

# PSYCHOLOGICAL UPSET OR INJURY? THE ONTARIO COURT OF APPEAL CONSIDERS THE STANDARD FOR MENTAL INJURY CLAIMS IN *BOTHWELL V. LONDON HEALTH SCIENCES CENTRE*

Posted on October 25, 2023

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Are persistent feelings of anger and frustration a compensable mental injury? In *Bothwell v. London Health Sciences Centre*, 2023 ONCA 323, the Ontario Court of Appeal held that in the absence of relevant evidence, a claim for psychological injury risks falling short of the requisite standard. “Without more,” feelings of anger and frustration are evidence of psychological upset, not injury.<sup>[1]</sup>

## Background

In September 2011, the claimant in *Bothwell* went to the London Health Sciences Centre, Victoria Hospital (the “**Hospital**”) to undergo a surgical procedure. While recovering in the post-anesthesia care unit following surgery, a nurse incorrectly administered Heparin instead of Voluven.

The claimant commenced a claim for medical negligence against the defendant nurse and the Hospital (the “**Claim**”), alleging that along with his physical injuries, he had also suffered from nightmares, emotional distress, anxiety, depression and psychological injury as a result of the erroneous administration of Heparin.

The only evidence on the matter of psychological injury came from the claimant’s testimony; he led no expert evidence. There was no evidence that the claimant had sought or received treatment for his emotional reaction to the medication incident and he acknowledged that it had not interfered with his ability to do his job.

## The Trial Decision

The Court considered, among other things, whether the defendants’ actions caused psychological damage amounting to mental injury. As noted above, the only evidence on the matter of psychological injury came from the claimant; **he did not lead any expert evidence**. The trial judge accepted the claimant’s evidence that he was frustrated and angry, which persisted up to the trial in 2020. The trial judge also found that these feelings were revisited whenever he attended the Hospital for his work as a paramedic.

The trial judge ruled that the defendant nurse and Hospital breached their duty of care by administering the wrong medication to the claimant. He concluded that the causation requirement between the breach of duty and the claimant's psychological upset met the standard described by the Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28. Specifically, he found that the claimant's feelings were objectively and subjectively serious and went beyond ordinary annoyances. It was this finding that was considered on appeal.

## Appeal

On appeal, the defendant Hospital and nurse argued that the trial judge failed to consider "key" factors from *Saadati* when concluding the claimant's feelings about the medication error were sufficient to prove a compensable mental injury at law.

The Court of Appeal agreed, finding the trial judge erred in law by failing to consider:

- the **degree of disturbance** the claimant had experienced due to his psychological upset.
- the **minimal impact** the claimant's continued anger and frustration had on his cognitive functions and participation in daily activities.
- the **absence of evidence** that the claimant had sought treatment for those feelings.

In its analysis, the Court of Appeal confirmed that in *Saadati*, the Supreme Court makes it clear that a mental injury is not proven by the existence of mere psychological upset.<sup>[2]</sup> Instead, claimants must show that the disturbance they suffered is "serious and prolonged and rises above the ordinary annoyances, anxieties, and fears that come with living in civil society." The claimant's ultimate task is to "show the requisite degree of disturbance." The Court confirmed that the trier of fact must consider not only the claimant's psychological upset, but also:

- How seriously the claimant's cognitive functions and participation in daily activities were impaired;
- The length of such impairment; and
- The nature and effect of any treatment sought and taken in relation to the psychological upset.

Importantly, the Court of Appeal noted that while expert evidence is not necessary to prove a mental injury, the absence of relevant evidence can have a detrimental impact on a claim. In *Bothwell*, the lack of evidence of impairment was in stark contrast to the evidence provided in *Saadati*, where friends and family testified about the claimant's behavioural and personality changes.

## Key Takeaways

*Bothwell* establishes that mere allegations of mental injury without relevant evidence run the risk of falling "short" of the standard outlined in *Saadati*. Where there is an absence of:

- evidence of impairment of cognitive functioning;
- interference with activities of daily living; or
- treatment for emotional symptoms,

a claim for mental injury cannot succeed.<sup>[3]</sup>

However, although *Bothwell* suggests a higher standard, defendants should be cognizant that the threshold for relevant evidence is not steep – lay evidence from family members, for example, can be enough to satisfy the *Saadati* factors.<sup>[4]</sup> This decision clarifies that, while an absence of evidence is detrimental to a mental injury claim, any relevant evidence – particularly that evidence supplied by lay witnesses – will be duly considered and weighed by a court.

[1] *Bothwell v. London Health Sciences Centre*, 2023 ONCA 323 at para 51 (“**Bothwell**”).

[2] *Bothwell* at para. 30.

[3] *Bothwell* at para. 51.

[4] *Bothwell* at para. 45.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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