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Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Appraisal

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Common law courts, in Canada and elsewhere, currently insist on proof of a recognizable psychiatric illness (RPI) before granting damages to plaintiffs seeking compensation for stand-alone mental harm caused by negligent acts. This article argues that the time has come to revisit this well-entrenched principle. The inquiry focuses specifically on the policy concerns underlying the current rule. As a first step, policy considerations for and against limiting the extent of actionable mental harm are canvassed and assessed. The author concludes that some of the perceived advantages of the RPI rule, in particular predictability, are debatable and that insistence on the traditional formula raises issues of access and fairness. As a second step, the option of eliminating all thresholds is examined and rejected in favour of a "no compensation for mere upsets" threshold. The author suggests that this threshold will allow courts to strike the correct balance between deterring legal actions based on "mere upsets" of life and recognizing the legitimacy of "mid-spectrum" mental harm, whether psychiatric, psychological, or emotional in nature.

À ce jour, au Canada et ailleurs, les tribunaux de common law insistent sur la preuve d'un préjudice psychiatrique reconnu (PPR) lorsqu'il s'agit d'indemniser les demandeurs ayant subi un préjudice purement moral causé par la négligence d'autrui. Cet article suggère qu'il est temps de revoir ce principe bien établi. La démarche est centrée sur les considérations de politique générale qui sous-tendent l'état actuel du droit. En premier lieu, l'auteure examine les questions de politique pour et contre la nécessité de limiter l'étendue du préjudice moral indemnisable. Elle conclut que les avantages associés à la règle PPR ne sont pas probants et que le fait d'insister sur un tel palier soulève des questions d'accès et d'équité. En deuxième lieu, l'auteure se penche sur la possibilité d'éliminer tous les paliers, mais cette option est rejetée en faveur d'un palier fondé sur la notion de « non-indemnisation pour simple contrariété ». Selon l'auteure, cette solution permettra aux tribunaux de prévenir les actions juridiques fondées sur les « simples désagréments de la vie » tout en reconnaissant la légitimité du préjudice moral sous toutes ses formes, qu'il soit psychiatrique, psychologique ou émotionnel.

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Introduction

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Introduction

Tort law has always viewed mental harm with caution, not to say scepticism. This devaluation of injury to the mind can be attributed to a number of intertwining causes including limited scientific and medical knowledge about the functioning of the psyche,¹ conceptions of the mind/body relationship inspired by Cartesian dualism,² prevalent assumptions

1. For a study of the evolution of medical knowledge, see, e.g., E Fuller Torrey & Judy Miller, *The Invisible Plague: The Rise of Mental Illness from 1750 to the Present* (New Jersey: Rutgers University Press, 2001); Rhodri Hayward, "Medicine and the Mind" in Mark Jackson, ed, *The Oxford Handbook of the History of Medicine* (Oxford: Oxford University Press, 2011) 524.

2. See Rene Descartes, *The Philosophical Writings of Descartes*, vol 2, translated by John Cottingham, Robert Stoothoff & Dugald Murdoch (Cambridge, UK: Cambridge University Press, 1984) at 50-62; Martha Chamallas, "Removing Emotional Harm from the Core of Tort Law" (2001) 54 Vand L Rev 751 at 758-761; Joanne Conaghan & Wade Mansell, *The Wrongs of Tort*, 2d ed (London: Pluto Press, 1999) at 35-36.

about women and emotion-based injuries,³ and fear and incomprehension of mental illnesses.⁴

Although redress for some forms of mental harm⁵ is possible through torts, such as assault and defamation,⁶ courts have been more guarded when the harm flows from negligent conduct. This is particularly true for so-called independent or stand-alone mental harm, not ancillary to physical injury.⁷

Actions for indemnification for negligently inflicted mental harm started to appear more frequently by the middle of the 19th century with the advent of passenger train travel.⁸ As shown by the well-known case of

3. Martha Chamallas & Linda K Kerber, "Women, Mothers and the Law of Fright: A History" (1990) 88 Mich L Rev 814.

4. See Michael L Perlin & Deborah A Dorfman, "Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence" (1993) 11 Behav Sci L 47 at 47-48; Nancy Levit, "Ethereal Torts" (1992) 61 Geo Wash L Rev 136 at 174-177.

5. In this article, given the nature of the present inquiry, the expression "mental harm" has been retained because it is wide enough to include emotional, psychological, or psychiatric injury. A similar definition was adopted in Scottish Law Commission, *Report on Damages for Psychiatric Injury* (2004) Scot L Com No 196, recommendation 3(a): "any harm to a person's mental state, mental function or mental well-being, whether or not the harm amounted to a medically recognised medical disorder." The choice of the term "mental harm" should not be construed as an endorsement of Cartesian dualism advocating the separation of mind and body. See Robert E Kendell, "The Distinction between Mental and Physical Illness" (2001) 178 BJ Psych 490 and the debate that followed his editorial. 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 Decision in *Mustapha v. Culligan*" (2009) 14 Appeal 37 at 42.

6. For a good survey of the various causes of action addressing mental distress, see Paula Giliker, "The 'New' Head of Damages: Damages for Mental Distress in the English Law of Torts" (2000) 20 LS 19; Peter Handford, *Mullany & Handford's Tort Liability for Psychiatric Damage*, 2d ed (Sydney: Law Book Co, 2006) at 82-92 [*Mullany & Handford*]; Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Liability* (Oxford: Hart Publishing, 2009) at 28-29.

7. Canadian case law and doctrine generally accept that mental harm flowing from a physical injury is not subject to the same stringent limiting factors applied to independent or stand-alone mental harm cases. See *Zawadzki v Calimoso*, 2011 BCSC 45 at para 106, 2011 BCJ 53; *Hussack v Chilliwack School District No 33*, 2009 BCSC 852 at para 137, 97 BCLR (4th) 330, rev'd on other grounds 2011 BCCA 258, 19 BCLR (5th) 257; and *Frazer v Haukioja*, (2008) OJ No 3277 at 289, aff'd 2010 ONCA 249, 101 OR (3d) 528 [*Frazer*].

8. See Danuta Mendelson, *The Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (Aldershot, UK: Ashgate, 1998) at 36-56; James Halpern & Mary Tramontin, *Disaster Mental Health Theory and Practice* (Belmont, CA: Thomson Brooke/Cole, 2007) 46 at 49; Danuta Mendelson, "English medical experts and the claims for shock occasioned by railway collisions in the 1860's: Issues of Law, Ethics and Medicine" (2002) 25:4 Int'l J L & Psychiatry 303.

Victorian Railways Commissioners v Coultas,⁹ early claims were rejected but doubts about this uncompromising approach soon arose. Hence, throughout the 20th century, decisions have oscillated between generosity towards plaintiffs¹⁰ and refusal to compensate.¹¹

In 2007, in *Mustapha v Culligan of Canada Ltd.*,¹² after a long hiatus,¹³ the Supreme Court of Canada commented on the principles applicable to mental harm claims. An important part of the decision focussed on some of the mechanisms to contain the ambit of compensation.¹⁴ In this article, the focus is on one of the control devices, namely the need for a plaintiff to prove a “recognizable psychiatric illness” (RPI).

Since the early 1970s, Canadian courts generally agree that an RPI is proven when a psychiatrist is able to confirm that the harm suffered

9. (1888) 13 App Cas 222 (PC) [*Coultas*]. In that case, a gate-keeper erroneously signalled to the driver of a buggy to enter the gate at a crossing while a train was approaching. A collision was narrowly avoided but the plaintiff, who was sitting inside the buggy, was frightened to such an extent that she suffered a form of mental shock due to extreme fright. She miscarried shortly afterwards. In denying compensation, the Privy Council wrote, at 225: “[d]amages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances...be considered a consequence which, in the ordinary course of things, would flow from the negligence.”

10. See, e.g., *Dulieu v White & Sons*, [1901] 2 KB 669; *Hambrook v Stokes Bros*, [1925] 1 KB 141; *McLoughlin v O'Brian*, [1982] 2 All ER 298 (HL) [*McLoughlin*]; and in Canada, *Toronto Railway Co v Toms* (1911), 44 SCR 268 [*Toronto Railway*]; *Horne v New Glasgow*, [1954] 1 DLR 832 at 844 (NSSC) [*Horne*]; *Mason v Westside Cemeteries Ltd* (1996), 135 DLR (4th) 361, [1996] OJ No 1387 (SC) [*Mason*]; *Sant v Jack Andrews Kirkfield Pharmacy*, 2001 MBQB 294, [2002] Man R (2d) 121.

11. See, e.g., *Bourhill v Young*, [1943] AC 92 (HL); *Alcock v Chief Constable of South Yorkshire Police*, [1992] 1 AC 310 (HL); and in Canada, *Henderson v Canada Atlantic Railway* (1898), 25 OAR 437 (CA) aff'd on other grounds (1899), 29 SCR 632; *Miner v CPR* (1911), 3 Alta LR 408 (CA) [*Miner*]; *Duwyn v Kaprielian* (1978), 22 OR (2d) 736 (CA) [*Duwyn*]; *Heighington v Ontario* (1987), 60 OR (2d) 641 (HCJ) [*Heighington, HCJ*], aff'd on other grounds (1989), 69 OR (2d) 484 (CA); *Rhodes Estate v CNR* (1990), 50 BCLR (2d) 273, (sub nom *Rhodes v Canadian National Railway Co*) 75 DLR (4th) 248 (CA) [*Rhodes*]; *Vanek v Great Atlantic & Pacific Co of Canada* (1999), 48 OR (3d) 228 (CA) [*Vanek*]; *Devji v District of Burnaby*, 1999 BCCA 599, 180 DLR (4th) 205 [*Devji*]; *Graham v MacMillan*, 2003 BCCA 90, 10 BCLR (4th) 397 [*Graham*].

12. 2008 SCC 27, [2008] 2 SCR 114 [*Mustapha*].

13. The Supreme Court of Canada dealt with compensation for mental harm in the negligence context in three earlier cases: *Vana v Tosta*, [1968] SCR 7; *Guay v Sun Publishing Co*, [1953] 2 SCR 216; *Toronto Railway*, supra note 10. There was also a brief discussion on the nature of actionable mental harm in *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 74, [2003] 3 SCR 263.

