culligan of Canada Ltd* [2008] 2 SCR 114 at [3].
18 [2008] 2 SCR 114 ('*Mustapha*').
19 *Saadati* 2017 SCC 28 at [19].
20 *Saadati* 2017 SCC 28 at [21].
21 *Saadati* 2017 SCC 28 at [21].
22 *Saadati* 2017 SCC 28 at [21].

As for the specific requirement that the claimant have suffered a "recognisable psychiatric illness", Brown J traced its origins to Lord Denning MR's speech in *Hinz v Berry*.[23] However, contrary to what had become the practice of Canadian trial and appellate courts,[24] his Honour did not consider it to be immediately obvious that "recognised" or "recognisable psychiatric illness" referred to mental injury recognisable by a psychiatrically trained expert witness, as opposed to an ordinary witness or the trier of fact.[25] Nonetheless, this is the position that has been taken in United Kingdom,[26] Australia,[27] and New Zealand.[28]

His Honour considered that there was good reason for the law of negligence to afford mental and physical injury identical treatment.[29] Requiring claimants who claim damages for mental injury to prove that their condition is a "recognisable psychiatric illness", while not imposing any such requirement on claimants who allege physical injury, would afford victims of mental injury less protection for "no principled reason".[30] On this basis, Brown J refused to endorse it. His Honour did make clear, however, that this did not mean that claimants could recover for "mere psychological *upset*".[31] Claimants would still be required, in accordance with the approach taken in *Mustapha*,[32] to show that that the disturbance is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" experienced by all members of society. His Honour also emphasised that expert evidence could still assist in determining whether or not mental injury had been shown, but that "it is not required as a matter of law".[33]

The trial judge in the present case had found that the accident caused the appellant to suffer "psychological injuries, including personality change and cognitive difficulties".[34] Those findings had not been challenged. Although no expert evidence had been adduced identifying symptoms consistent with a recognisable psychiatric illness, for the reasons above, it was unnecessary to do so. The Court therefore allowed the appeal, and restored the trial judge's award.

COMMENT

It is trite, in both the English and Australian law of negligence, that damages may not be recovered for mere grief, sorrow, anxiety or emotional distress,[35] but only for a "recognisable psychiatric illness". As Brown J noted, this term was coined by Lord Denning MR in *Hinz v Berry*, who spoke of damages being recoverable for "nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant".[36] The English position was confirmed by the House of Lords in *McLoughlin v O'Brian*, where Lord Bridge held that a claimant must establish that he or she is suffering "not merely grief, distress or any other normal emotion, but a positive psychiatric illness".[37] In Australia, the High Court has on numerous occasions endorsed the same requirement.[38] It is also worth noting that civil liability legislation in all Australian jurisdictions other

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23 [1970] 2 QB 40 at 42.
24 *Saadati* 2017 SCC 28 at [28].
25 *Saadati* 2017 SCC 28 at [27].
26 *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 491.
27 *Tame* (2002) 211 CLR 317 at [193]-[194].
28 *Van Soest v Residual Health Management Unit* [2000] NZLR 179 at [65].
29 *Saadati* 2017 SCC 28 at [35]
30 *Saadati* 2017 SCC 28 at [36].
31 *Saadati* 2017 SCC 28 at [37].
32 *Saadati* 2017 SCC 28 at [9].
33 *Saadati* 2017 SCC 28 at [38].
34 *Saadati* 2017 SCC 28 at [39].
35 In addition to the cases cited below, see *Hewitt v Bernhardt* (1979) 21 SASR 510 at 511; *Tsanaktsidis v Oulianoff* (1980) 24 SASR 500.
36 [1970] 2 QB 40 at 42.
37 [1983] 1 AC 410 at 431. See also *Page v Smith* [1996] AC 155 at 167; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 491.
38 See, eg, *Tame* (2002) 211 CLR 317 at 382 [193]-[194]; *Jaensch v Coffey* (1984) 155 CLR 549 at 587, 559-560; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394.

than Queensland and the Northern Territory also limits the recoverability of damages for mental harm to "recognisable" or "recognised" psychiatric illnesses.[39] A stark contrast can be drawn with the position in the United States, where "peace of mind" is recognised as a legally protected interest. In *Consolidated Rail Corporation v Gottshall*, the Supreme Court of the United States observed that "nearly all of the States have recognized a right to recover for negligent infliction of emotional distress … such as fright or anxiety".[40]

Despite over half a century of English and Australian authorities requiring a "recognisable psychiatric illness", little judicial time has been spent considering the purpose and rationale of that requirement.[41] The decision in *Saadati* provides a convenient opportunity for evaluating and assessing the rationale behind the requirement, and a clearly articulated case for its abolition. It must be stressed, however, that the decision in *Saadati* does not go so far as to recognise a right to recover damages for mere psychological upset. Claimants must still show that the disturbance suffered rises to the appropriate threshold.[42] The effect of *Saadati*, however, is to remove the need for claimants to demonstrate that their mental disturbance rises to the level of a "recognisable psychiatric illness". The arguments put forward by Brown J against that requirement can be summarised as follows.

