

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

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\*Please note that this manuscript has been modified from its published version for training purposes.

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## Introduction

In the last thirty years, there has been a palatable epistemic shift in how disability is understood in society.<sup>1</sup> 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.<sup>2</sup> This model is also focused on providing bureaucratic (and frequently segregated) rehabilitation services to disabled people.<sup>3</sup> The social model of disablement, in contrast, sees disability as a social construct.<sup>4</sup> This model is focused on removing structural barriers and the fostering of Independent Living (IL) to promote the inclusion and equality of disabled people in society.<sup>5</sup> In general, the medical model of disability is now considered to be the old paradigm through which

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

<sup>2</sup> The World Health Organisation 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: ICF* (Geneva: World Health Organization, 2002) at 8 [hereinafter “WHO”].

<sup>3</sup> Critical disability theorists continue to debate what is the most appropriate descriptor to employ 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 and Richard Devlin, eds. *Critical Disability Theory: Essays in Philosophy, Politics, and Law* (Vancouver: UBC Press, 2006) at 3 and 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.

<sup>4</sup> The World Health Organisation 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 SCLR (2d) 343, at 343 [hereinafter “Rosenbaum & Chadha”].

<sup>5</sup> 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.

to analyze the experience of disablement while the social model has been widely embraced by disability scholars and advocates.<sup>6</sup>

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*, which guarantees the right to equal treatment before and under the law, has generally embraced the social model of disablement.<sup>7</sup> 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.<sup>8</sup> Canadian tort law, in contrast, continues to exhibit remnants of the medical model of disability.<sup>9</sup> For instance, cases relating to "wrongful birth" characterize the "wretched health" or "abnormalities" of disabled babies as

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<sup>6</sup> The purpose of this paper 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 recognise 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. 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" impairment scholarship in response to the social model of disability which focuses rather on systemic and structural barriers.

<sup>7</sup> See Rosenbaum & Chadha, *supra* note 4. See also Ravi Malhotra, "Has the *Charter* Made a Difference for People with Disabilities? Reflections and Strategies for the 21<sup>st</sup> Century" (2012), 58 SCLR (2d) 273.

<sup>8</sup> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703 at para 30. See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 SCR 665 at paras 78-80.

<sup>9</sup> Louise Bélanger-Hardy, "Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis" (2013) 36 Dalhousie LJ 103. See also Tamara Larre, "Pity the Taxpayer: The Tax Exemption for Personal Injury Damages as Disability Policy" (2007) 33 Queen's LJ 217 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 and Paul Steven Miller, "Blindsight: How we see disabilities in tort litigation" (2011) 86 Wash L Rev 709 [hereinafter "Bloom & Miller"] in which the authors argued that in tort law, disability is cast 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.

actionable harms, and often imply that no parent would want a child with a disability.<sup>10</sup> Cases alleging “wrongful life” reply upon the “tragedy of disability” narrative even more starkly, alleging that the plaintiff child with a disability would be better off if he or she had never been born.<sup>11</sup> Similarly, the marginalization of mental disability has a particularly long history in Anglo-Canadian tort law.<sup>12</sup> Claimants seeking compensation for mental harms they have experienced have been treated with suspicion and hostility<sup>13</sup> and tort law continues to this day to exhibit many attitudinal barriers about individuals with mental illnesses that the social model identifies as the principal cause of disabling people.<sup>14</sup>

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

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<sup>10</sup> 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 *TS v Adey*, 2017 ONSC 397 (CanLII). See however, *Arndt v. Smith*, [1997] 2 SCR 539, where the majority questioned whether 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 foetus posed by her exposure to the virus which causes chickenpox. See also Bruce Feldthusen, “Suppressing Damages In Involuntary Parenthood Actions: Contorting Tort, Denying Reproductive Freedom and Discriminating Against Mothers” (2014) 29 CJFL 11 which provides an overview of wrongful parenthood cases in Canada, Australia and the UK. In this piece, the author argues that it is superfluous, demeaning and misleading to identify a child’s disability as the reason for awarding damages in involuntary parenthood actions. The author argues that it is unfair to offer compensation for involuntary parenthood only in cases in which the child born has a disability. The author stresses that there are child rearing costs relating to raising all children, including those with disabilities and those without, and that all of these costs ought to be recoverable. This 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.