14. For instance, foreseeability of psychiatric injury in a person of reasonable fortitude. See *Mustapha*, supra note 12 at paras 14–18. For a general discussion of the various limits, see Gerald HL Fridman, *The Law of Torts in Canada*, 3d ed (Toronto: Carswell, 2010) at 324 et seq; Lewis Klar, *Tort Law*, 5th ed (Toronto: Thomson Carswell, 2012) 497 et seq; Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham, Ont: LexisNexis, 2011) at ch 11; Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 85–93.

amounts to a mental disorder¹⁵ described by reference to diagnostic criteria found in classifications such as the American Psychiatric Association DSM-IV-TR,¹⁶ or the World Health Organization's ICD-10.¹⁷

This strict interpretation of the RPI threshold has persisted even if, as argued in a companion article,¹⁸ the Supreme Court's decision in *Mustapha* can and should be seen as the basis for a more flexible approach. Revisiting *Mustapha* in light of the evolution of the RIP requirement throughout the 20th century was the first step in re-examining the nature of actionable mental harm. The second step, considered in the present text, is the evaluation of the policy considerations underlying the limitation of compensable injury, and the proposal of a new threshold.¹⁹

The analysis starts with a brief overview in Part I of the Supreme Court's decision in *Mustapha* and its aftermath. Then, in Part II, policy considerations for and against limiting the extent of actionable mental harm are canvassed and assessed. Informed by this discussion, Part III of this article examines and discards both the option of eliminating all thresholds and the option of keeping the current RPI formula. This leads to

15. See, e.g., *Devji*, *supra* note 11 at para 83, where the Court wrote: "The medical distinction between psychiatric injury and ordinary grief or distress turns on diagnosis of a psychiatric illness," and explained that a number of psychiatric illnesses may follow trauma including posttraumatic stress disorder (PTSD); *Graham*, *supra* note 11 at para 4, where despite the family physician's testimony at trial, the Court noted that "there was no psychiatric evidence" and the plaintiff could not be compensated; *Schulze (Litigation Guardian of) v Strain*, 2010 BCSC 1516, [2010] BCJ No 2090 [*Schulze*] where the only medical witness at trial was deemed unqualified to make a diagnosis of recognized psychiatric illness; *Healey v Lakeridge Health Corporation*, 2010 ONSC 725 at para 120, [2010] OJ No 417 [*Healey SC*], *aff'd* in part 2011 ONCA 55, 103 OR (3rd) 401 [*Healey CA*], where the trial judge wrote: "Defining 'psychiatric illness' as any mental disorder as described by the [DSM IV], which is the authoritative diagnostic manual used by physicians and others to defined [sic] what is a recognizable psychiatric illness." *Contra Ulmer v Weidmann*, 2011 BCSC 130 at para 224, [2011] BCJ No 158 [*Ulmer*]; *Fakhri v Alfalfa's Canada Inc*, 2004 BCCA 549, 34 BCLR (4th) 201 at para 16.

16. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR*, 4th ed (Washington, DC: American Psychiatric Association, 2000), online: <<http://www.psych.org/>> [DSM-IV-TR]. The DSM-5 will be published in 2013.

17. World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders*, 2010, online: <<http://www.who.int/classifications/icd/en/bluebook.pdf>> ch 5 [ICD-10].

18. Louise Bélanger-Hardy, "Reconsidering the "Recognizable Psychiatric Illness" Requirement in Canadian Negligence Law" (2013) 38 *Queen's LJ* 583, available on SSRN [Bélanger-Hardy, "Reconsidering"].

19. There is a dearth of academic and judicial commentary on the RPI threshold. See Des Butler, "Identifying the Compensable Damage in 'Nervous Shock' Cases" (1997) 5 *Torts LJ* 67 at 67 (LexisNexis) [Butler, "Compensable Damage"]; Des Butler, *Damages for Psychiatric Injury* (Annandale, NSW: Federation Press, 2004) at 87-89, 132-144 [Butler, *Damages*]; Spencer Campbell & Chris Montigny, "Psychological Harm and Tort Law: Reassessing the Legal Test for Liability" in Todd Archibald & Michael Cochrane, eds, *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2003) 133 at 144 *et seq*; *Mullany & Handford*, *supra* note 6 especially ch 2, 4; Rachael Mulheron, "Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims" (2012) 32:1 *OJLS* 77, whose recent study focuses on English law from a comparative perspective; Teff, *supra* note 6.

the analysis of other limiting tests including a threshold based on harm that is “serious and prolonged,” a formula considered in a few post-*Mustapha* decisions. Finally, in Part IV, a model based on compensation of all forms of mental harm except “mere upsets” is proposed as the formula most apt to respond to the policy concerns previously outlined. In the conclusion Canadian courts are invited to adopt a flexible approach toward actionable mental harm based on a pragmatic assessment of the relevant facts and the evidence provided by a variety of health professionals.

I. *Mustapha and the nature of actionable mental harm*

In *Mustapha*, the threshold of actionable mental harm was not at issue. By all accounts, the plaintiff, Mr. Mustapha, suffered a severe mental illness after seeing a dead fly and the remnants of another in the large sealed water container delivered to his home by the defendant, Culligan of Canada Ltd. Nevertheless, in *obiter*, the Supreme Court commented on the matter. After stating that “[t]he distinction between physical and mental injury is elusive and arguably artificial in the context of tort,” the Court noted the need to distinguish between a “psychological disturbance that rises to the level of personal injury” and “psychological upset.”²⁰ The Court then wrote:

Personal injury at law connotes serious trauma or illness... The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept ... Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.”²¹

The Court noted the trial judge’s finding that Mr. Mustapha had “developed a major depressive disorder with associated phobia and anxiety.”²² In such circumstances, “the psychiatric illness was debilitating and had a significant impact on his life; it qualifies as a personal injury at law.”²³ Significantly, the Court did not use the term “recognizable psychiatric illness.”

Since *Mustapha*, Canadian courts have had to grapple with the contention that the Supreme Court’s decision changed the law on the

20. *Mustapha*, *supra* note 12 at paras 8-9.

21. *Ibid* at para 9 [emphasis in original, legal citations omitted].

22. *Ibid* at para 10.

23. *Ibid*. Nevertheless, the mental harm was considered too remote and, on that basis, Mr Mustapha’s appeal was dismissed since his psychiatric injury was not foreseeable in a “person of ordinary fortitude,” *ibid* at para 14.

nature of actionable mental harm: the threshold of recovery is not an RPI but something less, a “serious and prolonged injury.” Lower courts have not been receptive to this suggestion. In two key decisions, *Healey*,²⁴ and *Kotai v The Queen of the North*,²⁵ doubts were raised about the Supreme Court’s intention to bring about significant change,²⁶ a point of view endorsed by other post-*Mustapha* decisions.²⁷

Mustapha should not be interpreted in such a restrictive way.²⁸ At a minimum, the Court’s words raise enough doubt about the traditional approach to warrant an in-depth policy discussion of the threshold of actionable mental harm in the context of the tort of negligence.

II. *Policy considerations and the RPI threshold*

Although policy considerations underlying the need to treat mental harm claims restrictively have often been discussed in the literature, teasing out concerns about the nature of actionable mental harm has not often been done. This is particularly challenging because Canadian courts have rarely deliberately explained *why* they endorse the need for the RPI threshold. Nevertheless, some judicial and scholarly explanations, both in Canada and elsewhere, give an indication of the preoccupations at play. These can be grouped around four general themes: 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.

1. *Behavioural and attitudinal issues*

The first set of policy considerations focuses specifically on plaintiffs. At issue is the notion that without the RPI limit, damages for minor transient mental conditions will be easily obtainable and, consequently, claimants will resist rehabilitation.²⁹ The prospect that compensation could render

24. *Healey CA*, *supra* note 15. The case involved two class actions by a large number of patients who received notices of potential exposure to tuberculosis.

25. 2009 BCSC 1405, [2009] BCJ No 2022, supplementary reasons in *Kotai v The Queen of the North*, 2009 BCSC 1604, [2009] BCJ No 2332 [*Kotai SR*]. In that case, passengers, including a number of young children, sued for negligence after the ferry on which they were travelling sank en route to Vancouver Island.

26. *Kotai SR*, *ibid* at para 65; *Healey CA*, *supra* note 15 at para 61.

27. See, e.g., *Schulze*, *supra* note 15; *Thompson v Saanich (District) Police Department*, 2010 BCCA 308, 320 DLR (4th) 496, leave to appeal to SCC refused, 2010 SCC No 329; other cases discussed in Bélanger-Hardy, “Reconsidering,” *supra* note 18.

28. See “Reconsidering,” *ibid*.

29. *Tame v New South Wales* (2002), 211 CLR 317 at para 192, 191 ALR 449 (HC) cited in *Mulheron*, *supra* note 19 at 82; *White (Frost) v Chief Constable of South Yorkshire Police*, [1999] 2 AC 455 at 494 (HL), per Lord Steyn [*White*].

mental harm incurable has even been raised.³⁰ A related issue is the suggestion that plaintiffs are more likely to make fraudulent claims or to malingering given the less observable and less public character of mental harm.³¹ In *Healey*, the Ontario Court of Appeal noted the “highly subjective nature of an individual’s reaction to stresses and strains.”³²

Arguments centered on plaintiff behaviour have persisted through the years.³³ They are problematic on many levels especially when they are offered as generalizations without appropriate scientific or social underpinnings. For instance, whether rehabilitation is hampered by litigation is a complex question, intensely debated in the literature.³⁴ Some researchers have suggested that litigation may in fact have a therapeutic effect and help in the recovery process.³⁵ As for the issue of malingering, the fear of bogus claims apparently increased after the publication of an English study in the 1960s³⁶ and some courts continue to be swayed by this concern.³⁷ Tools have, however, been developed by the psychological and medical professions to identify problems and mitigate their effect thereby increasing courts’ ability to deal with simulation in mental harm

30. See Teff, *supra* note 6 at 145, who notes this concern and refers to the Court of Appeal decision in *McLoughlin v O’Brian*, [1981] QB 599 at 616, Stephenson LJ (this decision was reversed, see *McLoughlin*, *supra* note 10). See also *White*, *ibid*; Butler, *Damages*, *supra* note 19 at 32-33, who discusses links between various health conditions and the litigation process.

31. See *Devji*, *supra* note 11 at para 47. This issue is discussed in Linden & Feldthusen, *supra* note 14 at 426; Osborne, *supra* note 14 at 85; *Mullany & Handford*, *supra* note 6 at ch 4; Teff, *supra* note 6; John E Stannard, “Sticks, Stones and Words; Emotional Harm and the English Criminal Law” (2010) 74 JCL 533, who compares English criminal law and tort law.

32. *Healey CA*, *supra* note 15 at 65.

33. Indeed, this concern was first noted in *Coultas*, *supra* note 9 at 226: the Privy Council mentioned the danger of “imaginary claims.”

34. Paul B Suter, “Employment and Litigation: Improved by Work, Assisted by Verdict” (2002) 100 Pain 249; Natalie M Spearing & Luke B Connelly, “Is compensation ‘bad for health’? A systematic meta-review” (2011) 42:1 Injury 15; Nieke A Elbersa et al, “Do compensation processes impair mental health? A meta-analysis” (2012) 44:5 Injury 674, online: <<http://www.sciencedirect.com/science/article/pii/S0020138311005717>>.

35. See Peter A Bell, “The Bell Tolls: Towards Full Tort Recovery for Psychic Injury” (1984) 36 U Fla L Rev 333 at 375-376; Daniel W Shuman, “Making the World a Better Place through Tort Law?: Through the Therapeutic Looking Glass” (1992-1993) 10 NYL Sch J Hum Rts 739 at 755-758.

