The Dawning of the Social Model? Applying a Disability Lens to Recent Developments in the Law of Negligence

*Anne Levesque & Ravi Malhotra**

In the last thirty years, there has been a palatable epistemic shift in how disability is understood in society. In the past, disability was often seen through the medical model of disablement, which views disability as an impairment or disease. The social model of disablement, in contrast, sees disability as a social construct and focuses on removing structural barriers to promote equality for disabled people in society.

A recent decision by the Supreme Court of Canada illustrates how these changes in the conceptualization of disability have influenced the law of negligence. In *Saadati v Moorhead*, Justice Brown, writing for the Court, revisited the "recognizable [or recognized] psychiatric illness" (RPI) criterion that was often applied by lower courts in negligence cases when determining wheth-

Au cours des trente dernières années, il y a eu un changement épistémique tangible dans la façon dont le handicap est perçu dans la société. Dans le passé, le handicap était souvent compris à travers le modèle médical, qui le considère comme une déficience ou une maladie. Le modèle social, en revanche, voit le handicap comme une construction sociale et se concentre sur l'élimination des obstacles structurels pour promouvoir l'égalité des personnes handicapées dans la société.

Une décision récente de la Cour suprême du Canada, *Saadati v Moorhead*, illustre comment ces changements dans la conceptualisation du handicap ont influencé le droit de la négligence. Dans l'arrêt, le juge Brown, s'exprimant au nom de la Cour, a réexaminé le critère du « trouble psychiatrique

* Anne Levesque, Assistant Professor, Faculty of Law, Common Law Section, University of Ottawa. Ravi Malhotra, Full Professor, Faculty of Law, Common Law Section, University of Ottawa. The authors would like to warmly thank our dedicated research assistant, Ms. Dahlia James, JD candidate, class of 2019. We also greatly appreciate the insightful comments and generous feedback we received from Professors Bruce Feldthusen, John Currie, and Lynda Collins. All errors are our responsibility.

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er to award stand-alone damages for mental injuries. This article examines the changing lens through which disability is understood today, using *Saadati* as a case study. Part I provides an overview of the state of the law of negligence as it related to compensation for mental harms prior to *Saadati*. Part II describes the social model and the medical model of disability and how both concepts manifest themselves in Canadian jurisprudence. We argue that the application of the RPI criterion suggests that lower courts in Canada have continued to espouse the medical model of disability. Part III examines the Supreme Court's decision in *Saadati*. We explore the Court's reasons for abandoning the RPI criterion through the lens of the social model of disablement. We argue that *Saadati* ought to be celebrated as an important turn towards the social model of disability in the law of negligence in three important ways. However, we caution that the survival of the "ordinary fortitude" standard is troublesome and gives reason to pause before announcing the triumph of the social model in the law of negligence.

reconnaissable [ou reconnu] » (TPR) qui était souvent appliqué par les cours inférieurs dans les causes de négligence lorsqu'il s'agissait d'octroyer des dommages-intérêts pour un préjudice mental. Cet article examine le prisme changeant par lequel le handicap est perçu aujourd'hui, en utilisant *Saadati* comme étude de cas. La partie I donne un aperçu de l'état du droit de la négligence en ce qui concerne l'indemnisation pour les préjudices mentaux avant *Saadati*. La partie II décrit le modèle social et le modèle médical du handicap et la façon dont les deux concepts se manifestent dans la jurisprudence canadienne. Nous soutenons que l'application du critère du TPR révèlent que les cours inférieures du Canada ont continué d'adopter le modèle médical du handicap. La partie III examine *Saadati* comme une étude de cas. Nous examinons les raisons invoquées par la Cour pour abandonner le critère du TPR sous l'optique du modèle social du handicap. Nous soutenons que *Saadati* devrait être célébré comme un tournant important vers le modèle social du handicap dans le droit de la négligence de trois façons importantes. Cependant, nous prévenons que l'application continue de la norme de la « résilience ordinaire » est préoccupante et donne à réfléchir avant d'annoncer le triomphe du modèle social dans le droit de la négligence.

Introduction

In the last thirty years, there has been a palatable epistemic shift in how disability is understood in society.[1] In the past, disability was most often seen through the medical model of disablement, which views disability as a personal tragedy caused by an impairment or disease.[2] This model is also focused on providing bureaucratic (and frequently segregated) rehabilitation services to disabled people.[3] The social model of disablement, in contrast, sees disability as a social construct.[4] This model is focused on removing

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1 For a canonical account, see Michael Oliver, *The Politics of Disablement* (Basingstoke: Macmillan, 1990); and, more recently, Michael Oliver & Colin Barnes, *The New Politic of Disablement* (Basingstoke: Palgrave Macmillan, 2012).

2 The World Health Organization defines the medical model of disablement as understanding disability as "a feature of the person, directly caused by disease, trauma or other health condition, which requires medical care provided in the form of individual treatment by professionals." World Health Organization, *Towards a Common Language for Functioning, Disability, and Health* (Geneva: World Health Organization, 2002) at 8 [WHO].

3 Critical disability theorists continue to debate what the most appropriate descriptor is, given the range of possibilities including: "people with disabilities," "people with impairments," and "people who experience activity limitation." For an overview of the debate, see Dianne Pothier & Richard Devlin, "Introduction: Towards a Critical Theory of Dis-Citizenship," eds, *Critical Disability Theory: Essays in Philosophy, Politics, and Law* (Vancouver: UBC Press, 2006) at 3–4. In this article, we have chosen to use the term "disabled people" to emphasise pride in disability identity, to reclaim the term "disability" by challenging its negative connotation, and to underscore that disablement involves a social process of ascribing disability identity to individuals.

4 The World Health Organization defines the social model as one that "sees disability as a socially created problem and not at all an attribute of an individual. On the social model, disability demands a political response, since the problem is created by an unaccommodating physical environment brought about by attitudes and other features of the social environment." WHO, *supra* note 2 at 9. As the focus of our analysis is the influence of the medical model of disability and the social model in the law of negligence, we will not examine the other models of disability that have been developed by disability scholars. For a more complete explanation of the different models of disability and how they manifest themselves in Canadian jurisprudence, see Pauline Rosenbaum & Ena Chadha, "Reconstructing Disability: Integrating Disability Theory into Section 15" (2006) 33:2 SCLR 343 at 343. In this article, we use the terms "social model of disablement" and "social model of disability" interchangeably.

structural barriers and fostering Independent Living (IL) to promote the inclusion and equality of disabled people in society.[5] In general, the medical model of disability is now considered to be the old paradigm through which to analyze the experience of disablement while the social model has been widely embraced by disability scholars and advocates.[6]

Canadian courts have been inconsistent in keeping pace with these changing social attitudes about disablement. The Supreme Court's jurisprudence relating to section 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*), which guarantees the right to equal treatment before and under the law, has at times, albeit inconsistently, embraced the social model of disablement.[7] Consistent with the social model, the Supreme Court has emphasized, when interpreting the right to equality, that many inequalities experienced by disabled people do not flow from their physical or mental impairments but from society's response to impairment.[8] Submissions of

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5 For a recent history of this shift in the American context and a discussion of the IL movement, see Jennifer L Erkulwater, "How the Nation's Largest Minority Became White: Race Politics and the Disability Rights Movement, 1970-1980" (2018) 30:3 J Policy Hist 367.

