Thin-Skull Plaintiffs, Socio-Cultural "Abnormalities" and the Dangers of an Objective Test for Hypersensitivity

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The extent to which “hypersensitivity” can serve as a legal basis for demanding additional compensation has always been a controversial issue in tort law. A key challenge facing courts lies in determining how the “thin-skull rule,” traditionally related to physical conditions that predispose an individual to additional injury, can be applied to claims from “hypersensitive” plaintiffs citing personality-linked vulnerabilities of a religious, socio-cultural, or psychiatric nature. This article critically evaluates the viability of the “ordinary-fortitude test” adopted by the Supreme Court of Canada in Mustapha v. Culligan, and discusses the relative merits of a “multi-factorial test” in determining the admissibility of personality-linked “thin-skull claims.” In this regard, a fact-specific, contextual approach that considers the causal nexus between the defendant’s negligence and the plaintiff’s injury would provide a more flexible framework with which to measure liability than an artificially-defined “one-size-fits-all” standard of “psychological resilience” in an increasingly multicultural Canada.

En droit de la responsabilité civile délictuelle, la mesure dans laquelle l’hypersensibilité peut être utilisée comme base juridique pour réclamer une indemnité additionnelle a toujours été une question controversée. Un grand défi que doivent relever les tribunaux est de déterminer comment la doctrine de la vulnérabilité de la victime, traditionnellement liée aux affections physiques qui font qu’une personne est prédisposée à subir des préjudices additionnels, peut être appliquée aux réclamations par des demandeurs hypersensibles qui invoquent des vulnérabilités de nature religieuse, socioculturelle ou psychiatrique liées à leur personnalité. L’article évalue de manière critique la viabilité du critère de la résilience ordinaire adopté par la Cour suprême du Canada dans Mustapha c. Culligan, et discute du mérite relatif d’un critère multifactoriel pour déterminer l’admissibilité de réclamations liées à la personnalité et fondées sur la doctrine de la vulnérabilité. À cet égard, une approche contextuelle, fondée sur les faits, qui examine le lien de cause à effet entre la négligence de la partie défenderesse et le préjudice subi par la partie demanderesse offrirait, pour mesurer la responsabilité, une structure plus souple qu’une norme de « résilience psychologique » universelle définie artificiellement dans un Canada de plus en plus multicultural.

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Introduction

I. Facts of the case
II. Whither the primary/secondary victim dichotomy?
III. The dangers of adopting an “objective” test

Conclusion

Introduction

A fastidious consumer with a chronic obsession for order and perfection purchases a contaminated product which triggers an obsessive compulsive reaction consisting of repetitive ritualistic cleansing behaviour.\(^1\) A pedestrian who is almost run over by a drunk driver complains some weeks later of a mysterious severe pain on one side of the body.\(^2\) A worker seriously injured in a workplace accident refuses medical treatment on religious grounds, and suffers permanent paralysis as a result. Despite the seemingly diverse nature of these cases, they have one element in common. The victims in these cases possess personality-linked socio-cultural, religious or psychiatric traits that predispose them to additional injury—injury which exceeds in magnitude the harm that a similarly-situated victim without those traits would suffer. A key challenge facing courts in considering the claims of hypersensitive plaintiffs lies in distinguishing between harm that is causally attributable—both in fact and in law—to the tortfeasor’s negligence, and harm that is remote.

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\(^1\) Compulsions are defined as repetitive behaviors or mental acts that are used to reduce anxiety. Although the acts are typically considered by the person performing them to be senseless or irrational, the person cannot resist performing the compulsion. The two most common forms of compulsive behavior are reported by psychiatrists to be cleaning (in the form of repeated cleansing rituals) and checking (where the subject is driven by fear, insecurity or paranoia to repeatedly examine that a certain object is in place, such as a door lock). See Thomas F Oltmanns & Robert E Emery, Abnormal Psychology, 7th ed (Upper Saddle River, New Jersey: Pearson, 2012) at 143 and 144.