36. Henry Miller, “Mental after-effects of head injury” (1966) 59:3 Proc R Soc Med 257 cited in Teff, *supra* note 6 at 146. In his paper, Miller discusses the mental *sequelae* of head injuries including the condition called “accident neurosis” which he defines, at 258, as a “complaint of disabling subjective functional nervous symptoms following accidental injury or sometimes fright without physical injury of any kind.” Miller draws conclusions from his earlier 1961 study of some 51 such cases. He concludes, at 258, that “[n]early all these patients recover completely and without treatment after the case is settled” and, in fairly harsh words, speaks of “lifelong martyrdom” and states that the cases are closer to malingering than to any form of mental illness. His words were influential at the time as it appears only one other researcher had previously delved into the issue: Miller at 258-259.

37. See, *Devji*, *supra* note 11 at para 47 where the Court states that it is “not confident that the administration of justice is usually able to identify unmeritorious claims successfully” and points to the need for “judicial scepticism.”

cases.³⁸ As noted by Linden and Feldthusen, “the remedy for fraud is to be found in a vigorous search for the truth, not in the abdication of judicial responsibility.”³⁹

A more troubling question arises, however. What message does the law send in endorsing the suggestion that persons with mental harm are likely to fabricate their injuries? Writing from a disability studies perspective,⁴⁰ Foster points out that this assumption “incorporates a moral condemnation of the disabled plaintiff...[either as someone who cheats the system or is of] low moral fibre.”⁴¹ This culture of blaming the victim harks back to out-dated conceptions of mental illness which have no part in today’s legal system.

Generally speaking, the concerns grouped under this first theme can be seen as the product of another era and none of them justifies clinging to the RPI formula. In addition, issues of rehabilitation, malingering, and compensation neurosis are not unique to mental harm and many physical injuries are just as likely to create evidentiary challenges for a court.⁴²

2. *Pragmatic concerns, scope of liability, and reliance on diagnostic classifications*

The second set of policy considerations centers on the predictability brought to the law by a threshold such as the RPI formula. This viewpoint has found favour in both *Kotai* and *Healey*. In the first case the court explained how the RPI rule “introduces a degree of objectivity and certainty to the law through the mechanism of expert medical evidence,”⁴³ while in the second case the court suggested that insisting on an RPI brought “evidentiary

38. See Andreas Kapardis, *Psychology and Law—A Critical Introduction*, 3d ed (Cambridge, Cambridge University Press, 2010) at ch 8, where the author outlines a number of paradigms to study deception; Laura LS Howe, “Distinguishing Genuine from Malingered Posttraumatic Stress Disorder in Head Injury Litigation” in Cecil R Reynolds & Arthur MacNeill Jr, eds, *Detection of Malingering During Head Injury Litigation*, 2d ed (New York: Springer, 2012) at 301; Bell, *supra* note 35 at 351. Interestingly, a court’s ability to deal with the challenge of fabrication was recognised by the Supreme Court of Canada as early as 1911 in *Toronto Railway*, *supra* note 10 at 276.

39. Linden & Feldthusen, *supra* note 14 at 427. See also Teff, *supra* note 6 at 146-147 and the scientific literature cited at notes 43-47. At 151, Teff notes how difficult it would be for plaintiffs to fake mental harm “dupe medical experts, walk straight into the courtroom and persuade judge and counsel that a relatively minor upset has caused them serious psychiatric illness which merits substantial redress.” Butler, *Damages*, *supra* note 19 at 132: “Instead, like physical injuries, there should be faith in the capacity of the adversarial system and the scrutiny to which both expert and lay evidence are subjected to confirm the legitimacy of claims.”

40. See *Ontarians with Disabilities Act, 2001*, SO 2001, c 32, s 2 where “disability” is defined as “(b) a condition of mental impairment or a developmental disability, (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, (d) a mental disorder.” The critical disability theory viewpoint is discussed further below.

41. Foster, *supra* note 5 at 56.

42. Butler, *Damages*, *supra* note 19 at 72.

43. *Kotai SR*, *supra* note 25 at para 68.

rigour” to help counter the “frequency with which everyday experiences cause transient distress” or “the multifactorial causes of psychological upset.”⁴⁴

The RPI test is therefore viewed as a neat formula which satisfies the need for bright lines in this area of law.⁴⁵ Without this limit, difficulties about the quantification of damages would increase⁴⁶ and there would be greater diagnostic uncertainty,⁴⁷ increased costs for experts and lengthier litigation as debates on changing medical theories would be more likely to occur.⁴⁸

Preoccupations of this nature are not universal. Critics mention the fact that very similar difficulties arise in the context of physical harm⁴⁹ with less judicial concern.⁵⁰ Keeping in mind advances in the medical field, the argument whereby a more flexible threshold of actionable harm would lead to more complex and unmanageable litigation is opposed in a number of ways. As noted by Thomas J. in *van Soest v Residual Health Management Unit*: “doctors can speak with a great deal of precision without needing to address the question whether the mental suffering is a recognizable psychiatric illness or not.”⁵¹ Ward suggests that while mental harm cases may “involve complex and difficult issues of causation, they do not have any special quality which could justify imposing more restrictive rules as to liability than apply to ordinary personal injuries.”⁵² Partlett quite bluntly states that “litigation costs [are] exacerbated by the ‘psychiatric illness’ test,” mostly because its “inherent uncertainty will encourage initiation of claims for it is likely that the value of the claim

44. *Healey CA*, *supra* note 15 at 65. See also *Osborne*, *supra* note 14 at 85.

45. See Martin H Matthews, “Negligent Infliction of Emotional Distress: A View of the Proposed Restatement (Third) Provisions from England” (2009) 44 Wake Forest L Rev 1177 at 1182; Stannard, *supra* note 31 at 540, who mentions, and then criticises, the suggestion that RPI is a clear criterion.

46. *Brooks v Canadian Pacific Railway*, 2007 SKQB 247, 283 DLR (4th) 540 at para 58 [*Brooks*]. This point is discussed by Giliker, *supra* note 6 at 22 and by Butler, *Damages*, *supra* note 19 at 73-74.

47. *White*, *supra* note 29 at 493, a source highlighted and discussed by Teff, *supra* note 6 at 142-145, nn 43-47.

48. Mulheron, *supra* note 19 at 82 citing *Tame*, *supra* note 29 at 192 and *White*, *supra* note 29 at 503.

49. *McDermott v Ramadanovic Estate*, (1988), 27 BCLR (2d) 45 at 53 (SC), per Southin J; Stannard, *supra* note 31 at 553.

50. Teff, *supra* note 6 at 142. See, e.g., *Horne*, *supra* note 10 at 844: the Court points out that “[t]he ease with which in the one case the damages are capable of being ascertained, and the difficulty which in the other case may frequently arise, cannot be made the test of liability.”

51. [2000] 1 NZLR 179 at para 103 (CA). *Mullany & Handford*, *supra* note 6 at 79, adds: “more is now known about the effects of emotions on the body and doctors can with a considerable degree of precision identify various forms of emotional distress and their effects.”

52. Tony Ward, “Psychiatric Evidence and Judicial Fact-finding” (1999) 3 Int’l J Evidence & Proof 180 at 193. He acknowledges, at 181, that a minority of situations raise difficult scientific questions but he maintains that the problems encountered are not unique to psychiatric evidence.

may be inflated by the claimant.”⁵³ A different point is made by Bottalico and Bruni who explain that

[n]euroscience attempts to narrow the gap between physical and mental harm. If it succeeds, there will probably no longer be justification for their separate treatment.... Further research in neuroscience and the use of more advanced neuroimaging technologies will allow us to explain emotional suffering through [the] brain’s structure and function in a more sophisticated way.⁵⁴

If this is the case, there might be little sense in drawing the line at an RPI.

The notion that the RPI requirement leads to greater certainty in the law must be considered in light of the courts’ reliance on the psychiatric profession and classifications such as the DSM-IV⁵⁵ and the ICD-10.⁵⁶ A common criticism is that these compendiums were designed for medical research and diagnoses and their use in the legal setting raises a number

53. David F Partlett, “Tort Liability and the American Way: Reflections on Liability for Emotional Distress” (1997) 45 Am J of Comp L 171 at 182 [Partlett]. This article reviews the first edition of *Mullany & Handford*, *supra* note 6, and in his review Partlett criticizes the RPI threshold and argues that it should not be introduced into American law.

54. Barbara Bottalico & Tommaso Bruni, “Post traumatic stress disorder, neuroscience, and the law” (2012) 35:2 Int’l J L & Psychiatry 112 at 118-119. The authors acknowledge the matter is complex and that serious problems remain: for example the exclusion of pre-existent conditions at 118. In Peter Tyrer & Nick Craddock, “The Bicentennial Volume of the *British Journal of Psychiatry*: The Winding Pathway of Mental Science” (2012) 200:1 British J of Psych 1 at 3, the two editors discuss future trends in psychiatry and note that recent studies “are starting to point to the role of specific biological pathways and mechanisms in illness and helping to reveal the relationships between the major psychiatric disorders that have hitherto been classified on purely descriptive grounds. This represents the next stage in mental science’s long journey of discovery.” See also, Betsy J Grey, “Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims” in Michael Freeman, ed, *Law and Neuroscience—Current Legal Issues*, vol 13 (Oxford: Oxford University Press, 2011) 203 at 212, who points to research suggesting that there might be an increased ability to detect and quantify emotional harm through neuroscience. It must be said, however, that this author’s main thesis is that the RPI formula should be adopted by American courts because, at 226, it would “shift a normative decision to a medically based one.” She argues that moving to a medical model would align the law with advances in neuroscience and thus de-emphasize the distinction between physical and mental harm. Although this objective is desirable, this author does not see the endorsement of the RPI rule as the solution to the current mind/body distinction. See also Adam J Kolber, “The Experiential Future of the Law” (2011) 60 Emory LJ 585 at 618-622, who argues that new technologies will make it easier to assess various forms of mental harm.

55. *Supra* note 16. The DSM is a classificatory system of psychiatric disorders and their corresponding diagnostic codes by the American Psychiatric Association. Each disorder lists a set of diagnostic criteria to which some explanations are attached. The classification system does not provide any information about treatment. The DSM reflects only current knowledge and the emphasis is on patterns of symptoms.