<sup>11</sup> Darpana Sheth, “Better off unborn? An analysis of wrongful birth and wrongful life claims under the *Americans with Disabilities Act*” (2006) 73 Tenn Law Rev 641.

<sup>12</sup> *Saadati v Moorhead*, [2017] 1 SCR 543 at paras 14 to 18 [hereinafter *Saadati v Moorhead* (SCC)].

<sup>13</sup> *Ibid* at para 14.

<sup>14</sup> *Ibid* at paras 14 to 18. See also Part III of this article.

negligence cases when determining whether to award stand-alone damages for mental injuries.<sup>15</sup> 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.<sup>16</sup> This article examines the changing lens through which disability is understood today, using *Saadati v Moorhead* as a case study. Our analysis is divided into 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 v Moorhead*. 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 v Moorhead* as a case study. In particular, we explore the Court's reasons for abandoning the "recognizable [or recognized] psychiatric illness" criterion through the lens of the social model of disablement. We argue that *Saadati v Moorhead* marks a clear departure away from the medical model of disability and 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.

## **Part I – Damages for Negligently Caused Mental Injuries**

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<sup>15</sup> *Ibid*. Appeal from a judgment of the British Columbia Court of Appeal (Saunders, Chiasson and Frankel JJA) [2015] BCJ No 2027 (QL) [hereinafter *Saadati v Moorhead*, BCCA], setting aside a decision of Funt J, [2014] BCJ No 1898 (QL) [hereinafter *Saadati v Moorhead* (BCSC)]. As noted 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 term "mental harm", "mental illness" and "mental injury" interchangeably to describe this broad category of injuries. While there may be a distinction between such injuries, this question will not be examined in this paper.

<sup>16</sup> *Saadati v Moorhead* (SCC) *supra* note 12.

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 the standard of care regarding that duty; 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.<sup>17</sup> 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.<sup>18</sup> 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 on such claims 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 to [the claimant, or the claimant's children]".<sup>19</sup> English courts, for their part, differentiated between "primary" and "secondary" victims seeking compensation for mental harms as a consequence of being involved or witnessing traumatic events.<sup>20</sup> Recent Canadian case law has rejected the taxonomy of primary and secondary victims but has required plaintiffs to show that their mental injury would have been foreseeable "in a person of ordinary fortitude".<sup>21</sup> 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 him or her to experience a "recognizable [or recognized] psychiatric illness" (RPI).<sup>22</sup>

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<sup>17</sup> *Ibid* at para 13.

<sup>18</sup> *Ibid* at paras 14 to 24.

<sup>19</sup> *Ibid* at para 15. Justice Brown quoting *Hambrook v Stokes Brothers*, [1925] 1 KB 141 (CA) at 152.

<sup>20</sup> *Ibid* at para 16.

<sup>21</sup> *Mustapha v. Culligan of Canada Ltd.* [2008] 2 SCR 114. See Part III, *infra*.

<sup>22</sup> The apparent origins of this general principle are explained in *Saadati v Moorhead* (SCC) *supra* note 12 at para 26.

The basis for the RPI requirement can be traced back to an oft quoted statement made by Lord Denning MR in *Hinz v Berry* in which he specified that “grief or sorrow caused by a person’s death” do not warrant the award of damages but damages were “recoverable for nervous shock, or, to put it in medical terms, for a recognisable psychiatric illness caused by the breach of duty by the defendant.”<sup>23</sup> While it has been convincingly argued that Lord Denning was not necessarily seeking to create an additional evidentiary burden for this class of claimants, his reference to a “recognisable psychiatric illness” was largely interpreted in the United Kingdom, Australia, and New Zealand, as well as by lower courts in Canada, as imposing a requirement on claimants seeking damages for a mental injury in the absence of a physical harm.<sup>24</sup> In Canada, terms such as “genuine”, “objective”, “actual” and “positive” psychiatric illness were used when applying the criterion.<sup>25</sup> However, it was generally understood to mean that a claimant’s injury needed to be labelled by an expert with 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.<sup>26</sup> In her in depth study of the RPI threshold, Professor Louise Bélanger-Hardy provided a detailed analysis of the different policy