\(^2\) Such experiences are sometimes described as somatoform disorders, where unusual physical symptoms appear in the absence of any known illness or physical impairment. See Oltmanns & Emery, ibid at 184-185. On occasion, experiences involving physical endangerment or injury may also result in depression of a more traditional kind. Similar issues of remoteness arise for consideration when the post-accident depression or psychiatric condition becomes serious enough to cause the victim to attempt or commit suicide. The case of Wright Estate v Davidson provides an illustration of a car accident victim who suffered depression and later committed suicide. The court in that case held that the tortfeasor’s liability did not extend to the victim’s death, noting that there was insufficient evidence to indicate the presence of a mental disorder pre-dating the accident. See Wright Estate v Davidson (1992), 88 DLR (4th) 698 at 705.
Yet, the rules governing remoteness provide only limited guidance on the requirements for a successful action in a thin-skull claim involving a degree of hypersensitivity or vulnerability that sets a claimant apart from what is sometimes referred to in the jurisprudence as the “Canadian mainstream.”

Even without the issue of hypersensitivity, liability for psychiatric injury is generally considered a controversial area in the tort of negligence. Even without the issue of hypersensitivity, liability for psychiatric injury is generally considered a controversial area in the tort of negligence. The situation becomes even more complex when courts have to grapple with issues of legal causation when a plaintiff claims additional damages flowing from a “thin skull” or some special vulnerability. The central difficulty facing courts lies in determining whether, and to what extent, the “thin-skull rule,” so famously articulated in cases like Smith v. Leech Brain & Co., should be applied to “sensitivities of the mind or personality” in the same way it is applied to claims involving vulnerabilities of the body.

The Supreme Court’s 2008 decision in Mustapha v. Culligan has refocused attention on the thorny issue of how to resolve thin-skull cases with an element of personality-based hypersensitivity or vulnerability, even though the judgment in favour of Culligan was not entirely expected. Although the decision in Mustapha is already several years old, the questions that were raised in that case remain controversial, and will continue to animate debates on how far the protective arm of the law should extend in respect of “psychologically vulnerable” claimants.

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3. See Vaughan Black, “Cultural Thin Skulls” (2010) 60 UNB LJ 186 at 187 and 201-202, who also refers to “majority cultural backgrounds” in the context of emphasizing the cultural specificity of all plaintiffs, including those purportedly belonging to the so-called “mainstream.”

4. Linden & Feldthusen note that foreseeability remains the major criterion for determining the limits of tort responsibility, but certain interests (such as receiving compensation for mental suffering) are still imperfectly protected. Courts have traditionally placed emphasis on assuring “bodily security” over and above more “ephemeral” and less immediate interests. While the notion of “duty of care” was traditionally employed to rein in the scope of negligence liability in such “ephemeral” cases, the “neighbour principle,” articulated in the seminal case of Donoghue v Stevenson, [1932] AC 562 [Donoghue v Stevenson], has led to a more permissive regime for recovery, owing to the recognition of a generalized duty of care. However, Linden & Feldthusen are quick to point out that despite Donoghue v Stevenson, the courts have not swept away all vestiges of their “earlier reticence.” See Allen M Linden & Bruce Feldthusen, Canadian Tort Law, 9th ed (Markham, ON: LexisNexis, 2011) at 425.


6. It is interesting to note that courts in the United Kingdom have begun to make inroads into recognizing personality as a possible basis for a thin-skull claim. See, e.g., Malcolm v Broadhurst, [1970] 3 All ER 508 at 511 where it is noted that there is “no difference in principle between an egg-shell skull and an egg-shell personality.”


8. See MH Ogilvie, “The Fly in the Bottle and Psychiatric Damage in Consumer Law” (2010) 2 J Bus L 85 at 88, where it is noted that the Supreme Court handed down a brief seven-page decision rejecting Mustapha’s claim, to the “considerable surprise” of the legal community in Canada.
This article seeks to explore the legal significance of socio-cultural, religious, psychological or other personality-based factors that may predispose a thin-skull victim to a higher than expected magnitude of injury—whether of a psychiatric or physical nature. One thin-skull scenario might involve a mental condition—such as obsessive compulsive disorder—which produces a heightened psychiatric reaction to a negligent act. In another, religious beliefs might prohibit an injured claimant from seeking medical treatment, causing the physical injuries to further worsen. While *Mustapha* was not primarily a case involving religious sensitivity or physical injury, the Supreme Court’s endorsement of an objective-fortitude test may create difficulties in the future for claimants with specific psychological, religious, cultural or other “non-mainstream” qualities seeking additional compensation for injuries arising from their unique vulnerabilities. The concern here is not with the Supreme Court’s (arguably justified) dismissal of Mustapha’s claim per se, but with the possible limitations that an objective fortitude test would have in evaluating when (if ever) cultural factors or psychiatric vulnerabilities may be admissible, for the purpose of imposing additional liability, in future cases involving thin-skull claimants. In this regard, it will be proposed in this article that Canadian tort law needs to develop a sufficiently nuanced test to distinguish between cultural or psychiatric factors that may give rise to an actionable thin-skull claim and those which simply lack the requisite foreseeability to support an action for additional damages.