56. *Supra* note 17. The ICD-10 is a classification of all diseases by the World Health Organization, not just mental disorders. A numeric code and a short description including symptoms are provided for each condition.

of serious issues.⁵⁷ For instance, Mulheron explains that many of the classifications' built-in caveats and qualifications are not discussed in judgments.⁵⁸ She also highlights the tension between the weight to be given to concordance with diagnostic criteria listed in the classifications on the one hand, and clinical judgment (provided without insistence on these tools) on the other.⁵⁹ From a Canadian perspective, this is an interesting point because while most courts insist on proof of a psychiatric illness identified in the DSM-IV-TR or the ICD-10,⁶⁰ a few are more flexible and, in one case, clearly critical of this approach.⁶¹

This last point is closely related to concerns about judicial deference to psychiatric experts. Mulheron refers to the DSM-IV-TR's introduction and its warning that the classification should "not be applied mechanically by untrained individuals."⁶² She submits that, if the RPI criterion must be endorsed, the "starting point" should be the expert witness's opinion on actionable mental harm. However, when opinions differ, the court should resolve the matter.⁶³ Jones suggests that courts should not defer to the psychiatric profession too readily and should be cognizant of the possibility of controversies about psychiatric diagnoses.⁶⁴ For his part, Slovenko acknowledges that psychiatric diagnosis has a role to play in the legal process but warns that "it is not always a *sine qua non* in

57. Stannard, *supra* note 31 at 542; Mulheron, *supra* note 19 at 87.

58. *Ibid.*; an example of a caveat is the need to review all DSM-IV-TR axes (I to V) in making a psychiatric diagnosis, not just Axis I. This is not always understood by legal actors. For a more complete explanation of some of the drawbacks of the classification systems, Mulheron refers to the work of David Gill, "Proving and Disproving Psychiatric Injury" (2008) 76 Medico-Legal J 143 and "Psychiatric Injury: Checks and Balances" (2009) 75 Personal Injury LJ 16.

59. Mulheron, *supra* note 19 at 89-91.

60. See, e.g., *Healey SC*, *supra* note 15 at para 120 where the trial judge wrote: "Defining 'psychiatric illness' as any mental disorder as described by the [DSM-IV-TR], which is the authoritative diagnostic manual used by physicians and others to define what is a recognizable psychiatric illness." See also *Bruneau v Bruneau* (1997), 32 BCLR (3d) 317, [1997] BCJ No 30, where, in assessing whether a mother who had come upon the scene of a car accident involving her 20 month-old infant had suffered PTSD, the trial judge systematically assessed the DSM criteria for this condition before concluding that there was an RPI.

61. In the post-*Mustapha* case of *Ulmer*, *supra* note 15 at para 224, the Court "did not find a reference to the DSM-IV criteria on this issue of PTSD to be helpful to me at all." The Court reiterated the need for an RPI, but concluded that "diagnosis is a matter of clinical judgment" and reliance could be placed on the clinical opinion of one psychologist and two psychiatrists.

62. DSM-IV-TR, *supra* note 16 at xxxii.

63. Mulheron, *supra* note 19 at 93.

64. Michael A Jones, "Liability for Psychiatric Damage: Searching for a Path between Pragmatism and Principle" in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 113 at 137.

the resolution of a legal matter. It may result in a “battle of categories,” diverting attention from the issue at hand.”⁶⁵

Considering the objective of certainty from a broader perspective, another concern created by the dependence on classification systems is that diagnostic criteria are not static, and hence, not necessarily reflected in the latest version of the compendiums. Thus, a claim based on a “newer” condition could be rejected by a Court opting for strict adherence to the diagnostic criteria.⁶⁶ After noting that the field of medicine is in a “constant state of flux,” Campbell and Montigny ask if a claimant should “be required to await the development of a significant body of publications concerning her illness prior to commencing action?”⁶⁷

Another important point is the recognition that including a mental condition in the classifications can be an exercise fraught with controversy. This is well illustrated by the current debate leading to the release of the next edition of the DSM, anticipated for the spring of 2013. Of particular relevance to the issue of actionable mental harm is the disagreement about the inclusion of grief as a pathological disorder. As explained by Bryant, the issue has raised “enormous controversy” with opponents arguing that including “adjustment disorder related to bereavement” as a new diagnosis is a form of medicalization of grief, and proponents suggesting that some bereaved people experiencing marked impairment are entitled to recognition of their condition and to targeted treatment.⁶⁸ Although one may not go as far as stating that the classifications’ diagnostic criteria are “composed of sandstone rather than granite,”⁶⁹ the debate about the recognition of grief as a psychiatric disorder illustrates the challenges within the psychiatric profession. As noted by Young, even the imminent revision of the DSM will leave many key issues unresolved and much research remains to be done.⁷⁰

Therefore, when considering this set of policy justifications as a whole, two important points must be made. First, many of the concerns such as quantification of damages and weight of expert evidence, are not

65. Ralph Solvenko, “Commentary—The Role of Psychiatric Diagnosis in the Law” (2002) 30 J of Psy & L 421 at 438.

66. Mulheron, *supra* note 19 at 94-95; Jones, *supra* note 64 at 133, stating that courts are not “dealing with fixed phenomena.”

67. *Supra* note 19 at 145.

68. Richard A Bryant, “Grief as a Psychiatric Disorder” (2012) 201 British Journal of Psychiatry 9 at 9-10. See also Mario Maj, “Depression, Bereavement, and “Understandable” Intense Sadness: Should the DSM-IV Approach be Revised?” (2008) 165:11 Am J Psychiatry 1373.

69. Partlett, *supra* note 53 at 180, speaking specifically about PTSD.

70. Gerald Young, “Trends in Psychological/Psychiatric Injury and Law: Continuing Education, Practice Comments, Recommendations” (2010) Psychol Inj & Law 323 at 346.

unique to mental harm. These apply to physical harm as well⁷¹ and are part of a wider debate about the efficiency of the civil liability system. As such, they fail to strongly support the *status quo* regarding the threshold of compensable mental harm. Secondly, insisting on the need to prove an RPI does not ensure certainty within the law. As discussed above, the search for concordance with diagnostic criteria is not an easy task and with the advancement of scientific knowledge debates within the psychiatric profession will continue to occur. Accordingly, the RPI formula is not a warranty against uncertainty. Whether abolishing or lowering the existing threshold of actionable mental harm would eliminate the problem of uncertainty is another question altogether. The matter is addressed in more detail below.

3. *Fear of proliferation of claims and the burden for judicial administration*

Another set of policy justifications can be grouped under the often-mentioned floodgates argument. The fear of a proliferation of actions permeates the whole law of negligently caused mental harm. Generally, the perception is that a single negligent event can lead to a large number of claims because mental harm in some form or another is more likely to occur than physical injury.⁷² Klar sees the RPI requirement as a “practical way to limit recoverability,”⁷³ while Osborne notes that “judicial apprehension about large numbers of claims is intensified by the prospect of mass disasters such as aircraft crashes, train disasters...all of which may generate, in addition to personal injury and death, extensive psychiatric injury.”⁷⁴ In this context, the argument becomes the following: lowering the threshold or removing it altogether would increase the number of civil actions because more individuals could claim to have been psychologically or emotionally affected by a negligent act than if recovery was restricted only to those who could prove a psychiatric illness under one of the classifications. Another strand of the floodgates argument points to the danger of a disproportionate burden on defendants and their insurers⁷⁵ and

71. See *Mullany & Handford*, *supra* note 6 at 79, who state that “difficulty of valuation and assessment is a poor rationale for denial when one considers that awards for the non-pecuniary components of personal injury damages, such as pain and suffering, are routinely made but, by their very nature, are also incapable of valuation.”

72. See *Devji*, *supra* note 11 at para 47; *Brooks*, *supra* note 46 at para 58.

73. Klar, *supra* note 14 at 499.

74. Osborne, *supra* note 14 at 85. See also Mulheron, *supra* note 19 at 82 citing *Tame*, *supra* note 29 at 192.

75. Discussed by Bell, *supra* note 35 at 363-366; Osborne, *supra* note 14 at 85; Teff, *supra* note 6 at 142; *Heighington, HCJ*, *supra* note 11 at 657.

the corresponding pressure on the administration of justice.⁷⁶ In *Kotai*, the Court described the RPI rule as “one of the control mechanisms that have been employed to maintain what is perceived to be a fair balance between the plaintiffs and defendants.”⁷⁷

Although the fear of floodgates is easy to raise, both in the judicial context and, as noted by Teff, by the news media and the general public,⁷⁸ it must be considered very carefully. First, many of the arguments expressed through the “floodgates” label are not unique to mental harm cases. Mass disasters can bring about large scale physical harm while other negligent acts may raise complex legal issues about physical injuries. These situations are just as likely to raise questions about disproportionate liability or excessive administrative costs.⁷⁹ Second, litigation is costly, time-consuming and takes an enormous toll on a person’s life, thus deterring many from pursuing legal action including someone with mental harm amounting to less than an RPI. Third, the legal system itself has a number of built-in barriers to negligence-based claims; these range from practical measures such as limitation periods and rules as to costs, to liability principles such as causation and remoteness.⁸⁰ As evidenced by the final result in *Mustapha*, principles such as remoteness may turn out to be significant hurdles for plaintiffs.⁸¹

Regarding the specific question of lowering or eliminating the RPI threshold, one must admit that such a measure would certainly increase the number of potential claimants in the sense that more individuals would consider themselves eligible for compensation. Concluding that this would result in a corresponding increase in the number of civil actions is another

76. This point is discussed by Butler, *Damages*, *supra* note 19 at 76.

77. *Kotai SR*, *supra* note 25 at para 58.

78. Teff, *supra* note 6 at 150-151: the author makes various interesting comments about the role of the popular press and other news media in promoting the fear of floodgates climate. He argues, at 151, that media stories about exaggerated or unusual claims create resentment and “builds on populist scepticism about non-physical symptoms.” The facts in *Mustapha* led to unusual media interest for a tort case, none too sympathetic to the plaintiff: see Kirk Makin, “Supreme Court Overturns Damages for Fly in Bottled Water,” *The Globe and Mail* (23 May 2008) A5; Janice Tibbetts, “Court Swats Fly-in-Water Lawsuit,” *National Post* (23 May 2008) A7. See comments by Foster, *supra* note 5 at 37-38.

79. Butler, *Damages*, *supra* note 19 at 76. See, for example, *Andersen v St Jude Medical Inc*, 2012 ONSC 3660, a recent complex medical device products liability case, certified in 2003, which has engaged huge resources, as explained by Lax J at the beginning of her judgment at para 8: “2,293 documents were introduced into evidence as exhibits in electronic format with many exhibits running to hundreds of pages. The court heard testimony for 138 days from 40 witnesses, including 23 expert witnesses from 14 different disciplines in science and medicine. At the conclusion of the evidence, the parties delivered voluminous written submissions over a period of several months and 18 months after the trial had commenced, it concluded in late September 2011 with eight days of closing submissions.”

80. See Mulheron, *supra* note 19 at 110-111 who discusses the application of these measures in English law.

81. See Part I above.

matter altogether. At least two sets of data would have to be relied on to confirm a possible increase in claims: the prevalence of mental harm (not just psychiatric illness) in the general population following negligently caused events, and the extent to which victims would seek redress before the courts. Neither of these data sets currently exists.