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<sup>23</sup> *Hinz v Berry*, [1970] 2 QB 40 (CA) at 42. Quoted in *Saadati v Moorhead* (SCC) *supra* note 12 at para 26.

<sup>24</sup> *Saadati v Moorhead* (SCC), *supra* note 12 at paras 27-28. See Louise Bélanger-Hardy, “Reconsidering the ‘Recognizable Psychiatric Illness’ Requirement in Canadian Negligence Law” (2013) 38:2 Queen’s LJ 583 at 607, where the author argues that what Lord Denning meant by nervous shock is “not entirely clear” and are “not necessarily an endorsement of a new, higher threshold.”

<sup>25</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 26. Quoting Rachel Mulheron “Rewriting the Requirement for a ‘Recognized Psychiatric Injury’ in Negligence Claims” (2012) 32 *Oxford J Leg Stud* 77 at 81. See also *Rhodes Estate v. Canadian National Railway*, [1990] BCJ No 2388 (QL); *Bastien v. Ottawa Hospital (General Campus)*, [2001] OJ No 3899 (QL) and *Burnett v. St. Jude Medical, Inc.*, 2009 BCSC 1651 (CanLII).

<sup>26</sup> See, for example, Louise Bélanger-Hardy, *supra* note 9; Louise Bélanger-Hardy, *supra* note 26; 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 and 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 *Oxford J Leg Stud* 77; and Nicholas Mullany and Peter R. Handford, *Tort Liability for Psychiatric Damage* (Sydney, N.S.W.: Law Book Co., 1993) which were relied upon by Justice Brown in his reasons in *Saadati*, *supra* note 12.



considerations lying beneath the RPI requirement. She described four general types of concerns about mental injury claims that she grouped as follows:

[T]he 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.<sup>27</sup>

These concerns were clearly at play in a decision by the 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

It 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 screen such claims and to refuse compensation unless the injury is serious and prolonged.<sup>28</sup>

Many scholars, including Professor Bélanger-Hardy, have been critical of these concerns as a justification for the continued application of the RPI threshold..<sup>29</sup> 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 mental illness more

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<sup>27</sup> *Ibid.*

<sup>28</sup> Louise Bélanger-Hardy, *supra* note 9.

<sup>29</sup> See, for example, Louise Bélanger-Hardy *supra* note 9. See also *Saadati v Moorhead* (SCC) *supra* note 12 at paras 14 and 34-35. See also Margo Louise 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*” in *Appeal: Review of Current Law and Law Reform*, 2009 14, 2009 CanLIIDocs 182, <<http://www.canlii.org/t/2bx9>>, retrieved on 2018-11-16.

specifically.<sup>30</sup> 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 demonstrated discriminatory attitudes of distrust and scepticism towards people with mental illness.<sup>31</sup> 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 for example, 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 compared to workers with more "mainstream" impairments.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> This requirement in the law of negligence was imposed uniquely on claimants seeking standalone damages for mental injury thus causing them to be more likely to face the array of practical

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<sup>30</sup> Indeed, the Supreme Court has recognised that people with mental health disabilities face "particular disadvantage", social prejudice and negative stereotyping. See, for example, *R v Swain*, [1991] SCR 933 at 994. This point was also made by the Supreme Court of Canada in *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".

<sup>31</sup> See, for example, Louise Bélanger-Hardy *supra* note 9. See also *Saadati v Moorhead* (SCC) *supra* note 12 at paras 14 and 34-35. See also Foster *supra* note 30.