First, the requirement is one of policy and not principle, and is founded upon "dubious perceptions of, and postures towards, psychiatric and mental illness in general".[43] The rule reflects the common law's traditional suspicion that, due to its nature, mental illness is inherently subjective, and there is a risk that undeserving claimants may exaggerate or fabricate such injuries, resulting in awards being made for emotional harm that is "evanescent or trivial".[44]

Secondly, the requirement restricts recovery to claimants who can establish, by way of expert evidence, that they have suffered a clinically diagnosed psychiatric illness, and therefore confines mental injury to those conditions that are identifiable by reference to diagnostic tools such as the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") and the *International Statistical Classification of Diseases and Related Health Problems* ("ICD").[45] The effect of this is to condition recovery not upon the claimant's alleged *injury*, "but upon conformity with a legally irrelevant classification scheme designed to facilitate identification of *particular conditions*".[46] The focus of a trial judge's task should be on whether the claimant has suffered the requisite level of harm, irrespective of whether that harm attracts a particular label.

Thirdly, where there is uncertainty about the worthiness of a claim, it should not be addressed by the imposition of arbitrary limitations such as the requirement that there be a "recognisable psychiatric illness", but by the "robust application" of the elements of negligence.[47] Not all defendants will owe the claimant a duty of care; nor will all conduct resulting in mental harm amount to a breach of the standard of care. More importantly, not all cases of mental disturbances will amount to legally compensable mental harm, as opposed to mere anxiety or distress; and a claimant will not always be able to establish a causal link (factual or legal) between the defendant's conduct and his or her mental injury.[48]

These arguments led his Honour to reject categorically the "recognisable psychiatric illness" requirement. To some extent, the arguments may be accepted. However, as noted above, the Court was not prepared to hold that all emotional or mental distress could sound in damages. How then can

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39 See, eg, *Civil Liability Act 2002* (NSW) s 31; *Civil Law (Wrongs) Act 2002* (ACT) s 34; *Civil Liability Act 2002* (Tas) s 34; *Wrongs Act* 1958 (Vic) s 72; *Civil Liability Act 2002* (WA) s 5S; *Civil Liability Act* 1936 (SA) s 33, although referring only to a "psychiatric illness", not a "recognised" or "recognisable" psychiatric illness.

40 512 US 532 at 544 (1994).

41 See *Tame* (2002) 211 CLR 317 at [292] (Hayne J).

42 *Saadati* 2017 SCC 28 at [37] quoting *Mustapha* [2008] 2 SCR 114 at [9].

43 *Saadati* 2017 SCC 28 at [21].

44 See *Tame* (2002) 211 CLR 317 at [193].

45 *Saadati* 2017 SCC 28 at [28]-[31].

46 *Saadati* 2017 SCC 28 at [32].

47 *Saadati* 2017 SCC 28 at [22].

48 *Saadati* 2017 SCC 28 at [19].

trial judges consistently, and with a degree of certainty, determine what mental harm rises above "the ordinary annoyances, anxieties and fears" experienced by members of society?[49] The critical issue with the approach in *Saadati*, and indeed in the academic commentary advocating for the abolition of the "recognisable psychiatric illness" threshold,[50] is that it does not substitute a workable test for delineating the degree of distress that may or may not be the subject of a claim.[51] Indeed, when the New Zealand Court of Appeal considered this very issue in *J & P Van Soest v Residual Health Management Unit*[52] even Thomas J (in dissent), who would have removed the requirement to establish in all cases a "recognisable psychiatric illness", spoke of damages being recoverable where the "mental suffering is of the order, or approaching the order, of a psychiatric illness and therefore plainly outside the range of ordinary human experience".[53]

The benefit of the requirement for a "recognisable psychiatric illness" is that it sets an objective threshold between those cases which will be compensated and those that will not. It has been said that the distinction between an unpleasant state of mind or emotion and a "recognisable psychiatric illness" is "not easy to draw".[54] But that distinction, so long as courts continue to insist that mere emotional distress does not sound in damages, must be drawn. In *Tame*, the High Court of Australia accepted the "advances in the capacity of medicine objectively to distinguish the genuine from the spurious".[55] The decision in *Saadati* appears to implicitly reject that acceptance, choosing instead to rely on the capacity of trial judges to make these judgments. The central problem with that approach (in our view) was recognised by Gummow and Kirby JJ when discussing the rationale for the "recognisable psychiatric illness" requirement:

> To permit recovery for recognisable psychiatric illnesses, but not for other forms of emotional disturbance, is to posit a distinction grounded in principle rather than pragmatism, and one that is illuminated by professional medical opinion rather than fixed purely by idiosyncratic judicial perception.[56]

The most compelling argument against the requirement is that it unwittingly excludes a "middle class" of cases where a claimant has suffered a mental disturbance which is more than mere anxiety or stress, but is not a "recognisable psychiatric illness". Even if mere emotional distress is to be excluded, "it does not follow that there should be no redress for serious mental suffering and emotional disturbance which, though not identifiable as 'recognisable psychiatric illness', is 'plainly outside the range of ordinary human experience'".[57] In *Tame* Hayne J referred to this problem:

> It may also be accepted, with equal readiness, that there may be a radical difference between emotional responses to untoward events that are properly regarded as falling within the range of normal responses to the event, and a psychiatric illness that is brought on by that event. But if there is a difficulty it does not lie in distinguishing between cases at opposite edges of the field that is being considered. *The important question is whether a satisfactory criterion can be identified which will distinguish cases that lie in the middle of that field*.[58]

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49 *Saadati* 2017 SCC 28 at [37] quoting *Mustapha* [2008] 2 SCR 114 at [9].

50 Rachael Mulheron, 'Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims' (2012) 32(1) *Oxford Journal of Legal Studies* 77.

51 The very point made by the New Zealand Court of Appeal in *J & P Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at [67].

52 [2000] 1 NZLR 179.

53 [2000] 1 NZLR 179 at [83].

54 *Sutherland v Hatton* [2002] EWCA Civ 76 at [5]. See also *Tame* (2002) 211 CLR 317 at [193] where it is said that the distinction is one of "degree rather than kind and might change with advances in medical knowledge."

55 *Tame* (2002) 211 CLR 317 at [183].

56 *Tame* (2002) 211 CLR 317 at [194] (Gaudron J agreeing at [44]).

57 Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Hart Publishing, 2009) at 54. See also Louise Bélanger-Hardy, 'Actionable Mental Harm Following Tortious Conduct' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart, 2016) at 46.

58 *Tame* (2002) 211 CLR 317 at [286] (emphasis added).

The fundamental task which any "satisfactory criterion" must accomplish is to distinguish between those cases where the claimant suffers no more than ordinary grief, sorrow or emotion, and those cases in the middle of the spectrum where the claimant suffers a mental disturbance more pronounced than ordinary emotion, but not rising to the level of a "recognisable psychiatric illness", which nevertheless ought to sound in damages. We offer no such criterion here, and doubt whether one can be formulated. The distinction is one of degree not kind; there is not a bright line, but rather a spectrum of mental disturbances of varying intensity.[59] Rather, the modest proposal we make is not to abandon the existing requirement in its entirety, but to clarify its interpretation and application so as to broaden the number of deserving claimants it captures. Specifically, we say that satisfaction that a psychiatric illness is "recognisable" should not be conditional on that illness being identifiable according to a classificatory scheme such as the *DSM* or *ICD*. Instead, it should be open to a trial judge (if it is not already) to make a finding that a particular mental injury amounts to a "recognisable psychiatric illness" where there is credible evidence of an expert which suggests that is, even if not *yet* recognised in the *DSM* or *ICD*.

In order to explain this argument further, it is instructive to refer further to Brown J's criticisms in *Saadati* of the requirement for a "recognisable psychiatric illness". One criticism, noted above, was that the requirement restricts recovery for mental harm to those conditions that are identifiable by reference to the *DSM* or *ICD*. His Honour pointed to disagreement on which disorders should be included in the *DSM* or *ICD,* and the development of, and change in, those publications over time. Although not expressed in those terms, the mischief identified by his Honour is the same as that referred to above – that the requirement excludes the "middle class" of cases where the claimant has suffered a mental disturbance above the vicissitudes of everyday life, but not at a level that is classified in publications such as the *DSM*. The solution is for courts to take an open and receptive attitude to expert evidence about what constitutes a recognisable psychiatric illness,[60] and to be willing to find that a "recognisable psychiatric illness" has been suffered even if it cannot, as of yet, be medically classified according to strict diagnostic criteria. It is inevitable that views in the medical profession about the nature of mental distress will change as medical knowledge develops (his Honour does not suggest that judicial views would somehow be immune to this unremarkable fact of life). It would be extraordinary, however, if a trial judge were to reject credible evidence of an expert as to a recognised psychiatric illness, merely because it had not yet been recognised in the *DSM* or *ICD*.