Taking the second question first, at the moment, no Canadian data exists on the incidence of civil claims for mental harm.⁸² Conclusions, therefore, about possible increases or decreases in litigation cannot confidently be made. As for the prevalence of mental harm caused by traumatic events in the general population, literature on the topic has focused mostly on *psychiatric* responses to trauma, especially PTSD⁸³ leaving the question of negligently inflicted mental harm amounting to less than an RPI largely unexplored. For instance, a 2008 Canadian epidemiological survey on trauma exposure and PTSD,⁸⁴ related that 76.1% of the participants reported lifetime exposure to one or more traumatic events and that the rate of current PTSD (at the time of the interview) was 2.4% while the lifetime rate was 9.2%. Of course, these figures have to be understood in their proper context. For instance, the list of 18 qualifying traumatic events did not focus on negligent acts at all although some events—exposure to toxic chemicals, life-threatening motor vehicle accidents, very serious work-related accidents, a traumatic experience by a loved-one, and seeing someone badly injured or killed—could originate from a tortious act. Consequently, the figures generated by this Canadian study cannot easily be transferred to the tort context. Hence, research on the prevalence of certain psychiatric disorders generates interesting information but fails to provide statistics on the incidence of mental harm in the population

82. Statistics Canada gathers some information on “initiated and active civil court cases” from 7 out of 13 provinces/territories but this data comprises only family, probate, small claims, and other general civil actions. It does not provide disaggregate data for negligence actions let alone those based on mental harm. See Statistics Canada, “Table 1—Initiated and Active Civil Court Cases,” online: <<http://www.statcan.gc.ca/daily-quotidien/090120/t090120d1-eng.htm>>. This is the governmental agency’s latest analytical report on the matter. See Teff, *supra* note 6 at 155-165 and the references therein, especially Richard Lewis, Annette Morris & Ken Oliphant, “Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?” (2006) 14(2) Torts LJ 158 (LexisNexis), online: SSRN <http://papers.ssrn.com/2013/papers.cfm?abstract_id=892981>.

83. Given that, by definition, PTSD requires a link to an identifiable stressing event and that the symptoms are connected to that stressor, measuring the likelihood of PTSD is easier than for other psychiatric disorders such as depression: see Naomi Breslau, “Epidemiologic Studies of Trauma, Posttraumatic Stress Disorder, and Other Psychiatric Disorders” (2002) 47:10 Can J Psychiatry 923 at 927.

84. Michael Van Ameringen et al, “Post-Traumatic Stress Disorder in Canada” (2008) 14 CNS Neuroscience & Therapeutics 171. The sample size was 2,991 and participants came from Ontario, Quebec, Atlantic, and Western Canada with a 60:40 female/male ratio.

following a negligent act, let alone the rate of increase one could anticipate if the RPI criterion was lessened or abandoned.⁸⁵

In the end, the lack of data on the incidence of negligence actions for compensation for stand-alone mental harm means that floodgates concerns remain impressionistic and unsupported by empirical evidence; they can neither be completely eliminated nor fully justified and, in that context, courts should avoid generalizations that cannot be substantiated.

4. *Wider social issues*

The last set of policy concerns focus on wider social choices and issues. Chief amongst the arguments justifying the RPI threshold is the notion that all members of society need to develop a certain emotional robustness. Upsets, distress and other transient emotions should not give rise to the recovery of damages because they are “normal.” This is the only policy reason mentioned briefly by the Supreme Court of Canada in *Mustapha*.⁸⁶ According to the Court of Appeal in *Healey*, it is “appropriate for the law to decline monetary compensation for the distress and upset caused by the unfortunate but inevitable stresses of life in civilized society.”⁸⁷

Why should the law “foster the growth of tough hides not easily pierced by emotional responses” to borrow Linden and Feldthusen’s words?⁸⁸ Apart from references to difficulties of valuation of harm and proliferation of claims, both discussed above, some courts have emphasized the transient nature of the harm or its commonality.⁸⁹ The notion that the law is neither the only nor the best mechanism to deal with minor mental afflictions is also mentioned.⁹⁰ Keating points out that mental distress caused by witnessing ordinary accidents may simply be “an inevitable by-product of the reality that essential modern activities harness the enormous destructive power of advanced technologies” and that since these activities are deemed essential

85. Other studies on the prevalence of some psychiatric disorders after traumatic events include Breslau, *supra* note 83; Sandro Galea, Arijit Nandi & David Viahov, “The Epidemiology of Post-Traumatic Stress Disorder after Disasters” (2005) 27 *Epidemiol Rev* 78; Halpern & Tramontin, *supra* note 8 at 111-136; Naomi Breslau, “The Epidemiology of Trauma, PTSD, and other Posttrauma Disorders” (2009) 10 *Trauma, Violence & Abuse* 198.

86. *Supra* note 12 at para 9, the Court wrote: “The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal [in *Mustapha*] to be expressing in its quote from *Vanek* [*supra* note 11 at para 60]: ‘Life goes on’.”

87. *Healey, CA, supra* note 15 at 418.

88. *Supra* note 14 at 427.

89. *McLouglin, supra* note 10 at 431, per Lord Bridge; *White, supra* note 29 at 465, cited by *Mullany & Handford, supra* note 6 at 80-81. The authors query, at 80, “why the fact that it is commonly experienced is of itself a reason for denying recovery. This logic has not affected recoverability for the universal experienced sensation of physical (as opposed to emotional) pain.”

90. Des Butler, “An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence” (2002) 10(1) *Torts LJ* 13 (LexisNexis) at 3.1.1.

to modern living, members of society “must generally bear the distress they cause when they go awry.”⁹¹ A different but related concern is that by expanding liability through a threshold lower than an RPI, the law would simply place too many limits on human endeavours:⁹² individuals would not only refrain from engaging in socially useful and necessary activities, but would hesitate to communicate for fear of being sued.⁹³

These policy justifications are opposed by a number of legal commentators who raise different concerns. For instance, to take the point just made about the impediment to human activity, Bell has argued that liability for mental harm may create a climate of respect for others’ feelings and this should be encouraged rather than decried.⁹⁴ In that sense, compensating for mental harm amounting to less than an RPI would be justified.

This type of comment brings to the fore the viewpoints of critical theorists expressed chiefly through feminist and disability scholarship. Recognizing the existence of various biases is an essential step in the process of determining if and how mental harm claims should be contained. For instance, feminists have long denounced tort law’s structural division between mind and body. This dichotomy creates a hierarchy of values with physical injury given greater importance and priority than mental harm.⁹⁵ When physical injury is at the top of the hierarchy of harms, mere distress probably ranks even lower than an RPI.⁹⁶ Generally, mental harm is “devalued because of its cognitive association with women and women’s activities.”⁹⁷ As Chamallas and Wriggins explain “the gender disadvantage flows from disfavoursing the type of claim that women plaintiffs are likely

91. Gregory C Keating, “Emotional Distress as Harm” (Paper delivered at the Obligations VI Conference, London, Ontario, 20 July 2012 at 23) [unpublished]. This paper does not deal with RPI as such since this rule does not exist in that form in American law. Rather, the article explores American tort law’s treatment of NIED (negligent infliction of emotional distress), in particular the notion that the negligent infliction of pure mental harm should be a matter of remoteness rather than duty.

92. Carolyn Sappideen & Prue Vines, eds, *Fleming’s The Law of Torts*, 10th ed (Pyrmont, NSW: Lawbook Co, 2011) at 175-176; Butler, *Damages*, *supra* note 19 at 76-78.

93. Discussed by Teff, *supra* note 6 at 169.

94. See Bell, *supra* note 35 at 370-371.

95. See Martha Chamallas, “The Architecture of Bias: Deep Structures in Tort Law” (1997-1998) 146 U Pa L Rev 463 at 490-503; Martha Chamallas & Jennifer B Wriggins, *The Measure of Injury—Race, Gender and Tort Law* (New York: New York University Press, 2010) at 40-41, 90; *Law of Fright*, *supra* note 3; Nicky Priaulx, “Endgame: On Negligence and Reparation for Harm” in Janice Richardson & Erika Rackley, eds, *Feminist Perspectives on Tort Law* (Oxford: Routledge, 2012) 36 at 38-42; Conaghan & Mansell, *supra* note 2 at 160.

96. *Mullany & Handford*, *supra* note 6 at 80.

97. Chamallas & Wriggins, *supra* note 95 at 24; Prue Vines, Mehera San Roque & Emily Rumble, “Is ‘nervous shock’ still a feminist issue? The duty of care and psychiatric injury in Australia” (2010) 18 Tort LR 9 at 18-20.

to bring, thus placing them—and any male plaintiffs who bring similar claims—at a structural disadvantage.”⁹⁸

From another perspective, scholars have highlighted the persistence of “stubborn cultural biases” within the judicial process including fear of mental illnesses and their stigma.⁹⁹ The legal system makes many assumptions which “reflect our fears and apprehensions about mental disability, the mentally disabled, and the possibility that *we* may become mentally disabled.”¹⁰⁰

Although research within the field of disability legal studies has not yet extended to the topic under review in this article, the disability studies discourse provides powerful arguments to support a more open approach towards mental disability within tort law.¹⁰¹ For instance, disability studies scholars offer a strong critique of the medical model of disability.¹⁰² This seems particularly relevant to the topic at hand as one could argue that, through the recourse to formal classifications such as DSM-IV or the ICD-10 and the reliance on the psychiatric profession, tort law’s emphasis on the need to prove an RPI is based on this biomedical model. Disability

98. Chamallas & Wriggins, *supra* note 95 at 92.

99. Osborne, *supra* note 14 at 85; Levit, *supra* note 4 at 175, where the author states: “Emotional injuries are unsympathetic; mental harms are treated as the idiosyncratic reactions of individuals. The emotionally injured are viewed as ipso facto emotionally, if not biologically, weaker than the rest of us, who presumably would have been able to resist the temptation to succumb to an emotional injury. This attitude is undoubtedly related to the broader paradigm within which society views mental illness.” On the problem of stigmatisation, see Senate of Canada, Standing Senate Committee on Social Affairs, Science and Technology, *Out of the Shadows at Last—Transforming Mental Health, Mental Illness and Addiction Services in Canada* (May 2006) at 10-19.

100. Perlin & Dorfman, *supra* note 4 at 47-48. See also JM Ussher, *Women’s Madness: Misogyny or Mental Illness?* (Amherst, MA: University of Massachusetts Press, 1991) at 4, who writes about her mother’s illness: “But we never talk of this time. Perhaps the fear of the madness is still with us, the shame which we did not know until the secret was made, so that the word ‘madness’ was never spoken. Perhaps we fear it will happen to us. That it is ‘in our genes.’ That one day too our nerves will snap. That we will crack. That we will split in two, fall in a heap, face the terror head on. That this madness, now called depression, or schizophrenia, or neurosis, will afflict us, and we will lose control.”

101. The field of disability studies is rich with various viewpoints which cannot be given the attention they deserve here. For a thorough overview of the subject, see Arlene S Kanter, “The Law: What’s Disability Studies Got to Do With It or An Introduction to Disability Legal Studies” (2011) 42 Colum HRL Rev 403. She notes, at 406, that disability studies “offers the law and legal education the opportunity to critically examine the role of ‘normalcy’ within the law and within society, generally.” See also Christopher Ralston & Justin Ho, eds, *Philosophical Reflections on Disability* (New York: Springer Verlag, 2010) [*Reflections on Disability*].