<sup>32</sup> Judith Mosoff, "Lost in Translation?: The Disability Perspective in *Honda v Keays* and *Hydro-Québec v Syndicat*" (2009) 3:1 MJLH 137. The author views the Superior Court of Justice of Ontario's characterization of invisible disabilities as "non-mainstream" as problematic. She writes: "it suggests that a condition is inconsistent with a medical model of disability and is, therefore, questionable". See also Tess Sheldon, "It is Not Working: Barriers to the Inclusion of Workers with Mental Health Issues" (2011) 29 Windsor Y B Access Just 163-192.

<sup>33</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 28.

<sup>34</sup> See *Saadati v Moorhead* (SCC) *supra* note 12 para 30 where Brown J referenced 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.

challenges that often arise when one seeks to admit and rely upon expert evidence during a trial. These include, for example, 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 often arise when one seeks to introduce expert evidence.<sup>35</sup>

## **Part II – The Medical and the Social Model of Disablement**

Beyond its more practical implications, the RPI requirement also raised more theoretical questions relating to disablement, including 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 it is physicians who are best positioned to determine who is disabled.<sup>36</sup> Similarly, its emphasis on diagnosis implied an understanding of disability that is focused on bio-medical conditions without regard to the social consequences of an impairment or limitation in particular financial, social, professional and cultural circumstances.<sup>37</sup> This conceptualisation of disability, and mental illness in particular, corresponds with what disability scholars have labelled the medical model of disability. Often described as the old paradigm of disability, the medical model sees

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<sup>35</sup> Paul Michell and Renu Mandhane, “The Uncertain Duty of the Expert Witness” (2005) 42 *Alta L Rev* 635. 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 exceed by far 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* (Toronto: Ontario Ministry of the Attorney General, 2007) that states that the proliferation of expert witness in trials causes delays and unduly increases the cost of litigation.

<sup>36</sup> Lisa I Iezzoni and Vicki A Freedman, “Turning the Disability Tide; The Importance of Definitions” (2008) 299:3 *JAMA* 334.

<sup>37</sup> Note that the requirement of medical diagnosis has not always been applied in cases involving intentional infliction of mental injury. See eg *Clark v Canada*, [1994] 3 FC 323; *Rahemtulla v. Vanfed Credit Union*, 1984 CanLII 689 (BC SC).

disability as a personal tragedy relating to a disease, trauma or other health condition.<sup>38</sup> 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 people can better integrate into society.<sup>39</sup>

The social model, in contrast, advances the view that disability-related limitations or exclusion are caused not by biomedical conditions but by environmental, attitudinal, communication and organisations barriers about disabilities and disabled people. Seen through this lens, disability is understood as 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 society at a given time.<sup>40</sup> If one accepts that the social consequences of an impairment can vary in different circumstances, an individual's account of his or her lived experience of these impacts are of vital importance to understanding his or her 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 no allowances whatsoever for pregnancy (and in some cases did not even provide female washrooms), the social model has led to a reconceptualization of how social institutions, from workplaces to schools, fail to accommodate and include disabled people.<sup>41</sup>

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<sup>38</sup> WHO *supra* note 2 at 8.

<sup>39</sup> See Michael Oliver & Colin Barnes *supra* note 1.

<sup>40</sup> *Ibid.* See also WHO *supra* note 2.

<sup>41</sup> 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,

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 of Rights and Freedoms* and its eventual inclusion in all human rights statutes in Canada.<sup>42</sup> More recently, we have also seen the enactment of accessibility legislation in some provinces as well as the introduction of a bill in Parliament aiming to eliminate a wide range of barriers for disabled people.<sup>43</sup> These laws generally espouse the social model of disablement as they are “premised on the principles of access, equality, universal design, and systemic responsibility”.<sup>44</sup> Likewise, 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 of Canada’s analysis of disablement, which is generally consistent with the social

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*Disabling Barriers: Social Movements, Disability History and the Law* (Vancouver: University of British Columbia Press, 2017).

<sup>42</sup> See e.g. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15; *Human Rights Code*, RSO 1990, c H.19, 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 of Rights and Freedoms*, 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. 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).