This is of course "not to say, experts in the area of psychiatric harm will speak with one voice".[61] It is more than likely that in any given case expert psychiatrists will disagree as to the nature and severity of the mental injury (if any) suffered by the claimant. Where expert psychiatric opinion differs as to whether or not the claimant has suffered a mental injury, then as Mulheron has argued, this "will properly be an 'essential issue for the court to resolve'."[62] Far from simply deferring to the judgment of expert witnesses, the trial judge will be required to evaluate the testimony of such witnesses, and make findings of fact about the harm allegedly suffered by the claimant, and whether it is a recognisable psychiatric illness. The proper role of expert evidence is to assist them in making those findings. In contrast, the decision in *Saadati*, permits a judge to rely solely on his or her own idiosyncratic perception as to those mental injuries which rise above the threshold of "mere distress" and are therefore worthy of compensation. To do so "overlooks the clinical judgment, skill and training and daily experience of clinical practice" which the medical profession brings to bear on these issues.[63]

Our proposal has the benefit of retaining the "recognisable psychiatric illness" requirement, and thus providing an objective threshold for when the law will award damages for mental harm, while

59 *Tame* (2002) 211 CLR 317 at [287] (Hayne J).

60 *J & P Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at [67].

61 *State of New South Wales v Briggs* [2016] NSWCA 344 at [17].

62 Rachael Mulheron, 'Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims' (2012) 32(1) *Oxford Journal of Legal Studies* 77 at 93.

63 Rachael Mulheron, 'Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims' (2012) 32(1) *Oxford Journal of Legal Studies* 77 at 93.

ensuring that worthy claimants are not excluded merely because their condition has not yet been recognised in the *DSM* or *ICD*. On the other hand, if the law were truly to abandon any distinction between physical and mental injury, and afford each "identical treatment",[64] then the decision in *Saadati* might not go far enough. A more principled and workable, although much more radical, approach would be to award damages for all instances of "mental distress" or "emotional harm".[65] If there is no *legal* bar to an award of damages for minor physical injuries, such as bruises or a cut finger, "why should the same not apply to a comparatively minor emotional injury?"[66] Indeed, it makes little sense to remove the requirement for a recognisable psychiatric illness on the basis of these arguments, yet not remove the further limit that the disturbance suffered by the claimant be "serious and prolonged and rise above the ordinary annoyances, anxieties and fears" that come with living in a civil society.[67] Justice Brown justified this requirement by stating that it "does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes 'mental injury'."[68] But it is difficult to see how the "requisite degree of disturbance"[69] is a distinction of kind, and not degree.

CONCLUSION

There is significant academic support for removing the requirement that claimants in cases of negligently inflicted mental injury demonstrate that they have suffered a "recognisable psychiatric illness".[70] In *Saadati*, the Court made tolerably clear that the requirement has no place in the Canadian law of negligence. To the authors' knowledge, the case is the first time a final appellate court has actually taken this step. In so doing, the Supreme Court of Canada has forged a new path in the law of negligence, departing from the orthodox position which remains good law in Australia, the United Kingdom, and New Zealand. Nonetheless, we have argued that, so long as the courts continue to insist that emotional distress does not sound in damages, the requirement is essential in providing an objective standard by which trial judges can determine which claims for mental harm are legally compensable. The concerns expressed by the Court are valid and may be accepted, but we say that the better course is not to remove the requirement entirely, but to clarify its interpretation and application. Many of the concerns will be addressed by recognising that meeting the threshold of a "recognisable psychiatric illness" does not require a mental disorder which is recognised in the *DSM* or *ICD*. This approach could be adopted in Australian law without doing violence to existing authority, including in jurisdictions regulated by civil liability legislation.

64 *Saadati* 2017 SCC 28 at [35].

65 See eg, Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Hart Publishing, 2009) at 171.

66 Peter Handford, *Tort Liability for Mental Harm* (Thomson Reuters, 3rd ed, 2017) at 177 [6.40]. See also *Mason v Westside Cemetries Ltd* (1996) 135 DLR (4th) 361 at 379-380.

67 *Mustapha* [2008] 2 SCR 114 at [9].

68 *Saadati* 2017 SCC 28 at [37].

69 *Saadati* 2017 SCC 28 at [37].

70 See the references in Peter Handford, *Tort Liability for Mental Harm* (Thomson Reuters, 3rd ed, 2017) at 214 [6.460].