102. This was recognized by the Supreme Court of Canada in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 and in *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703. See also Kanter, *supra* note 101 at 419-421, where the author explains that the medical model of disability has been greatly criticized as it “places responsibility on the individual to change or to be ‘rehabilitated’ or ‘cured’ in order to fit into society....The result of relying solely on [this model]...is that society...has no obligation to look at how it, itself, is structured; how it creates barriers to inclusion; and how it shares in the responsibility to eliminate the legal, attitudinal, and physical barriers that exclude people with disabilities.”

scholars have explored other models including the “social model” of disability according to which disability is a social construct and “it is affirmatively the obligation of society to change or adapt...”¹⁰³ Schulz explains that such a social perspective places less emphasis on diagnostic labels.¹⁰⁴ This seems to point to the need for courts to move away from the RPI formula towards a threshold which could encompass a wider array of mental harms.¹⁰⁵

Bias is not the only concern to be noted. Recognizing problems of access is also important. The law’s insistence on proof of an RPI may have disproportionate effects on vulnerable members of society. Savvy and well-informed plaintiffs understand the importance of seeking medical and psychiatric help as soon as possible after a negligent event. They may be more apt to seek legal advice quickly and to furnish the necessary retainers to finance the costs of expert reports. This may not be the case for individuals who live in isolated areas, have no financial means, or are less informed about the intricacies of the legal process and the importance of seeking psychiatric help early to strengthen their claims.

In summary, this last set of policy considerations illustrates the importance of going beyond instrumentalist concerns such as opening the floodgates of litigation when considering if a limiting device such as RPI should be retained. The law cannot ignore the important social ramifications attached to the decision to favour “psychiatric” disorders

103. Kanter, *ibid* at 428. Other models have been suggested including the minority group model, the social model and the cultural model. See generally Kanter, *ibid* and Ann Silvers, “An Essay on Modeling: The Social Model of Disability” in *Reflections on Disability*, *supra* note 101 at 19.

104. Izabela Z Schulz, “Determining Disability: New Advances in Conceptualization and Research” (2009) 2 Psychol Inj & L 199 at 200 discussing David B Peterson & Heidi Paul, “Using the International Classification of Functioning, Disability and Health (ICF) to Conceptualize Disability and Functioning in Psychological Injury and Law” (2009) 2 Psychol Inj & Law 205.

105. An approach based on disability studies could yield very interesting results as shown by the case of *Plesner v British Columbia (Hydro and Power Authority)*, 2009 BCCA 188, 95 BCLR (4th) 1 (Ryan JA dissenting). This was not a tort case but the issue before the court had to do with the threshold of compensation for stand-alone mental harm in the context of workers compensation legislation and policy. The requirements for compensation for this type of harm were more stringent than those for physical injury or for mental harm flowing from a physical injury. The British Columbia Court of Appeal found that s 5.1(1)(a) of the *Workers Compensation Act*, RSBC 1996, c 492 (whereby compensation for mental stress could only occur “if an acute reaction to a sudden unexpected traumatic event arising out of and in the course of the worker’s employment”) when read together with Policy No 13.30 (expanding on the unexpected and traumatic criteria) breached s 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] as it discriminated, on the basis of mental disability, against workers who suffer stand-alone mental harm. The Court confirmed that the dispositions could not be saved under s 1 of the *Charter*. At para 130 of the decision, the Court took into account contextual factors such as the fact that persons with mental disabilities “are subjected to pre-existing disadvantage, stereotyping, prejudice and vulnerability.” The Court also noted that the scheme reinforced negative messages about pure mental harm, at para 152.

over lesser forms of mental harm. In the early 1970s, when the phrase “RPI” first found its way into Canadian jurisprudence,¹⁰⁶ courts may not have been able to appreciate some of these repercussions, but more than forty years later, they can no longer ignore them.

III. *Redefining negligence law’s approach to the nature of actionable mental harm*

How should Canadian negligence law deal with the nature of actionable mental harm? Informed by the policy justifications discussed above, this section explores options ranging from the removal of thresholds altogether to the adoption of formulas other than the current insistence on the need to prove an RPI.

To fully appreciate the range of possible responses, it is useful to recall that the need for an RPI is almost always mentioned in conjunction with the rule that there can be no compensation for “mere upsets or distress.”¹⁰⁷ Thus, the orthodox view treats mental harm as an either/or proposition: in order to recover damages for a mental injury that does not manifest itself physically, a plaintiff must establish that the harm goes beyond emotions that are part and parcel of human life and is, in fact, an RPI.¹⁰⁸ The assumption that the “no compensation for mere upsets” lower threshold necessarily calls for proof of an RPI must be rejected in favour of a tripartite conception of harm intensity. According to this approach, mere distress is the lower threshold, RPI the higher limit and, in the mid-range, there are harms amounting to more than mere fleeting emotions but less than conditions recognized by the formal classifications. The thresholds envisaged below move along this scale. Their respective merit is assessed in light of the policy considerations outlined above.

1. *Unlimited actionable mental harm*

Eliminating all thresholds pertaining to the nature of actionable mental harm is an option worth exploring.¹⁰⁹ This would involve removing not

106. Canadian courts have repeatedly relied on the English case of *Hinz v Berry*, [1970] 2 QB 40, [1970] 1 All ER 1074 (CA) as the source for this phrase. See Bélanger-Hardy, “Reconsidering,” *supra* note 18, for a thorough discussion of the case and the suggestion that the decision may not be as clear a precedent as previously thought.

107. Early statements of this rule are discussed in Mendelson, *supra* note 8 at 29-35.

108. Mulheron, *supra* note 19, describes this threshold as the “Traditional Rule” at 78.

109. See Bell, *supra* note 35, who examines this option in the context of American tort law and on a wider scale, as he considers the removal of *all barriers* to compensation for mental harm for indirect plaintiffs (or bystanders) except the need to prove the foreseeability of “psychic” injury. He argues, at 335, that this “full recovery rule would serve the goal of reducing overall accident costs more satisfactorily than do the present liability rules.” His article sparked a lively debate: Richard N Pearson, “Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell” (1984) 36 U Fla L Rev 413 and Peter A Bell, “Reply to a Generous Critic” (1984) 36 U Fla L Rev 437.

only the RPI limit but also the “no compensation for mere upsets” lower threshold leaving plaintiffs free to seek redress before the courts without regard to the intensity of the harm suffered. Although not articulated in detail, this may have been what was envisaged in *McDermott* where Southin J. considered “scars on the mind” as equivalent to “scars on the flesh,”¹¹⁰ and in *Mason* where Molloy J. suggested that minor distresses could be deterred by the award of low damages and frivolous claims and cost sanctions.¹¹¹

Removing barriers to actionable mental harm would have practical advantages. In relevant cases, plaintiffs could choose to substantiate their claim with medical experts’ testimony if they wished, but proof of concordance with the classifications’ diagnostic criteria would not be necessary. Lower administrative costs may follow, especially where complex psychiatric opinion would otherwise have been required to deal with borderline cases. More importantly, the rules regarding mental harm would be brought in line with those applying to physical harm (where minor injuries attract minor damages), thereby avoiding the need to make “elusive and arguably artificial” distinctions between physical and mental injury, a goal specifically recognized by the Supreme Court in *Mustapha*.¹¹²

A strong argument supporting the removal of limits on the nature of actionable harm is the absence of this type of control device in many other contexts of tort law.¹¹³ For instance, damages are regularly awarded for the “suffering” component of non-pecuniary losses flowing from physical injuries. Also, a number of torts—assault, false imprisonment, and even malicious prosecution, for example—allow damages for mental harm without imposing limits based on its intensity.¹¹⁴ Granted these are intentional wrongs, where the stakes may be different;¹¹⁵ nevertheless the common law has been able to accommodate these claims for centuries without unduly burdening the judicial system. The intrinsic elements of

110. *Supra* note 49 at 53.

111. *Supra* note 10 at 381-382.

112. *Supra* note 12 at para 8.

113. See *McDermott*, *supra* note 49 at 53, per Southin J.

114. For a good survey of this question see Giliker, *supra* note 6 and *Mullany & Handford*, *supra* note 6 at 82-92.

115. Giliker, *supra* note 6 at 39, points out that “courts’ disapproval of intentional conduct overrides the concerns of indeterminate liability.” She argues that damages should be awarded “(a) where mental distress is consequential on physical injury resulting from a tort, and (b) generally in addition to ordinary compensation for torts committed intentionally and/or actionable per se.” She would not extend recovery to negligently caused stand-alone mental harm.

these intentional torts have helped to contain the number of claims,¹¹⁶ something which can also occur in the case of negligence as plaintiffs must prove the various elements of the tort, often a difficult task as seen in *Mustapha*. Indeed, the need to prove proximate cause, especially the foreseeability of mental harm in a person of reasonable fortitude can represent a formidable obstacle to the recovery of damages. The same can be said about negligence's other components such as factual causation.

While removing all thresholds of actionable mental harm can be defended on a number of levels, objections can be anticipated especially from those concerned by the danger of proliferation of actions—even if the argument has been largely discredited. Refusing to admit that a measure such as the removal of *all* thresholds has the potential of widening the pool of claimants would be myopic. As discussed above, however, the development of clear jurisprudential trends regarding both liability rules and procedural control devices such as motions to strike unmeritorious actions should temper floodgates fears.¹¹⁷

There is another concern, however. The abandonment of all thresholds, especially the “no compensation for mere upsets” lower threshold, could lead to the perception that negligence actions are possible even for the most insignificant, short-lived, minor mental discomforts. Should the law insist on *de minimis* mental harm as a condition of compensation? In *Mustapha*, the Supreme Court has taken a clear stance on this issue and has answered in the affirmative.¹¹⁸ Even scholars writing from a critical

116. Battery requires that the offensive contact with the person of another depart from generally accepted social conduct, while assault demands that the apprehension of physical contact be reasonable: see Klar, *supra* note 14 at 44, 47-48. Recently, in *Jones v Tsige*, 2012 ONCA 32, 118 OR (3rd) 241, the Ontario Court of Appeal recognized a new right of action for “intrusion upon seclusion” a form of invasion of personal privacy. The Court defined the elements of the new tort and discussed the issue of harm. After noting, at para 71, that “proof of harm to a recognized economic interest is not an element of the cause of action,” the Court explained, at para 71, that damages were to be measured by a “modest conventional sum.” A monetary threshold of \$20,000 was proposed. In calculating damages, the Court stated, at para 87, that regard should be had to factors such as the nature of the offensive act, its effect on the health, welfare, social, business or financial position of the plaintiff, the relationship between the parties, the distress, annoyance or embarrassment suffered by the plaintiff or his family, and finally the conduct of the defendant after the violation of privacy.

117. The combination of these various devices has proven very efficient in limiting negligently inflicted mental harm claims in Canada. For instance, since the year 2000, successful plaintiffs defending claims for compensation for stand-alone mental harm have rarely been successful before Canadian appellate courts. This is mainly due to control mechanisms other than the RPI threshold. One successful case is *Frazer*, *supra* note 7. In that case, the mental harm (which was clearly an RPI) was considered foreseeable in a person of reasonable fortitude. It must be noted however that the psychiatric illness the plaintiff suffered was directly linked to his physical harm (an injury to his ankle). Thus, one could query whether there was “stand-alone” mental harm in that case. See *supra* note 7 for the importance of this distinction.