<sup>43</sup> *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, *Accessible Canada Act: An Act to Ensure a Barrier-Free Canada*, 1st Sess, 42nd Parl, Canada, 2018 (first reading, June 20, 2018).

<sup>44</sup> Tracy Smith-Carrier, Don Kerr, Juyan Wang, Dora M.Y. Tam, and Siu Ming Kwok, “Vestiges of the Medical Model: A Critical Exploration of the Ontario Disability Support Program” (2017) 32:10 *Disabil Soc* 1570.

model.<sup>45</sup> 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.<sup>46</sup> 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 biomedical condition.<sup>47</sup> Human rights tribunals, for their part, have also embraced the social model of disability, often by referring to this model of disablement directly in decisions.<sup>48</sup> It is in this context of shifting attitudes and understandings of disablement in the law and in society that *Saadati v Moorhead* arose.

### **Part III –Recent Developments in the Law of Negligence**

#### **(a) *Saadati v Moorhead***

*Saadati v Moorhead* squarely raises questions about how we think about disability, the social construction of disabled bodies and how we classify who or who is not labelled as disabled. The decision comes at a time in which Canadian and American scholars are beginning

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<sup>45</sup> 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 cases such as *Granovsky v Canada (Minister of Employment and Immigration)*, *supra* note 8; *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, [2007] 1 SCR 650. See, however, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, *supra* note 8, where the social model was applied although no disability organisations were involved as interveners.

<sup>46</sup> *Granovsky v Canada (Minister of Employment and Immigration)* *ibid* at para. 30.

<sup>47</sup> Smith-Carrier, Tracy, Don Kerr, Juyan Wang, Dora M.Y. Tam, and Siu Ming Kwok, "Vestiges of the Medical Model: A Critical Exploration of the Ontario Disability Support Program." (2017) 32:10 Disabil Soc 1570; *Villani v. Canada (Attorney General)*, [2002] 1 FC 130, 2001 FCA 248 (CanLII).

<sup>48</sup> See, for example, *Hinze v. Great Blue Heron Casino*, 2011 HRTO 93 (CanLII); *Brock v. Tarrant Film Factory Ltd.*, 2000 CanLII 20858 (ON HRT); *Hill v. Spectrum Telecom Group Ltd.*, 2012 HRTO 133 (CanLII) and *Turnbull v. Famous Players Inc.*, 2001 CanLII 26228 (ON HRT).

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.<sup>49</sup> As the primary function of tort law consists in 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 torts litigation.<sup>50</sup> Some have asked whether this is inherently incompatible with the social model.<sup>51</sup>

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.<sup>52</sup> Although the plaintiff's vehicle was significantly damaged, he appeared not to have been physically injured during the accident.<sup>53</sup> An ambulance was dispatched at the scene of the accident, however, the plaintiff was not hospitalised.<sup>54</sup> Following the accident, the plaintiff initiated an action seeking damages in the range of \$244,000 to \$294,000 in lost wages and non-pecuniary losses. The defendants (respondents before the Supreme Court) conceded their liability but argued that the plaintiff suffered no damages.<sup>55</sup> The trial judge, Justice Funt, held that the plaintiff failed to establish that the accident had caused him to suffer any physical injury.<sup>56</sup> However, he also found that the plaintiff had experienced "psychological injuries, including

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

<sup>50</sup> See Bloom and Miller *supra* note 9.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Saadati v Moorhead* (BCSC) *supra* note 12 at para 1.

<sup>53</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 3.

<sup>54</sup> *Ibid.* See also *Saadati v Moorhead* (BCSC) *supra* note 15 at paras 10-12.

<sup>55</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 5.