6 The purpose of this article is not to articulate a defense of the social model but rather to examine recent developments in the law of negligence through the lens of the medical and the social model of disablement. However, the authors recognize that the social model has been criticized by some disability scholars in recent years. For a critique of the social model of disablement, see Tom Shakespeare & Nicholas Watson, "The Social Model of Disability: An Outdated Ideology?" in Sharon N Barnartt & Barbara M Altman, eds, *Exploring Theories and Expanding Methodologies: Where We Are and Where We Need to Go* (Oxford: Elsevier Science, 2001) at 9–28. See also Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (London: Palgrave Macmillan, 2007) at 122 where the author discusses recent efforts to "bring the body back in" to impairment scholarship in response to the social model of disability which focuses rather on systemic and structural barriers.

7 *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See Rosenbaum & Chadha, *supra* note 4 at 350. See also Ravi Malhotra, "Has the Charter Made a Difference for People with Disabilities? Reflections and Strategies for the 21st Century" (2012) 58 SCLR (2d) 273.

8 See *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703 at para 30 [*Granovsky*]. See also *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City);*

plaintiffs making torts claims, in contrast, continue to exhibit remnants of the medical model of disability.[9] For instance, claims relating to wrongful birth characterize the so-called wretched health or abnormalities of disabled babies as actionable harms, and often imply that no parent would want a child with a disability.[10] Cases alleging wrongful life rely upon the tragedy

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Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City), 2000 SCC 27 [2000], 1 SCR 665 at paras 76–80 [*Québec v Boisbriand*].

9 See Louise Bélanger-Hardy, "Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis" (2013) 36:1 Dalhousie LJ 103 at 121 [Bélanger-Hardy, "Thresholds"]. See also Tamara Larre, "Pity the Taxpayer: The Tax Exemption for Personal Injury Damages as Disability Policy" (2007) 33:1 Queen's LJ 217 at 240 in which the author examines the prevalence of the medical model of disability in tax law. She argues that the use of "pity" and "sympathy" by tax scholars when justifying the tax exemption for personal injury damages reinforces the view that disability is something to be pitied or feared and is indicative of the medical model of disability. In the American context, see Anne Bloom & Paul Steven Miller, "Blindsight: How we See Disabilities in Tort Litigation" (2011) 86 Wash L Rev 709 at 716–27 in which the authors argue that in tort law, disability is cast as a medical phenomenon. The authors point to the pathologizing role of medical experts and the insinuations that disabled claimants are less than whole as evidence of the wide reliance on the medical model in tort litigation. Similar observations can be made about Canadian tort law.

10 In the American context, academics have argued that causes of action such as wrongful birth and wrongful life convey the message that a life with a disability is not worth living and devalues disabled people generally. See Wendy F Hensel, "The Disabling Impact of Wrongful Birth and Wrongful Life Actions" (2005) 40 Harv CR-CLL Rev 141 at 173. For a recent Canadian claim alleging wrongful life, see e.g. *TS v Adey*, 2017 ONSC 397. *Cf Arndt v Smith*, [1997] 2 SCR 539 at 540, 148 DLR (4th) 48, where the majority held that "a reasonable person in the plaintiff's position would not have decided to terminate her pregnancy in the face of the very small increased risk to the fetus posed by her exposure to the virus which causes chickenpox." See also Bruce Feldthusen, "Supressing Damages in Involuntary Parenthood Actions: Contorting Tort Law, Denying Reproductive Freedom and Discriminating Against Mothers" (2014) 29 Can J Fam L 11 at 27 which provides an overview of wrongful parenthood cases in Canada, Australia, and the UK. Feldthusen argues that it is superfluous, demeaning, and misleading to identify a child's disability as the reason for awarding damages in involuntary parenthood actions. He argues further that it is unfair to offer compensation for involuntary parenthood only in cases in which the child has a disability, and stresses that there are child rearing costs relating to raising all children, all of which should be recoverable. This

of disability narrative even more starkly, alleging that the plaintiff child with a disability would be better off if they had never been born.[11] The marginalization of mental disability has a particularly long history in Anglo-Canadian tort law.[12] Claimants seeking compensation for mental harms have been treated with suspicion and hostility[13] and tort law continues to exhibit many attitudinal barriers about individuals with mental illnesses that the social model identifies as the principal cause of disabling and devaluing people.[14] A common thread of stigma unites judicial attitudes toward people labelled as having physical and mental disabilities

Despite this tendency, a recent decision by the Supreme Court of Canada illustrates how changes in the conceptualisation of disability have begun to influence the law of negligence. In *Saadati v Moorhead*, Justice Brown, writing for the Court, revisited the "recognizable [or recognized] psychiatric illness" (RPI) criterion that was often applied by lower courts in negligence cases when determining whether to award standalone damages for mental injuries.[15] At issue was whether claimants who had experienced a mental injury as a result of negligent conduct were obliged to adduce expert medical evidence confirming a particular diagnosis in order to obtain damages.[16] This article examines the changing lens through which disability is understood today, using *Saadati* as a case study. Our analysis is divided into

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argument is consistent with the universalist model of disability whereby impairments are regarded as a spectrum on which all individuals find themselves at any given times in their lives.

11 Darpana M Sheth, "Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims under the Americans with Disabilities Act" (2006) 73 Tenn L Rev 641 at 647–48.

12 See *Saadati v Moorhead*, [2017] 1 SCR 543 at paras 14–18 [*Saadati*].

13 See *ibid* at para 14.

14 See *ibid* at paras 14–18. See also Part III of this article.

15 *Ibid* (as noted by Brown J, the terms "nervous shock," "psychiatric or psychological injury," and "psychiatric or psychological illness" have been used in the case law to describe a vast array of mental harms in negligence cases; for the purposes of this analysis, we will use the terms "mental harm," "mental illness," and "mental injury" interchangeably to describe this broad category of injuries). See generally *Saadati v Moorhead*, 2015 BCCA 393 [*Saadati* BCCA]; *Saadati v Moorhead*, 2014 BCSC 1365 [*Saadati* BCSC].