118. *Supra* note 12 at para 9.

perspective recognize that limits to liability are necessary as long as they are not biased.¹¹⁹ Perhaps the key lies in the intuition that tort law cannot compensate for *all* harms and that limited resources are best dedicated to the compensation of mental suffering which crosses at least a minimal threshold. This consideration creates enough hesitation about the outright abandoning of all thresholds of actionable mental harm to warrant the examination of other less drastic options.

2. *Exploring limitations on actionable mental harm*

If the option of removing all thresholds is not retained, the challenge is to choose where to draw the line along the spectrum of mental harm intensity.

a. *Discarding the RPI higher threshold*

Should the RPI threshold continue to be part of Canadian law? Apart from the policy justifications discussed above—predictability and containment of claim proliferation in particular—one could argue that if categories of psychiatric injury are set to expand (for example, if grief is eventually included in the DSM-5) more plaintiffs will fit within the RPI label thus widening, indirectly, the scope of compensable injury. Similarly, if advances in neuroscience make it easier to document the physiological basis of mental harm, more plaintiffs will be able to convince courts that their condition has a “physical component” and is therefore compensable. Waiting for the gradual inclusion of mental disorders in the DSM-5 or for the evolution of neuroscience is neither a practical way of dealing with the problems associated with the current state of the law, nor does it provide a satisfactory principled answer to the policy concerns discussed above. For those who cling to the RPI criterion on the basis of predictability, the inherent limits of the classification systems, the debates within the psychiatric profession and the continuing evolution of knowledge about mental health should be sufficient to dispel any assurance that such a goal can be met. Furthermore, because of this uncertainty, there is no evidence that this particular higher limit is more efficient at containing the number of claims and the costs of litigation than would be a less demanding threshold.¹²⁰

Ultimately, the criterion unfairly excludes those who fail to access psychiatric care and discards as unworthy of compensation other forms of mental harm that can be as debilitating as those closely associated with

119. See, e.g., Chamallas & Wriggins, *supra* note 95 at 91.

120. See Bell, *supra* note 35 at 377 *et seq.*

the formal diagnostic criteria found in the classifications.¹²¹ As argued elsewhere,¹²² *Mustapha* did not endorse the RPI rule as it is applied today by Canadian courts—moreover, the jurisprudential footings of the rule are not particularly solid.¹²³ Keeping in mind all these considerations, Canadian courts should abandon the RPI limit.

b. *Whither the “serious and prolonged” formula?*

Following *Mustapha*, a number of plaintiffs argued that the Supreme Court had replaced the RPI threshold with a new criterion.¹²⁴ According to this view, compensation for stand-alone mental harm would be possible if the injury sustained was “serious and prolonged.”¹²⁵ Although this is probably not the correct interpretation of the decision,¹²⁶ examining the workability of a formula more flexible than the RPI requirement is worthwhile.

At the outset, the “serious and prolonged” test seems attractive because the dependence on the diagnostic criteria found in the DSM-IV or the ICD-10 is reduced. In *Kotai*, however, the Court expressed reservations about the formula as it did not “provide a particularly helpful benchmark for the court, lawyers or litigants.”¹²⁷ More specifically, the problem of measuring the seriousness of the psychological illness was raised. Would it be by reference to the impact of the mental harm on the emotional state or feelings of the plaintiff, by reference to the consequences of the mental harm on the plaintiff’s ability to pursue usual activities, or by reference to other factors or combination of factors?¹²⁸ These questions illustrate some of the drawbacks of the criterion and the danger that courts may be led back to relying on the classification systems.

Even if establishing the “serious” nature of mental harm would prove difficult, the second prong of the formula would be even more problematic because insistence on “prolonged” mental harm excludes serious but short-

121. *Mason*, *supra* note 10 at 380; Nicholas J Mullany & Peter R Handford, “Moving the Boundary Stone by Statute—The Law Commission on Psychiatric Illness” (1999) 22 UNSW LJ 350 at 369; Butler, *Damages*, *supra* note 19 at 68. See also Grey, *supra* note 54 at 224, who supports the introduction of the RPI threshold in American law. She recognizes that imposing a higher threshold (RPI rather than “negligent infliction of emotional distress” (NIED) which is the terminology retained in the United States) would impose “a higher threshold requirement which could eliminate recovery for mental effects that do not amount to medical disorders, a more restrictive approach than that of the Restatement.”

122. Bélanger-Hardy, “Reconsidering,” *supra* note 18.

123. *Ibid.*

124. See, *Kotai SR*, *supra* note 25 and Healey, *supra* note 15.

125. *Mustapha*, *supra* note 12 at para 9.

126. Bélanger-Hardy, “Reconsidering,” *supra* note 18 where it is argued the phrase “serious and prolonged” simply provided another way of defining the lower “mere upset” threshold.

127. *Supra* note 25 at para 67.

128. *Ibid.*

lived illnesses. Justifying why serious mental harm of short duration is less worthy of compensation than serious mental harm of longer duration is very difficult and, inevitably, would lead to unfair results.

If the adoption of “serious and prolonged” threshold was envisaged in Canada, consideration of the position in the United States might be prudent even if the particular evolution of American tort law makes comparisons difficult. In that country, claims for the negligent infliction of emotional distress (NIED) do not require proof of an RPI. Instead, courts have relied on other standards such as the “physical manifestations” criterion, a formula eventually replaced, in some States, by qualitative requirements such as “serious,” “serious, genuine and reasonable,” or quantitative requirements such as “significant” or “substantial.”¹²⁹ Section 46 of the *Restatement (Third) of Torts* relies on the phrase “serious emotional disturbance.”¹³⁰ Delving into the details of American law goes beyond the scope of the present article, but the American experience seems to confirm that qualifiers such as “serious” and “prolonged” may oblige courts to create numerous distinctions which can be as problematic as the RPI criterion.

c. *Exploring other limiting formulas*

Alternatives to the RPI rule have not been discussed often but the few scholars who have ventured to study the subject have made interesting suggestions which are worth examining in some detail.¹³¹ The solutions offered by Teff and Butler are discussed in this section while the more recent work of Mulheron is considered in the next part as it is closer to what will ultimately be recommended in this article.

129. The nature of actionable harm is not the only element considered by the courts. For instance, in the case of *direct* NIED, section 46 of the *Restatement* provides that liability follows only if the defendant “a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance,” *infra* note 130. For a description of the evolution of American law see WP Keeton et al, *Prosser & Keeton on Torts*, 5th ed (St Paul, MN: West Publishing, 1984) at 359-367; Grey, *supra* note 54 at 206-212; Narbeh Baddasarian, “A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases” (2000) 26 *Am J of L & Medicine* 401, arguing that courts should insist on the physical manifestations requirement thus allowing them to supplement their analysis with tenets of the doctrine of psychosomatic disorders; *Mullany & Hanford*, *supra* note 6 at 89-90.

130. American Law Institute, *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, vol 1 (Philadelphia: American Law Institute, 2009) §4.

131. Only comprehensive proposals with a strong focus on actionable mental harm are reviewed here, which is not to say that other suggestions for reform may not be of interest. See, e.g., Campbell & Montigny, *supra* note 19 at 153-155 (neutral observer test).

After his thorough analysis of all the factors limiting compensation for mental harm, Teff makes a proposal for the reform of English law which includes a component on actionable mental harm.¹³² Of note is the fact that he recommends a “moderately severe mental or emotional harm” threshold and imposes a uniform minimum monetary threshold to exclude both physical and mental minor, transient harms.¹³³ Giving due attention to the proposal’s second prong goes beyond the scope of this work and will have to be left to another context. The suggestion to rely on a “moderately severe mental or emotional harm” threshold is, however, directly related to the present inquiry.

In promoting this threshold, Teff argues that courts would “assess the reality and value of the injury in terms of its relative severity, taking numerous relevant variables into account.”¹³⁴ He maintains that courts are familiar with the process of assessing the severity of harm as this is what they must currently do when considering non pecuniary losses flowing from physical harm or from compensable mental harm (if there is an RPI). Psychiatric evidence would not be excluded but there would be a greater role for other mental health professionals such as clinical psychologists.¹³⁵

Perhaps the key question to ask when considering Teff’s proposal is whether the threshold he advocates would attract the same concerns as those outlined above in the discussion of the “serious and prolonged” test. What would “moderately severe mental or emotional harm” encompass? The word “moderately” is quite vague and the word “severe,” defined as “grievous” and “extreme,”¹³⁶ may lead courts to a line of analysis very similar to the one they take when they apply the RPI threshold. Nevertheless, Teff’s intimation that the inquiry about actionable mental harm should call upon a wider variety of health professionals is welcomed as is his proposal to include a wider spectrum of mental conditions.

Butler’s reform proposal is grounded in the medical research on trauma and its consequences, in particular on Mardi Horowitz’s stress response

132. *Supra* note 6 at 185 where he summarizes his full proposal for reform. Apart from the two elements mentioned above, his plan includes: abolishing the primary/secondary divide (of lesser interest in Canada since, for the moment at least, this dichotomy has not been endorsed by Canadian courts), relying on the standard negligence principles of reasonable care, reasonable foreseeability and causation for all cases, and creating two categories of damages for non-pecuniary losses: severe and moderately severe.

133. *Ibid* at 8-9, 177-178.

134. *Ibid* at 178.

135. *Ibid*.

136. *The Oxford English Dictionary*, 2d ed, *sub verbo* “severe.”

theory.¹³⁷ Butler suggests a two-prong formula whereby compensable mental harm would require evidence of a failure to return to a “psychiatric homeostatic equilibrium” which “adversely affects the plaintiff’s normal enjoyment of life.”¹³⁸ The advantages envisaged here are the exclusion of mere upsets from the sphere of compensatory harm and the focus on the impact of the negligent conduct on the plaintiff rather than on concordance with the classifications’ diagnostic criteria. Butler explains that assessing the normal enjoyment of life would be similar to what courts already do when they consider non pecuniary losses.¹³⁹

The merit of Butler’s proposal lies in his serious and thoughtful attempt to ground the threshold of actionable mental harm in developing knowledge on trauma and its effects. Realistically, however, it seems unlikely that Canadian courts would embrace an esoteric phrase such as “psychiatric homeostatic equilibrium” in lieu of the RPI formula. This being said, the second prong of Butler’s proposal, with its emphasis on the consequences of a negligent act on the injured plaintiff, is of interest especially given that input beyond psychiatric evidence is envisaged. This point, also highlighted by Teff, is considered in the next section.