<sup>56</sup> *Ibid.* See also *Saadati v Moorhead* (BCSC) *supra* note 15 at para 32.

personality change and cognitive difficulties” as a result of the respondent’s negligence.<sup>57</sup> 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 plaintiff’s personality and created cognitive difficulties.”<sup>58</sup> 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.<sup>59</sup> The trial judge also relied on this evidence to determine the impact of the plaintiff’s change in personality and cognitive troubles on his activities of daily living, including the loss of close personal relationships with his family and friends.<sup>60</sup> Based on this finding, he awarded the plaintiff \$100,000 in non-pecuniary damages.<sup>61</sup> The Court of Appeal for British Columbia allowed the appeal of the damages award on the basis that the plaintiff had not proven that he “suffered from a recognised medical condition”.<sup>62</sup> “Absent expert medical opinion evidence” the Court of Appeal stated, “a judge is not qualified to say what is, or is not, an illness”.<sup>63</sup>

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 recognized] mental illness”.<sup>64</sup> More practically, the Supreme Court was called upon to determine whether claimants were required to adduce expert medical

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<sup>57</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 5. See also *Saadati v Moorhead* (BCSC) *supra* note 18 at paras 33 to 50.

<sup>58</sup> *Saadati v Moorhead* (BCSC) *supra* note 15 at 38.

<sup>59</sup> *Ibid* at paras 39 to 49.

<sup>60</sup> *Ibid* at para 63.

<sup>61</sup> *Ibid* paras 65 to 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. See *ibid* at para 78.

<sup>62</sup> *Ibid* at para 30.

<sup>63</sup> *Saadati v Moorhead* (BCCA) *supra* note 15 at para 32.

<sup>64</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 13.



evidence in order to obtain compensation for mental harm in negligence cases in the absence of a physical injury.<sup>65</sup>

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 characterised as "one of suspicion and sometimes outright hostility".<sup>66</sup> The Court noted that even when common law courts did away with its 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.<sup>67</sup>

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.<sup>68</sup> 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 meant to create an additional requirement for claimants who experienced a mental injury when using this language.<sup>69</sup> The Court then weighted 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.<sup>70</sup> It concluded that there was no basis, as matter of legal principle or policy, for lower courts to maintain these distinct rules for certain claimants. Such distinctions, the Court

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<sup>65</sup> *Ibid* at paras 12-13. This paper's focus is the "recognizable [or recognized] 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.

<sup>66</sup> *Ibid* at para 14.

<sup>67</sup> *Ibid* at para 15.

<sup>68</sup> *Ibid* at para 25.

<sup>69</sup> An overview of the origins are provided in part one of this article.

<sup>70</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at paras 20 and 36.

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.”<sup>71</sup> For this reason, the Court stated that it would not endorse maintaining the RPI threshold.<sup>72</sup> 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 or 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 a safeguard against unmeritorious or trivial claims.<sup>73</sup> 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 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.<sup>74</sup> 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.<sup>75</sup> The Court further specified that the removal of the RPI

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<sup>71</sup> *Ibid* at para 21, quoting A M Linden and B Feldthusen, *supra* note 26 at 449 and R Mulheron, “Rewriting the Requirement for a ‘Recognized Psychiatric Injury’ in Negligence Claims” (2012) 32 *Oxford J Leg Stud.* 77 at 82

<sup>72</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 36.

<sup>73</sup> *Ibid* at para 34. These elements are explained in Part I of this paper. 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 paper.

<sup>74</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 22. See also Linden & Feldthusen, *supra* note 26.

<sup>75</sup> *Ibid* at para 34.

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.<sup>76</sup>

In following part of the 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.

#### **(b) Glimmers of the social model**

In our view, *Saadati v Moorhead* 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 in keeping with an understanding of disability that is focused 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.<sup>77</sup> In eliminating this dubious distinction in how tort law

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<sup>76</sup> *Ibid* at para 38.