16 See *Saadati*, *supra* note 12 at para 25.

three parts. Part I provides an overview of the state of the law of negligence as it related to compensation for mental harms prior to *Saadati*. Part II describes the social model and the medical model of disability and how both concepts of disablement manifest themselves in Canadian case law. Here, we argue that the application of the RPI criterion suggests that lower courts in Canada have continued to espouse the medical model of disability. Part III examines the Supreme Court's decision in *Saadati*. In particular, we explore the Court's reasons for abandoning the RPI criterion though the lens of the social model of disablement. We argue that *Saadati* marks a clear departure from the medical model of disability and an important turn towards the social model of disability in the law of negligence in three important ways. However, we caution that the survival of the "ordinary fortitude" standard is troublesome and gives reason to pause before announcing the triumph of the social model in the law of negligence.

I. Damages for Negligently Caused Mental Injuries

To succeed in negligence, the claimant must establish that a) the defendant owed a duty of care to the claimant in light of their relative proximity; b) the defendant breached that standard of care; c) the claimant sustained compensable damages; and d) those damages were caused, in fact and in law, by the defendant's breach of the standard of care.[17] When applying this analysis, common law courts have struggled with the issues of whether to characterize mental injury as a loss for which claimants can seek compensation and, if so, how to appropriately circumscribe liability for this particular category of harms.[18] Courts eventually narrowly opened the door to awarding damages for mental injuries in the absence of a related physical harm. However, even when doing so, they imposed various limits that were not applied to claimants who had experienced a physical injury. For instance, claimants were required to show that their mental injury arose from "a reasonable fear of immediate personal injury either to [the claimant, or the claimant's children]."[19] Recent Canadian case law has rejected the English distinction between "primary" and "secondary" victims seeking compen-

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17 See *ibid* at para 13, citing *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 3, [2008] 2 SCR 114 [*Mustapha* SCC].

18 See *ibid* at paras 14–24.

19 *Ibid* at para 15, citing *Hambrook v Stokes Bros*, [1925] 1 KB 141 at 152, 94 LJKB 435.

sation for mental harms,[20] and instead has required plaintiffs to show that their mental injury would have been foreseeable "in a person of ordinary fortitude."[21] Moreover, prior to *Saadati*, claimants seeking compensation for a mental injury have been required to establish that the defendant's breach of a duty of care caused them to experience an RPI.[22]

The basis for the RPI requirement can be traced back to an oft quoted statement made by Lord Denning MR in *Hinz v Berry* where he specified that "grief or sorrow caused by a person's death" do not warrant the award of damages but damages are "recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant."[23] While scholars have convincingly argued that Lord Denning was not necessarily seeking to create an additional evidentiary burden for this class of claimants, courts in the United Kingdom, Australia, and New Zealand, as well as lower courts in Canada, largely interpreted "recognisable psychiatric illness" as imposing such a requirement on claimants seeking damages for a mental injury in the absence of a physical harm.[24] In Canada, courts have used terms such as "objective" and "genuine" psychiatric illness when applying the criterion.[25] However, courts generally found that a claimant's injury needed to be labelled by an expert with

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20 See *ibid* at para 16.

21 *Mustapha* SCC, *supra* note 17 at para 16. See also Part III of this article.

22 See generally *Saadati*, *supra* note 12 at para 26.

23 *Hinz v Berry*, [1970] 2 QB 40 at 42, 1 All ER 1074, cited in *Saadati*, *supra* note 12 at para 26.

24 See *Saadati*, *supra* note 12 at paras 27–28; Louise Bélanger-Hardy, "Reconsidering the 'Recognizable Psychiatric Illness' Requirement in Canadian Negligence Law" (2013) 38:2 Queen's LJ 583 at 607–08 [Bélanger-Hardy, "Reconsidering"], where the author argues that what Lord Denning meant by nervous shock is "not entirely clear, and his words are not necessarily an endorsement of a new, higher threshold."

25 See e.g. Rachel Mulheron, "Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims" (2012) 32:1 Oxf J Leg Stud 77 at 81 cited in *Saadati*, *supra* note 12 at para 26. See also *Bastien v Ottawa Hospital (General Campus)*, [2001] OJ No 3899 (QL) in which the Ontario Superior Court of Justice considered whether there was an "actual psychiatric illness"; *Rhodes Estate v Canadian National Railway*, [1990] BCJ No 2388 (QL) at para 156 in which the Court of Appeal of British Columbia, citing *Chadwick v Br Tpt Bd*, [1967] 1 WLR 912, used the term "genuine neurotic symptoms."

a particular medical diagnosis in order to obtain damages for mental harm in the absence of a physical injury.

Much has been written on the RPI criterion.[26] In her in-depth study of the RPI threshold, Professor Louise Bélanger-Hardy provided a detailed analysis of the different policy considerations lying beneath the RPI requirement. She described four general types of concerns about mental injury claims that she grouped as follows:

> the attitude and behaviour of plaintiffs, pragmatic considerations and evidentiary rules including the reliance on classifications such as DSM-IV-TR and ICD- 10, the fear of proliferation of claims, and the wider social context including critical analysis of tort law's devaluation of mental harm.[27]

These concerns were clearly at play in a decision by the Ontario Court of Appeal involving a class action of plaintiffs who claimed to have experienced mental anxiety, suffering, and distress after being told to get tested for tuberculosis which they did not have. Justice Sharpe, writing for a unanimous court, dismissed the claim and held that:

> [i]t seems to me quite appropriate for the law to decline monetary compensation for the distress and upset caused by the unfortunate but inevitable stresses of life in a civilized society and to decline to open the door to recovery for all manner of psychological insult or injury. Given the frequency with which everyday experiences cause transient distress, the multifactorial causes of psychological upset, and the highly subjective nature of an individual's reaction to such stresses and strains, such claims involve serious questions of evidentiary rigour. The law quite properly insists upon an objective threshold to

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[26] See e.g. Bélanger-Hardy, "Thresholds", *supra* note 9; Bélanger-Hardy, "Reconsidering", *supra* note 24. See also Michael Jones, "Liability for Psychiatric Damage: Searching for a Path between Pragmatism and Principle" in Jason W Neyers, Erika Chamberlain and Stephen G A Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 113; Allen Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis, 2015); Rachael Mulheron, "Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims" (2012) 32:1Oxford J Leg Stud 77; Nicholas Mullany & Peter R Handford, *Tort Liability for Psychiatric Damage* (Sydney, NSW: Law Book Co, 1993) (which were relied upon by Brown J in his reasons in *Saadati*, *supra* note 12).

[27] Bélanger-Hardy, "Thresholds", *supra* note 9 at 109.

> screen such claims and to refuse compensation unless the injury is serious and prolonged.[28]

Many scholars, including Professor Bélanger-Hardy, have been critical of these concerns as a justification for the continued application of the RPI threshold.[29] These critics have generally emphasized that the purported policy considerations invoked in support of the RPI requirement are rooted in stigma and stereotypes about disability and, more specifically, mental illness.[30] In particular, it has been suggested that the requirement of expert evidence to attest to the validity of a claimant's lived experience of disability demonstrates discriminatory attitudes of distrust and scepticism towards people with mental illness.[31] Such attitudes and perceptions are consistent with stereotypes and biases regarding mental disabilities that manifest themselves in other areas of the law. In the context of employment, case law suggests that workers with invisible impairments are more likely to be perceived by both their employers and the courts as malingering or "faking" their disability than workers with more "mainstream" impairments.[32]

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28 *Healey v Lakeridge Health Corporation*, 2011 ONCA 55, 103 OR (3d) 401 at para 65.