3. *The “no compensation for mere upsets” lower threshold: a limit endorsed in Mustapha*

Exploring the limits of actionable mental harm requires a closer examination of the rule whereby a plaintiff cannot be compensated for “disagreeable disturbance of emotional or mental tranquility.”¹⁴⁰ This lower threshold was explained by the Supreme Court in *Mustapha* as follows: “[t]he law does not recognize upset, disgust, anxiety, agitation and other mental states that fall short of injury...[rising] above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept...Quite simply, minor and transient upsets do not constitute personal *injury*.”¹⁴¹ Similar formulations of the rule have been part of Canadian law for over 100 years.¹⁴² A useful way to express how would work a reform proposal based on this threshold is to follow Thomas J.’s suggestion to frame the scope of compensable injury negatively: damages

137. MJ Horowitz, “Stress-Response Syndromes: A Review of Posttraumatic Stress and Adjustment Disorders” in JP Wilson & B Raphael, eds, *International Handbook of Traumatic Stress Syndromes* (New York: Plenum Press, 1993) 49. See Butler, *Damages*, *supra* note 19 at 8-12.

138. *Ibid* at 138-139.

139. *Ibid* at 139.

140. This is the expression used by *Mullany & Handford*, *supra* note 6 at 56.

141. *Supra* note 12 at para 8 (emphasis by the Court).

142. See *Armstrong v South-Eastern Railway Co* (1847), 11 Jur 758 for an early British case and, in Canada, *Miner*, *supra* note 11 at 421 (quoting *Dulieu*, *supra* note 10 at 673).

may be recovered for stand-alone mental harm unless such harm is “of the kind which is part of ordinary human experience.”¹⁴³

In her well-articulated article, Mulheron argues in favour of keeping the “no compensation for mere upsets” limit while discarding the RPI requirement. She explains that a court would no longer ask “whether the claimant has suffered a psychiatric illness identified in ICD-10 or DSM-IV, but whether the claimant has suffered some abnormal psychological reaction, as opposed to ordinary human emotions of grief, distress, etc., to constitute actionable damage.”¹⁴⁴ Her proposal differs, however, from what is suggested in the present article in that she would nevertheless retain a higher limit—a “grievous mental harm” threshold—to replace the RPI formula.¹⁴⁵ To assist courts with the task of delineating the actionable harm, Mulheron points to the use of objective factors such as “how seriously the claimant’s cognitive functions and participation in daily activities was impaired, post negligence; the length of time for which the impairment was suffered; and/or the extent of medical care required by the claimant.”¹⁴⁶ Although these questions do not necessarily require reliance on the classifications, establishing the extent to which cognitive functions and participation in daily activities have been impaired or determining if the harm amounts to “grievous mental harm” may be quite challenging and would more than likely require psychiatric testimony. In addition, wording such as “grievous,” a term denoting a serious injury,¹⁴⁷ is quite vague and its strict interpretation may lead to the exclusion of meritorious claims. This is why the solution proposed in the present article focuses only on the lower threshold: all mental harm amounting to more than “mere upsets” would be actionable.

The option of keeping only the lower threshold is closest to the Supreme Court’s intention in *Mustapha*.¹⁴⁸ In its decision, the Court did not endorse the RPI threshold as it is presently understood in Canadian law, but chose instead to emphasize the notion that compensable harm must amount to more than mere upsets of life. This manner of characterising the nature of actionable harm is in line with the Court’s intimation that

143. *Van Soest*, *supra* note 51 at para 97.

144. Mulheron, *supra* note 19 at 91.

145. *Ibid.* Mulheron does not work with the tripartite approach adopted in this article. Her position is that a plaintiff cannot claim for mere upsets and must therefore prove grievous mental harm in order to be compensated.

146. *Ibid.* at 109.

147. *The Oxford English Dictionary*, 2d ed, *sub verbo* “grievous.”

148. This interpretation of *Mustapha* is developed in more detail in Bélanger-Hardy, “Reconsidering,” *supra* note 18.

it “would not purport to define compensable injury exhaustively.”¹⁴⁹ The correct interpretation of *Mustapha*, therefore, confirms the Supreme Court’s preference for this approach¹⁵⁰ and lower courts must simply be encouraged to reorient their traditional stance on the issue. Interestingly, in the context of recent negotiated settlements,¹⁵¹ modest damages have been awarded for harm amounting to less than an RPI, perhaps indicating that, in practice, accommodating a variety of mental harm claims is not only possible but acceptable to the insurance industry.

Insisting on a lower threshold of actionable mental harm based on the exclusion of insignificant or trivial emotional upsets would assuage, at least in part, fears of unlimited liability as the lower end of the potential pool of claimants would be circumscribed. In addition the proposed reform would respond to some extent to the need for predictability by providing a guideline on the intensity of mental harm likely to be accepted by courts. On a normative level, the existence of a *de minimis* threshold would signal that the law does not protect against claims for insignificant or trivial momentary upsets and that people living in a complex society must bear the costs of this type of inconvenience even if it flows from negligent conduct.

As noted above, the debate about the nature of actionable mental harm raises concerns about overdependence on the diagnostic criteria listed in classification systems such as DSM-IV or ICD-10 and the inherent limits of such diagnostic instruments. Mulheron argues that eliminating the need to prove a RPI would make this reliance “less significant.”¹⁵² Although this

149. *Supra* note 12 at para 8.

150. The language used in *Mustapha* is very similar to the Supreme Court’s reasoning in *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, a case dealing with a parent’s right to state-funded counsel in cases of custody suspension by the State. The Court concluded, at para 58, that a parent’s right to security under s 7 of the *Charter*, *supra* note 105, includes physical and psychological integrity, and that this protection goes beyond the criminal law to include child protection proceedings. The Court wrote at para 59-60: “It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action...For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person’s psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.”

151. See *Kotai v The Queen of the North*, 2010 BCSC 1180, [2010] BCJ No 1645. The settlement of this class action was negotiated considering the difficulty for many claimants to prove that they had reached the RPI threshold. Individuals who, in their counsel’s opinion, were considered to have been merely “upset” by the event received \$500 as recognition of the harm suffered “even though it was unlikely that the court would award damages.” Others, who were identified as having “apparently compensable claims,” received larger amounts based on a prior third party assessment.

152. *Supra* note 19 at 95.

seems correct, it is important to recognize that dependence on psychiatric testimony would not disappear altogether as courts may need assistance to separate non compensable emotional upsets from compensable emotional harm.

Drawing the line at mere upsets rather than at an RPI, or at grievous or severe harm, would have the advantage of reducing dependence on the classifications' diagnostic criteria as well as on the medical model of mental harm assessment in general. If necessary, a plaintiff's case could be based on the clinical judgment of a psychiatrist, a psychologist or a family physician but, in less complicated cases, the difference between mere upsets and compensable mental harm could be determined in much the same way as the notion of "contact" is handled within the tort of battery. In that context, courts have to establish that the offensive or harmful interference to the person is "beyond the trivial contact that is expected in the course of ordinary life."¹⁵³ Distinguishing between mere upsets and actionable mental harm would be based on a flexible approach which is what Teff, Butler, and Mulheron have all advocated—albeit in slightly different ways. This flexibility, in combination with the lower threshold, may also address some of the wider social concerns identified above: for instance, problems of lack of access to mental health specialists would not be as crucial to the success of a claim.

Although relying on the lower threshold of "no compensation for mere upsets" may not respond perfectly to all the policy concerns noted above, the proposal provides a workable model which answers the main criticisms of the traditional RPI limit. Of course, dispelling the impression that, initially, the number of claims may increase is impossible but this fear must be resisted and recognition given to the procedural measures and substantive limits which will contain unmeritorious claims. Indeed, the proposed changes must not be viewed in isolation. In *Mustapha*, the Supreme Court has laid out the other rules which currently apply to claims for mental harm and, for the moment at least, these are unlikely to change dramatically. In that context, the Court's flexible approach regarding the issue of actionable mental harm should be fully embraced.

Conclusion

This article endeavoured to respond to the interest recently generated for the notion of actionable mental harm following the *Mustapha* decision and its aftermath, in particular the need to prove an RPI, one of the mechanisms devised by common law courts to control the ambit

153. Linden & Feldthusen, *supra* note 14 at 42.

of liability for negligently caused stand-alone mental harm. The inquiry focussed specifically on the policies underlying the difficult decision of setting the line of demarcation of compensable harm along the spectrum of possible mental reactions to a negligent act. The study highlighted many interacting concerns based either on plaintiffs' behaviour and attitude, pragmatic and evidentiary issues including the reliance on classifications such as DSM-IV-TR and ICD-10, fear of proliferation of claims, and wider social expectations and values about mental harm.

A critical look at these concerns revealed that some of the perceived advantages of the RPI rule, in particular predictability, were debatable if not illusory. Moreover, insistence on the traditional formula raised issues of access and fairness towards plaintiffs who, while suffering significant mental harm, were unable to show the necessary concordance between their condition and the diagnostic criteria outlined in well-known classifications.

After surveying various proposals for reform, a model based on a "no compensation for mere upsets" threshold was evaluated and adopted as it appeared most apt to strike the correct balance between deterring legal actions based on "mere upsets" of life and recognizing the legitimacy of "mid-spectrum" mental harm occurring after a negligent act. Under the proposed model, legal actors are encouraged to differentiate between mere upsets and actionable harm through a flexible approach based on a pragmatic assessment of evidence provided by a variety of health professionals and other social actors.

Although the proposal may not eliminate the problem of "broad, culturally influenced assumptions about mental disability and about what it means to be ordinary,"¹⁵⁴ the hope is that by embracing a broader conception of actionable mental harm, Canadian courts will acknowledge the inequities created by the current rules. Indeed, the most compelling policy considerations discussed above revolve around mental health and society's attitude towards mental disability and the social groups most likely to suffer from its effects. As noted by Chamallas and Wriggins, nowadays "outside the realm of law, the state of a person's emotional and relational life is regarded as central to that person's well-being."¹⁵⁵ The very notion of emotional health and well-being is debated in the fields of psychology and other social sciences where interesting and fascinating links between legal rules and knowledge about emotional harms and

154. Foster, *supra* note 5 at 65.

155. Chamallas & Wriggins, *supra* note 95 at 90.

their impact on well-being are explored.¹⁵⁶ Of course, more research is required on topics of this nature. In this exciting climate, with mental health being pushed to the fore of public and social consciousness like never before,¹⁵⁷ 21st century Canadian tort law simply cannot trail behind. Shedding the RPI requirement would be an important first step towards the modernization of the law on mental harm.

156. See, e.g., David DePianto, "The Hedonic Impact of Stand-Alone Emotional Harms: An Analysis of Survey Data" (2012) *Law & Psychology Rev* 115 [forthcoming], online: <<http://ssrn.com/abstract=2111734>>. The article can best be summarized by quoting from its conclusion, at 141: "a range of emotional harms that might be subject to dismissal in courts—including stand-alone claims of emotional distress—bear a significant impact on SWB [subjective well-being]. To the extent that the unequal treatment of physical and emotional harms is based not upon practical concerns but upon the belief that mental health is less important to the quality of life the findings presented [in DePianto's study] challenge the distinctions currently drawn in tort law."

157. Consider for instance the work of the Mental Health Commission of Canada, online: MHCC <<http://www.mentalhealthcommission.ca/english/pages/default.aspx>>. The Commission, created in 2007, has developed a mental health strategy for Canada: see Health Commission of Canada, *Toward Recovery & Well-Being—A Framework for a Mental Health Strategy for Canada* (Mental Health Commission, 2009).