<sup>77</sup> *Ibid* at para 36.

treats physical and mental disabilities, the Court in *Saadati v Moorhead* 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 economical context. As it is recognised 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.<sup>78</sup> 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.<sup>79</sup>

Secondly, the lifting of the requirement that a mental injury be diagnosed 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.<sup>80</sup> It would certainly be an overstatement to conclude

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<sup>78</sup> This viewpoint has long been espoused by cross-disability advocacy groups, such as the CCD, whose work focuses on seeking to eliminate environmental, attitudinal, communication and organisations barriers faced by all disabled people, irrespective of the nature of their impairment. See, for example, submissions of the CCD dated August 5, 2018 in *MacLaren v British Columbia (Attorney General)*, 2018 BCSC 1753 (CanLII). In a motion to strike, BC argued that the CCD ought not to have standing in a *Charter* challenge relating to the rights of people with mental disabilities because it was not a mental health organisation. In its submissions, the CCD emphasized that it espoused the social model of disability and was focused on eliminating the environmental, attitudinal, communication and organisations barriers faced by all disabled people, regardless of the nature of their impairment.

<sup>79</sup> See for example, *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 in which the Human Rights Tribunal of Ontario held that the Government of Ontario's special diet program discriminated between individuals with different types of disabilities who have dietary needs that fall within the purpose of the Ontario Disability Support Program. See also *Plesner v British Columbia (Hydro and Power Authority)*, 2009 BCCA 188, [2009] No 856 (QL) (Ryan JA dissenting) where the British Columbia Court of Appeal held that it is contrary to section 15(1) of the *Charter* to impose additional criteria to injured workers seeking compensation for mental injury compared to those applied to workers with physical injuries.

<sup>80</sup> *Saadati v Moorhead*, *supra* note 12 at para. 37.

that the Supreme 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.<sup>81</sup> Indeed, even in cases involving physical injuries where diagnoses and expert evidence are not strictly required, medical experts are nevertheless given a privileged position in trials.<sup>82</sup> 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, in turn, help erode the discriminatory assumptions about disability, central to the medical model, that physicians know what is best for disabled people.<sup>83</sup> 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

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<sup>81</sup> See *ibid* at para 38. See also Bloom and Miller, *supra* note 9 at 722.

<sup>82</sup> See also *Westerhof v Gee Estate*, 2015 ONCA 206 (CanLII) in which the Court of Appeal for Ontario 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* reports that personal injury trials often involve at least three doctors at *supra* note 36. At the time of writing, *Saadati v Moorhead* 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 (CanLII) 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 (CanLII), para 146; *Lau v Royal Bank of Canada*, 2017 BCCA 253 (CanLII), para 47 and *Ponsart v Kong*, 2017 BCSC 1126 (CanLII), where expert evidence was provided to confirm the existence of a mental injury.

<sup>83</sup> Lisa I Iezzoni and Vicki A Freedman, "Turning the Disability Tide; The Importance of Definitions" (2008) 299:3 *JAMA* 334.

that is consistent with the social model of disablement.<sup>84</sup> Given the long history of deep distrust between psychiatric survivors and medical professionals, an increased acceptance of the validity of the self-reported patient experience is a significant advance entirely in keeping with the social model.<sup>85</sup> 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.<sup>86</sup> 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 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.<sup>87</sup> The hope is that the Court's concerns regarding the DSM in *Saadati v Moorhead* will also cause the reliance on such tools in other areas of law to also be questioned.<sup>88</sup>

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, are what lead to the disabling of individuals,

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<sup>84</sup> 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 (applying Gadamerian theory to case law).

<sup>85</sup> 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).

<sup>86</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para 32.

<sup>87</sup> See *Saadati v Moorhead* (SCC) *supra* note 12 at paras 31 and 32. For a discussion, see Louise Bélanger-Hardy, *supra* note 9.

<sup>88</sup> 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.

their isolation and their exclusion. Recognising 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.<sup>89</sup> After examining how such discriminatory attitudes about mental 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.<sup>90</sup> 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 eventually also influence other areas of law where such stereotypes are still at play.<sup>91</sup>

### **(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.<sup>92</sup> The plaintiff in *Mustapha* sustained a debilitating psychological injury after viewing the remains of dead flies in

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<sup>89</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at para. 22.

<sup>90</sup> *Ibid* at para. 21.