29 See e.g. Bélanger-Hardy, "Thresholds", *supra* note 9. See also *Saadati*, *supra* note 12 at paras 14, 34–35; Margo Foster, "There Was a High Court That Swatted a Fly… But Why? Mental Disability in the Negligent Infliction of Psychiatric Injury and the Decisions in Mustapha v Culligan" (2009) 14 Appeal 37.

30 Indeed, the Supreme Court has recognized that people with mental health disabilities face "particular disadvantage[s]," social prejudice, and negative stereotyping. See *R v Swain*, [1991] 1 SCR 933 at 994. See also *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566 at para 31 where the Court recognized "the particular historical disadvantage faced by persons with mental disabilities."

31 See e.g. Bélanger-Hardy, "Thresholds", *supra* note 9 at 119–23. See also Foster, *supra* note 29.

32 See Judith Mosoff, "Lost in Translation?: The Disability Perspective in Honda v Keays and Hydro-Québec v Syndicat" (2009) 3:1 McGill JL & Health 137 (the author views the Ontario Superior Court of Justice's characterization of invisible disabilities as "non-mainstream" as problematic, as "it suggests that a condition is inconsistent with a medical model of disability and is, therefore, questionable" at 142). See also Tess Sheldon, "It's Not Working: Barriers to the Inclusion of Workers with Mental Health Issues" (2011) 29:1 Windsor YB Access Just 163.

Whatever its rationale, the RPI requirement had significant implications for claimants with mental illnesses. In particular, it meant that claimants were required to adduce expert medical evidence in support of their claim of a mental injury.[33] When testifying, such experts were called upon to provide a diagnosis of the claimant's mental impairment or variance in accordance with an internationally accepted classification tool of mental disorders.[34] This requirement in the law of negligence was imposed uniquely on claimants seeking standalone damages for mental injury. Thus, such claimants were more likely to face the array of practical challenges that often arise when one seeks to admit and rely upon expert evidence during a trial. These include the significant costs of retaining an expert and the increased risk of complicating or prolonging litigation as a result of the various procedural issues that accompany the introduction of expert evidence.[35]

II. The Medical and the Social Models of Disablement

Beyond its more practical implications, the RPI requirement also raised more theoretical questions relating to disablement, including how courts (and, by extension, Canadian society) define disability and who can make these determinations. The strict reliance on expert evidence to validate the existence of a mental harm with a diagnosis conveyed the message that physicians are best positioned to determine who is disabled.[36] Similarly, the

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33 See *Saadati*, *supra* note 12 at para 28.

34 See *ibid* at para 30 (Brown J references the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) published by the American Psychiatric Association and the *International Statistical Classification of Diseases and Related Health Problems* (ICD) published by the World Health Organization).

35 See Paul Michell & Renu Mandhane, "The Uncertain Duty of the Expert Witness" (2005) 42 Alta L Rev 635 at 660. See also Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar J 639 where the author reports that legal fees for litigants generally far exceed their disbursements. Personal injury cases, however, are the exception, as they may involve very large medical expert fees, which can exceed the legal fees. See also Ontario, *Civil Justice Reform Project: Summary of Findings & Recommendations*, by Coulter A Osborne (Toronto: Ontario Ministry of the Attorney General, 2007) at 68, which states that the proliferation of expert witness in trials causes delays and unduly increases the cost of litigation.

36 See Lisa I Iezzoni & Vicki A Freedman, "Turning the Disability Tide: The Importance of Definitions" (2008) 299:3 JAMA 334 at 334 in which the authors

emphasis on diagnosis implied an understanding of disability that is focused on biomedical conditions without regard to the social consequences of an impairment or limitation in particular financial, social, professional, and cultural circumstances.[37] This conceptualization of disability, and mental illness in particular, corresponds with the medical model of disability. Often described as the old paradigm of disability, the medical model sees disability as a personal tragedy relating to a disease, trauma, or other health condition.[38] The medical model also promotes the rehabilitation or curing of biomedical conditions of disabled people with the view that it is only through such interventions that disabled people can better integrate into society.[39]

The "social model," in contrast, advances the view that disability-related limitations or exclusions are caused not by biomedical conditions but by environmental, attitudinal, communication, and organizational barriers related to disabilities and disabled people. Seen through this lens, disability is a social construct. Critical disability scholars who subscribe to the social model of disablement emphasize that the social consequences of an impairment often vary according to whether the diverse needs and abilities of individuals are considered and met by political action in a society at a given time.[40] If one accepts that the social consequences of an impairment can vary in different circumstances, an individual's account of their lived experience of these impacts are of vital importance to understanding their disability. For example, how the built environment and the world of work – including the network of legal regulations that accompany and imbricate both institutions – are structured may marginalize bodies that do not conform to able-bodied standards. In the same way that many workplaces traditionally assumed a male worker and made little allowance for pregnancy (and in some cases did not even provide female washrooms), the social model has

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argue that the medical model is built upon the assumption that physicians know what is best for their patients.

37 Note that the requirement of medical diagnosis has not always been applied in cases involving intentional infliction of mental injury. See e.g. *Clark v Canada*, [1994] 3 FC 323, 76 FTR 241 at paras 59, 65; *Rahemtulla v Vanfed Credit Union*, [1984] 51 BCLR 200, CanLII 689 (BCSC) at para 53.

38 WHO, *supra* note 2 at 8.

39 See Oliver & Barnes, *supra* note 1 at 83–85 (noting the rise of medicine as an "institutional complex" that has acquired the right to define and treat conditions).

40 See *ibid* at 22.

led to a reconceptualization of how social institutions, from workplaces to schools, fail to accommodate and include disabled people.[41]

For decades, disability rights advocates in Canada have maintained that the social model represents a more appropriate lens through which to understand disability. Their persistent advocacy efforts have led to the introduction of policies and legislation aiming to reduce the societal and attitudinal barriers faced by disabled people, including, most notably, the eleventh-hour incorporation of disability as a prohibited ground of discrimination in section 15 of the *Charter* and its eventual inclusion in all human rights statutes in Canada.[42] More recently, we have also seen the enactment of accessibility legislation in some provinces as well as the passage of the *Accessible Canada Act* by the federal government which aim to eliminate a wide range of barriers for disabled people.[43] These laws generally espouse the social model of disablement as they are "premised on the principles of access, equality, universal design, and systemic responsibility."[44] Moreover,

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41 For a recent treatment in the context of chronic illness, see Odelia R Bay, "Battling the Warrior-Litigator: An Exploration of Chronic Illness and Employment Discrimination Paradigms" in Ravi Malhotra & Benjamin Isitt, eds, *Disabling Barriers: Social Movements, Disability History and the Law* (Vancouver: University of British Columbia Press, 2017).

42 See e.g. *Human Rights Code*, RSO 1990, c H19, s 17. For an account of the campaigns led by disabled people to ensure that disability was included as a prohibited ground in the *Ontario Human Rights Code* and the *Charter*, see David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians with Disabilities Act: The First Chapter" (2004) 15 NJCL 125 at 140–46. The author notes that disability was not initially included as a protected ground of discrimination under section 15 of the *Charter* and was added as a result of advocacy from the disability rights community. For a recent history of the Canadian disability rights movement and its relationship to employment policies, see Dustin Galer, *Working Towards Equity: Disability Rights Activism and Employment in Late Twentieth-Century Canada* (Toronto: University of Toronto Press, 2018). For a specific discussion on section 15 equality rights, see Galer at 179.

43 See e.g. *Accessibility for Ontarians With Disabilities Act*, 2005, SO 2005, c 11; *Accessibility for Manitobans Act*, SM 2013, c 40; *Accessibility Act*, SNS 2017, c 2; Bill C-81, *An Act to ensure a barrier-free Canada*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019) [*Accessible Canada Act*].

44 Tracy Smith-Carrier et al, "Vestiges of the Medical Model: A Critical Exploration of the Ontario Disability Support Program" (2017) 32:10 Disabil Soc 1570 at 1577.

strategic litigation of disability groups, such as the Council of Canadians with Disabilities, in cases involving the rights of disabled people has informed the Supreme Court's analysis of disablement, which is generally consistent with the social model.[45] The Supreme Court's recognition that the inequalities experienced by disabled people are most often attributed to the reaction of society to impairment, rather than physical or mental impairment itself, was regarded as an important victory for the disability community.[46] While many income support programs for disabled people remain embedded in the medical model of disablement, developments in case law relating to the application of the criteria for eligibility occasionally display elements of the social model, such as considering the "real world" implications of a physical, sensory, intellectual, or psychological variance.[47] Human rights tribunals, for their part, have also embraced the social model of disability, often by directly referring to this model of disablement in decisions.[48] *Saadati* arose in this context of shifting attitudes and understandings of disablement in the law and in society.

III. Recent Developments in the Law of Negligence

A. Saadati v Moorhead

Saadati raises questions about how we think about disability, the social construction of disabled bodies, and how we classify who is or is not

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45 The Council of Canadians with Disabilities was either a party or an intervener in many cases in which the Supreme Court adopted the social model of disability. See *Granovsky*, *supra* note 8; *Council of Canadians with Disabilities v VIA Rail Canada Inc*, [2007] 1 SCR 650 at paras 11, 36, 42, 110–12. See also *Québec v Boisbriand*, *supra* note 8, where the social model was applied although no disability organizations were involved as interveners.

46 See *Granovsky*, *supra* note 8 at para 30.

47 See Smith-Carrier et al, *supr*a note 44; *Villani v Canada (AG)*, 2001 FCA 248, [2002] 1 FC 130 in which the "real world" analysis was put forth. This analysis recognizes, at least in part, that one's social context can impact how one experiences disability.

48 See e.g. *Hinze v Great Blue Heron Casino*, 2011 HRTO 93; *Brock v Tarrant Film Factory Ltd*, 2000 ON HRT 20858 at 12–13; *Hill v Spectrum Telecom Group Ltd*, 2012 HRTO 133 at para 24; *Turnbull v Famous Players Inc*, 2001 ON HRT 26228.

labelled as disabled. The decision comes at a time when Canadian and American scholars are beginning to pose salient questions about how the social model influences the development of common law doctrine in areas as diverse as quantifying damages when someone suing in tort has a pre-existing condition to the controversial claims of wrongful birth and wrongful life.[49] As the primary function of tort law consists of providing compensation to those who have suffered an injury or a loss as a result of another's wrongful conduct, disability is often cast as a tragedy and something to be pitied by those involved in tort litigation.[50] Some have asked whether this is inherently incompatible with the social model.[51]

The facts giving rise to *Saadati* are as follows: while driving a tractor-truck, the plaintiff (the appellant before the Supreme Court) was struck by a sports utility vehicle driven by the defendant (the respondent before the Supreme Court).[52] Although the plaintiff's vehicle was significantly damaged, he appeared not to have been physically injured during the accident. An ambulance was dispatched to the scene of the accident, however, the plaintiff was not hospitalized. Following the accident, the plaintiff initiated an action seeking damages in the range of $244,000 to $294,000 for lost wages and non-pecuniary losses. The defendants conceded their liability but argued that the plaintiff suffered no damages. The trial judge, Justice Funt, held that the plaintiff failed to establish that the accident had caused him to suffer any physical injury. However, he also found that the plaintiff had experienced "psychological injuries, including personality change and cognitive difficulties" as a result of the respondent's negligence.[53] The finding of the existence of an impairment was made in the absence of medical evidence and was based instead on the testimony of the plaintiff's friends and family who stated that the accident resulted in "significant changes to the

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49 See e.g. Darcy MacPherson, "Damage Quantification in Tort and Pre-Existing Conditions: Arguments for a Re-Conceptualization" in Pothier & Devlin, *supra* note 3 at 247–53; Lydia XZ Brown, "Legal Ableism, Interrupted: Developing Tort Law and Policy Alternatives to Wrongful Birth and Wrongful Life Claims" (2018) 38:2 Disability Stud Q.

50 See Bloom & Miller, *supra* note 9.

51 See *ibid* at 716–26.

52 See *Saadati* BCSC, *supra* note 15 at para 1.

53 *Ibid* at para 50.

plaintiff's personality and created cognitive difficulties."[54] The plaintiff's niece, for example, testified that the plaintiff had gone from being charming, funny, and energetic to a "totally different person" who often experienced mood swings, complained of headaches, and was generally uninterested in talking.[55] The trial judge also relied on this evidence to determine the impact of the plaintiff's change in personality and cognitive troubles on his daily life, including the loss of close personal relationships with his family and friends. Based on this finding, he awarded the plaintiff $100,000 in non-pecuniary damages.[56] The British Columbia Court of Appeal allowed the appeal of the damages award on the basis that the plaintiff had not proven that he suffered from a recognized medical condition. "Absent expert medical opinion evidence," the Court of Appeal stated, "a judge is not qualified to say what is, or is not, an illness."[57]

The plaintiff appealed the decision to the Supreme Court of Canada. At issue in the appeal was whether the trial judge erred by awarding damages for mental injury in the absence of evidence of a "recognizable [or recogniz*ed*] mental illness." More practically, the Supreme Court was called upon to determine whether claimants are required to adduce expert medical evidence in order to obtain compensation for mental harm in negligence cases in the absence of a physical injury.[58]

Justice Brown, writing for the Court, began his analysis by providing a brief overview of the common law's historical approach to claims for mental injury in negligence cases, which he characterized as "one of suspicion

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54 *Ibid* at para 38.