<sup>91</sup> For example, see Judith Mosoff, *supra* note 33 for a discussion of how such stereotypes are at play in the context of employment and labour law. See also Judith Mosoff, Isabel Grant, Susan B Boyd & Ruben Lindy, “Intersecting Challenges: Mothers and Child Protection Law in BC” (2017) 50:2 UBC L Rev 435 where the author examines a tendency in child protection cases of presuming that mothers with a mental health diagnosis are necessarily unfit to parent.

<sup>92</sup> *Mustapha v. Culligan of Canada Ltd.*, *supra* note 24.

his bottle of drinking water supplied by Culligan. The trial judge, finding for Mustapha, accepted the truth of his testimony and held that his injuries were caused, in fact and in law, by Culligan's negligence.<sup>93</sup> 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".<sup>94</sup> 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*.<sup>95</sup> However, the Court refused 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.<sup>96</sup> 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 marginalise or penalise 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.<sup>97</sup>

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

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<sup>93</sup>*Mustapha v. Culligan of Canada Ltd.*, [2005] O.J. No. 1469, 32 C.C.L.T. (3d) 123 (SCJ).

<sup>94</sup>*Mustapha v. Culligan of Canada Ltd.*, 2006 CanLII 41807 (ON CA).

<sup>95</sup>*Mustapha v. Culligan of Canada Ltd.*, *supra* note 24 para 6.

<sup>96</sup>*Ibid* paras 14 to 18.

<sup>97</sup>*Ibid*.



by pulling oneself up one's boot straps.<sup>98</sup> 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.<sup>99</sup> 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 "Canadian mainstream".<sup>100</sup> 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 and misconceptions are the primary cause of the exclusion and isolation of disabled people.<sup>101</sup>

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 if applied uniquely to such claims.<sup>102</sup> Indeed, if the threshold 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 defendants "takes their victims as they find them" and are

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<sup>98</sup> Foster, Margo Louise "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*" in *Appeal: Review of Current Law and Law Reform*, 2009 14, 2009 CanLIIDocs 182, <<http://www.canlii.org/t/2bx9>>, retrieved on 2018-11-16.

<sup>99</sup> Lim, Eugene, "Thin-Skull Plaintiffs, Socio-Cultural "Abnormalities" and the Dangers of an Objective Test for Hypersensitivity" (2014) *Dalhousie LJ* 37(2) 749-769 at 762.

<sup>100</sup> *Ibid.*

<sup>101</sup> Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003) at 9.

<sup>102</sup> Allen M. Linden, Bruce Feldthusen, Margaret Isabel Hall, Erik S. Knutsen, and Hilary A. N. Young, *Canadian Tort Law*, 11th Ed (Toronto: Nexis Lexis, 2018) at 8.20 [Linden, Feldthusen, Hall, Knutsen, & Young ].

therefore liable for the full extent of the harm even if resulting from unique vulnerabilities.<sup>103</sup> 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”.<sup>104</sup> 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.”<sup>105</sup> 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 was not grounded in its objective: screening out “low-level, wholly unexpected claims for which tort law should not provide a remedy”.<sup>106</sup>

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 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.”<sup>107</sup> This is also consistent with its multiple *dicta* stressing that

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<sup>103</sup> *Ibid* at 8.21

<sup>104</sup> *Mustapha v. Culligan of Canada Ltd.*, *supra* note 24.

<sup>105</sup> Linden, Feldthusen, Hall, Knutsen, & Young, *supra* note 105 at 8.20

<sup>106</sup> *Ibid* at 8.19

<sup>107</sup> *Ibid* at para 20.

there should be no special rules for claimants in mental injury cases.<sup>108</sup> 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 bio-medical classifications of their impairments. 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, which 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 *Canadian Charter of Rights and Freedom*. It went on to argue that torts law jurisprudence, in contrast, has failed to keep pace with changing societal views about disablement. As an example, we explored the RPI requirement imposed 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

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<sup>108</sup> *Saadati v Moorhead* (SCC) *supra* note 12 at paras 21, 23, 31, and 35-36.

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.

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 recognising 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 welcomed understanding of the social model that holds out promise for the future.