55 *Ibid* at paras 39–49.

56 See *ibid* at paras 65–67. No damages were awarded for lost wages because the plaintiff had not provided sufficient evidence that "by reason of his [psychological] injuries, [he was] unable to do many things that, but for his injuries, he could have done to earn income" at para 78.

57 *Saadati* BCCA, *supra* note 15 at para 32.

58 This article's focus is the "recognizable [or recogniz*ed*] mental illness" criterion. For this reason, we will not discuss the other issue on appeal, that is, whether the trial judge's award for mental injury was made in breach of procedural fairness. The Court's reasons for its decision regarding this issue are provided in paragraphs 9 to 12 of the decision. In sum, the Court held that the respondent was given "ample notice" of the case which they had to answer.

and sometimes outright hostility."[59] The Court noted that even when common law courts did away with an absolute bar on compensation for mental harms in the absence of a physical injury, they continued to apply various conditions on awards for such damages that were not required of other claimants.[60]

Considering this context, the Court went on to consider the principal issue presented in the appeal, that is, what constitutes mental injury and how it may be proven. The Court began by examining the origins of the RPI terminology in common law jurisdictions and emphasized that it was "far from clear" that courts had in fact meant to create a separate requirement for claimants who experienced a mental injury when using this language.[61] The Court then weighed the appropriateness of its continued application. It noted that the RPI criteria imposed an additional requirement on claimants who had sustained a mental injury, as opposed to those seeking compensation for a physical harm, and therefore afforded them unequal protection in law.[62] It concluded that there was no basis, as a matter of legal principle or policy, for lower courts to maintain these distinct rules for certain claimants. Such distinctions, the Court reasoned, are problematic as they are founded upon "dubious perceptions of, and postures towards, psychiatry and mental illness in general" such as stereotypes that mental illness is subjective or trivial and that it can be feigned or exaggerated.[63] For this reason, the Court stated that it would not endorse maintaining the RPI threshold.[64] As a result, the absence of a medical diagnosis is no longer a bar for compensation for a mental or physical injury alike.

The Court then directly addressed the commonly invoked concerns of indeterminate liability and more general floodgate arguments typically made in justification of the RPI criterion. The Court reasoned that the robust application of the elements of the cause of action of negligence constitutes

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59 *Saadati*, *supra* note 12 at para 14.

60 See *ibid* at para 15.

61 *Ibid* at para 27.

62 See *ibid* at paras 20, 36.

63 *Ibid* at para 21, citing Linden and Feldthusen, *supra* note 26 at 449; Rachael Mulheron, "Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims" (2012) 32:1 Oxford J Leg Stud 77 at 82.

64 See *ibid* at para 36.

a safeguard against unmeritorious or trivial claims.[65] It then emphasized the crucial role of triers of fact in dealing with potentially subjective or exaggerated symptoms. Trial judges, it held, must deal with such issues by making proper assessments of credibility based on the evidence before them and not through the application of a criterion aiming to unjustifiably weed out certain types of claims. Quoting the late Honorable Allen Linden and Professor Bruce Feldthusen, it wrote that "a vigorous search for the truth, not the abdication of judicial responsibility" would resolve concerns regarding the worthiness of mental injury claims.[66] Based on this reasoning, the Court concluded that there was no justification for the continued application of "arbitrary mechanisms" such as the RPI requirement in order to deal with potentially frivolous claims.[67] The Court further specified that the removal of the RPI criterion does not mean that expert medical evidence is not relevant to a claim. Such evidence can inform a court's determination of whether or not a mental injury has been shown. However, a specific diagnosis or expert medical evidence confirming the existence of a mental harm is not a requirement as a matter of law.[68]

In following sub-part of this article, we will examine *Saadati* through the lens of the social model and the medical model of disablement. In particular, we will explore the Court's reasons for rejecting the RPI requirement to argue that the decision demonstrates, to a certain extent, an understanding of disablement that is consistent with the social model. Conversely, we will contend that the Court's failure to explicitly overturn the "ordinary fortitude" standard was a lost opportunity to fully embrace the social model of disablement.

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65 See *ibid* at para 34. These elements are explained in Part I of this article It must be emphasized that the Court did not modify the remoteness requirement in negligence cases involving a mental harm. Claimants must still demonstrate that their mental injury was foreseeable "in a person of normal fortitude." The continued application of this element will be discussed in further detail in Part III of this article.

66 *Ibid* at para 22, citing Linden & Feldthusen, *supra* note 26.

67 *Ibid* at para 34.

68 See *ibid* at para 38.

B. Glimmers of the social model

In our view, *Saadati* represents a decided departure from the medical model of disability and marks a significant shift towards the social model of disability in the law of negligence in three principal ways. Firstly, the Court's clear rejection of at least one rule that was previously applied exclusively to claimants seeking compensation for mental injuries is consistent with an understanding of disability that focuses on the barriers faced by disabled people rather than on the arbitrary classification of impairments. As noted by the Court, the application of this additional criterion to victims of mental injuries and not others resulted in the unequal treatment of certain claimants in law and created a hierarchy of protection based on the type of impairment they experienced. In eliminating this dubious distinction in how tort law treats physical and mental disabilities, the Court in *Saadati* has embraced a robust and all too rare vision of substantive equality that appreciates the merits of a broad understanding of disability in a manner that situates disabled bodies within a particular social, cultural, and economic context. As it is recognized by the social model of disability, an invisible psychiatric condition may create more barriers in day-to-day functioning than a very visible physical impairment.[69] The analysis endorsed by the Court will allow claimants who experience a mental injury as a result of a defendant's negligent conduct to have a more equal opportunity to seek compensation for their loss. This is also consistent with findings from human rights tribunals and courts that distinctions in the treatment of disabled people based on the nature of their impairments, rather than on their actual needs, amounts to discrimination.[70]

Secondly, the removal of the requirement that a mental injury be diagnosed in order for damages to be awarded is also noteworthy. By shifting the legal standard to one that requires merely the demonstration of a serious and prolonged disturbance that rises above ordinary annoyances, anxieties, and fears, the Court has eliminated the requirement in law to adduce expert evidence to validate the existence of a mental harm. It would certainly be an overstatement to conclude that the Court's firm rejection of the RPI criterion has eliminated the use of medical evidence relating to mental injuries. The Court emphasized this point in its reasons. Indeed, even in cases involving

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69 See *MacLaren v British Columbia (AG)*, 2018 BCSC 1753.

70 See *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360 at para 166. See also *Plesner v British Columbia (Hydro and Power Authority)*, 2009 BCCA 188 at para 98.

physical injuries where diagnoses and expert evidence are not strictly required, medical experts are nevertheless assigned considerable importance in trials.[71] However, there may be significant implications resulting from the fact that such evidence will no longer be strictly required of claimants who experience mental injuries as a result of negligent conduct. Participants in tort litigation may begin to question the central role that has traditionally been given to medical experts in trials involving mental injuries and their narratives that often pathologize disabled bodies. This may also challenge common assumptions about disability, such as the idea that physicians know what is best for disabled people.[72] In contrast, the Court's new, more pragmatic approach to assessing mental harm might pave the way for the acceptance of a broader range of evidence to corroborate claims relating to mental illness. This may translate into increased attention to and reliance on the testimony of claimants relating to their lived experience of mental illness by the courts. The privileging of patient experience is long overdue and can provide helpful context that trial courts can use to make more informed decisions about the impact of disability on a claimant's life, in a manner that is consistent with the social model of disablement.[73] Given the long history

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71 See *Westerhof v Gee Estate*, 2015 ONCA 206 at para 14 in which the Ontario Court of Appeal held that treating physicians may be permitted to testify without complying with the rules of civil procedure relating to the introduction of expert evidence as "participant experts." The *Civil Justice Reform Project: Summary of Findings & Recommendations*, *supra* note 35, reports that personal injury trials often involve at least three doctors. At the time of writing, *Saadati* had rarely been relied upon by a lower court to justify the award of damages for a mental injury in the absence of expert evidence. See however *Galea v Wal-Mart Canada Corp*, 2017 ONSC 245 at paras 217–74 where the claimant was awarded $20,000 for mental distress in the absence of expert medical evidence. Rather, lower courts continue to rely on expert medical evidence to validate a claimant's experience of mental illness and to decline to award damages when such evidence is not adduced. See *R v Blanchard*, 2017 ABQB 369, para 146; *Lau v Royal Bank of Canada*, 2017 BCCA 253 at paras 47, 54; *Ponsart v Kong*, 2017 BCSC 1126 at para 61, where expert evidence was provided to confirm the existence of a mental injury.

72 See Iezzoni & Freedman, *supra* note 36.

73 For a philosophical account of mental health stressing the importance of the patient's lived experience from a hermeneutic perspective, see Hans-Georg Gadamer, *The Enigma of Health* (Stanford: Stanford University Press, 1996) at 52. See also Reem Bahdi, "Truth and Method in the Domestic Application of International Law" (2002) 15 Can JL & Juris 255 at 276–77 (applying Gadamerian theory to case law).

of deep distrust between psychiatric survivors and medical professionals, an increased acceptance of the validity of the self-reported patient experience is a significant advancement entirely in keeping with the social model.[74] Likewise, the Court's persuasive critique of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) also represents an important strike to the old paradigm of disability in tort law.[75] Disability rights advocates have long expressed concerns regarding the DSM, emblematic of the medical model and notorious for its decades-long medicalization of homosexuality as a disorder. The Court's acknowledgement of the stigmatization of homosexuality in the DSM-III and the reluctance of its editors to remove homosexuality as a psychiatric condition for a period of decades provides a chilling example of the discrimination and exclusion that can be caused by the pathologizing of individuals.[76] The hope is that the Court's concerns regarding the DSM, even as articulated in its most recent fifth edition, in *Saadati* will also cause the reliance on such tools in other areas of law to be questioned. [77]

Finally, the Court's recognition of the discriminatory attitudes and stereotypes regarding mental illness is of profound significance for advocates of the social model of disability. Indeed, a central component of the social model of disablement is that systemic barriers, particularly attitudinal barriers about people with impairments, produces the disabling of individuals, their isolation, and their exclusion. Recognizing and denouncing stereotypes relating to disabled people is thus a fundamental aspect of the social model. In its reasons, the Court explicitly acknowledged the prevalence of stigma relating to mental disability including that it is often inappropriately perceived as subjective and trivial in comparison with physical injuries and that people with mental illness are frequently wrongly portrayed as malingering.[78] After examining how such discriminatory attitudes about mental

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74 See e.g. Brenda A LeFrancois, Robert Menzies & Geoffrey Reaume, eds, *Mad Matters: A Critical Reader in Canadian Mad Studies* (Toronto: Canadian Scholars' Press, 2013).

75 See *Saadati*, *supra* note 12 at para 32.

76 See *ibid*. See also Bélanger-Hardy, "Thresholds", *supra* note 9.

77 For example, the use of the DSM by expert medical witnesses to predict the dangerousness of offenders has been criticized. See Matthew Lafond, "Disorder in the Court: The Use of Psychiatric Testimony in the Prediction of Dangerousness" (2005) 14 DJLS 1.

78 See *Saadati*, *supra* note 12 at para 22.

illness have influenced the common law in the past, the Court emphasized that such "misguided prejudices" should not be perpetuated in the law of torts.[79] This strong and unequivocal denunciation of mental health stigma has not just put an end to the controversial application of the RPI criterion in negligence cases involving mental injury but may also eventually influence other areas of law where such stereotypes are still at play.[80]

C. Lingering of the medical model

While *Saadati* gives disability rights advocates reason to celebrate, the decision does not yet mark the complete triumph of the social model of disablement in the law of negligence. The Court's failure to revisit the "ordinary fortitude" standard elaborated in *Mustapha v Culligan*, the leading Canadian case on recovery for psychiatric harm unaccompanied by physical injury prior to *Saadati*, is at odds with the modern approach to understanding disability. The plaintiff in *Mustapha* sustained a debilitating psychological injury after viewing the remains of dead flies in his bottle of drinking water supplied by the defendant, Culligan of Canada Ltd. The trial judge, finding for the plaintiff, accepted the truth of his testimony and held that his injuries were caused, in fact and in law, by Culligan's negligence.[81] The Ontario Court of Appeal reversed this decision and held that no duty of care existed because the plaintiff's injury was not foreseeable in a person of normal fortitude.[82] At the Supreme Court of Canada, it was properly recognized that Culligan, as the manufacturer of a consumable good, owed a duty of care to Mustapha, the ultimate consumer of that good, as it had long been established in *Donoghue v Stevenson*.[83] However, the Court re-

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79 *Ibid* at para 21.

80 See e.g. Mosoff, *supra* note 32 for a discussion of how such stereotypes are at play in the context of employment and labour law. See also Judith Mosoff et al, "Intersecting Challenges: Mothers and Child Protection Law in BC" (2017) 50:2 UBC L Rev 435, where the authors examine a tendency in child protection cases of presuming that mothers with a mental health diagnosis are necessarily unfit to parent.

81 See *Mustapha v Culligan of Canada Ltd*., [2005] OJ No 1469 (ONSC) at para 223.

82 See *Mustapha v Culligan of Canada Ltd*., [2006] OJ No 4964, 84 OR (3d) 457 (ONCA).

83 See *Mustapha* SCC, *supra* note 17 at para 6.

fused recovery on the grounds that Mustapha's injury was "too remote" to be recoverable in tort because it was not foreseeable in a person of ordinary fortitude.[84] Rather, his reaction was found to be unusual and extreme. In other words, Mustapha failed the test for legal causation because his injury was the combined result of his unique psychiatric vulnerability and the defendant's breach of the standard of care. While the Court emphasized that the ordinary fortitude standard was not meant to marginalize or penalize claimants who sustain mental injuries, it reasoned that a line must be drawn for compensability. This line, it stated, must be based on reasonable foreseeability, and not on perfection.[85]

Post-*Mustapha*, the "ordinary fortitude" requirement was roundly criticized in the academic literature. Some expressed concern that dismissing claims on the basis that a person of ordinary fortitude would not have sustained similar mental harms perpetuates stereotypes that mental illness is uncommon, subjective, caused by lack of resilience, and that it can be overcome by pulling oneself up by one's boot straps.[86] It was also argued that an abstract construction of a model person of ideal fortitude inevitably failed to take into account certain socio-cultural factors or religious convictions that may make an individual more at risk to certain injuries.[87] This would likely lead to the dismissal of claims involving mental harms that may have been heightened by certain psychological, religious, or cultural sensitivities not common to the "Canadian mainstream."[88] Both of these critiques highlight how the ordinary fortitude standard is incompatible with the social model of disablement. Indeed, if a court's construction of a person of ordinary fortitude may be culturally biased, it is equally at risk of reflecting ableist norms about disability and mental illness. Similarly, the language of lack of "ordinary fortitude" when describing individuals who experienced psychiatric injuries could be interpreted as implying that the mentally disabled are abnormal and weak. According to the social model, such stereotypes

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84 *Ibid* at paras 14–18.

85 See *ibid*.

86 See Foster, *supra* note 29 at 54.

87 See Eugene C Lim, "Thin-Skull Plaintiffs, Socio-Cultural 'Abnormalities' and the Dangers of an Objective Test for Hypersensitivity" (2014) 37:2 Dalhousie LJ 749 at 762.

88 *Ibid*.

and misconceptions are the primary cause of the exclusion and isolation of disabled people.[89]

Prior to *Saadati*, it was also feared that the "ordinary fortitude" requirement could result in yet another difference in the treatment between claimants who have sustained a physical harm and those who have experienced a mental injury.[90] Indeed, if the threshold was applied solely in mental injury cases, such claims would be dismissed and denied the benefit of the seemingly contradictory thin-skulled rule otherwise used to assess damages in successful claims, which provides that a defendant "takes their victims as they find them" and is therefore liable for the full extent of the harm even if resulting from unique vulnerabilities.[91] Yet the Court in *Mustapha* was clear in its position that the difference between physical and mental injuries is "elusive and arguably artificial in the context of torts."[92] Noting the Court's preoccupation not to commit the law to distinctions between mental and physical injuries, tort law experts attempted to explain the ordinary fortitude requirement articulated in *Mustapha* by opining that it constituted "a basic minimum threshold for recovery for mental injuries that would track the same threshold a court would require of physical injuries."[93] However, these scholars also warned that the ordinary fortitude threshold could potentially lead to differential treatment between claimants who have experienced mental and physical injuries if the analysis is not grounded in its objective: screening out low-level, wholly unexpected claims for which tort law should not provide a remedy.[94]

In accordance with the social model of disablement that is espoused throughout the decision, the Court in *Saadati* confirmed that the ordinary fortitude requirement was indeed meant as a minimum threshold to be applied equally to all negligence claims, irrespective of the nature of the injury for which damages are sought. The judgment clarifies that "just as recovery

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89 See Mayo Moran, *Rethinking the Reasonable Person* (Oxford:Oxford University Press, 2003) at 9.

90 See Allen M Linden et al, *Canadian Tort Law*, 11th ed (Toronto: Lexis Nexis, 2018) at 8.20.

91 *Ibid* at 8.21.

92 *Supra* note 17 at para 8.

93 Linden et al, *supra* note 90.

94 See *ibid* at 8.19.

for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant's negligence, so too will claimants be denied recovery (as the claimant in *Mustapha* was denied recovery) where mental injury could not have been foreseen to result from the defendant's negligence."[95] This is also consistent with its multiple dicta stressing that there should be no special rules for claimants in mental injury cases.[96] The passage relating to the ordinary fortitude threshold addresses concerns expressed by experts following *Mustapha* regarding the risk of differential treatment between claimants on the basis of biomedical classifications of their impairments or conditions. While this clarification reduces the stigma relating to mental illness that may have been created by applying the ordinary fortitude threshold uniquely to such claims, the preservation of the requirement continues to be of concern to those who fear that it is rooted in ableist norms and stereotypes of disabled people as abnormal and weak. In that regard, *Saadati* was a lost opportunity to fully embrace the social model in the context of a judgment that is otherwise of historic significance in its eloquent defense of the equality of disabled people.

Conclusion

This article introduced the medical model of disablement and juxtaposed it with the social model. The latter is now the more commonly held understanding of disability amongst scholars and advocates. We examined how the social model of disability has been influential in shaping jurisprudence relating to human rights legislation and section 15 of the *Charter*. We went on to argue that tort law jurisprudence, in contrast, has failed to keep pace with changing societal views about disablement. As an example, we explored the RPI requirement imposed on claimants seeking compensation for a mental injury caused by negligent conduct in the absence of physical harm. We argued that the RPI criterion suggested attitudes of distrust and scepticism regarding people with mental illnesses and reinforced the medical model of disability that casts disablement as an abnormality or disease and disregards the voices of those with lived experience. We pointed to some practical implications of the RPI for litigants seeking compensation for a mental injury, such as a cost of retaining a medical expert and the increased risk of complicating and lengthening trials.

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95 *Saadati*, *supra* note 12 at para 20.

96 See *ibid* at para 35.

We then examined *Saadati* as a case study of how the law of negligence may evolve to increasingly embrace a more modern understanding of disability. Exploring the Court's reasons for rejecting the RPI requirement, we argued that the decision represents an important shift towards the social model of disablement by recognizing and denouncing stereotypes regarding people with mental illnesses, eliminating arbitrary classifications of disabled people based on the nature of their impairment, and challenging the previously inevitable central role played by medical experts in trials involving mental harms. However, we concluded by cautioning that the continued application of the "ordinary fortitude" standard could perpetuate attitudinal barriers about disabled people. Despite this, by acknowledging the reality of this stigma in its strong rebuke of the RPI requirement, the judgement infuses Canadian tort law with a welcome understanding of the social model that holds out promise for the future.