This article will use the Supreme Court’s decision as a springboard to discuss two issues relating to liability in thin-skull cases involving hypersensitivity. First, it will explore whether the primary/secondary victim dichotomy, which appears to have been endorsed by earlier Canadian decisions, has survived the holding in *Mustapha*. It will argue that the Supreme Court wisely side-stepped the issue of Mustapha’s classification as a victim, thereby avoiding the rather artificial strictures of evaluating the recoverability of mental harm through a test based rigidly on the risk of direct physical endangerment to the victim or others. The Supreme Court’s silence on the issue of classification is justified in the circumstances, although it could possibly be surmised that the decision was not primarily designed to jettison the “victimhood” dichotomy entirely.
Second, the article will critically analyze the Court’s endorsement and application of the ordinary-fortitude test. It will be suggested that while such a test might be viewed as an essential tool to rein in the bounds of negligence liability, it creates the risk of subjecting claimants to a culturally polarizing, politically alienating and subjective hypothetical standard which measures one’s mental constitution against an idealized fictional notion of resilience. This article argues that no single “standard” is capable, on its own, of providing a suitable yardstick with which to measure the remoteness of a victim’s claim. Rather, it will be proposed that a fact-specific, multi-factorial contextual-forseeability test for remoteness that explores considerations such as the nature of the claimant’s “underlying personality-based condition,” the constitutionality of the claimant’s beliefs (if applicable), the requirement of taking steps to mitigate threats to one’s health and well-being in the absence of any strong moral prohibition, the presence of conscious choice in exposing oneself to danger, the balance of rights between the claimant and alleged tortfeasor, as well as the causal nexus between the defendant’s actions and the plaintiff’s specific injury, would, taken together, furnish a more flexible and appropriate set of guidelines with which to resolve issues of liability in thin-skull claims involving a degree of hypersensitivity. In this respect, it will be argued that the law relating to hypersensitivity can benefit from some of the insights

9. This test determines whether a claimant with a particular sensitivity can recover by comparing the claimant’s reaction with that of the hypothetical individual of reasonable mental robustness or fortitude. If such an individual would not have suffered psychiatric injury in the circumstances, then the claimant with the particular vulnerability of sensitivity would not be eligible to recover compensation. The Supreme Court of Canada was not, of course, the first court to apply this test. The ordinary-fortitude test had already been applied in earlier cases such as White v Chief Constable of South Yorkshire Police, [1999] 1 All ER 1 [White], and the Canadian case of Vanek v Great Atlantic and Pacific Co of Canada Ltd, [1999] 48 OR (3d) 228 (CA) [Vanek].

10. It has been suggested that a balancing exercise that weights the plaintiff’s dignity against the defendant’s rights within a highly fact-specific framework would provide courts with sufficient room for manoeuvrability in determining the scope of civil liability. See, e.g., Olga Redko, “Religious Practice as a ‘Thin Skull’ in the Context of Civil Liability” (2014) 72 UT Fac L Rev 38 at 71, who advocates, for the consideration of claims involving “religious thin skulls,” the approach adopted by the Supreme Court of Canada in Syndicat Northcrest v Amselem, 2004 SCC 47, [2004] 2 SCR 551, where the court resolved the conflict between the plaintiff’s religious freedom and the defendant’s contractual rights, through recourse to section 9.1 of the Quebec Charter of Human Rights and Freedoms. This article suggests that an individualized, fact-specific balancing exercise that takes into account sensitivities of a non-religious nature can be productively applied to claims involving personality-based elements in general, including claims concerning socio-cultural or psychiatric vulnerabilities.

11. Costs that the plaintiff is deemed to have accepted by, for instance, voluntarily or consciously engaging in potentially risky or dangerous activity, will not generally be recoverable from the tortfeasor as part of a thin skull claim for additional compensation. This consideration—relating to the awareness and acceptance of danger—may be pertinent both at the remoteness stage of evaluating legal causation, as well as the defence stage of the negligence analysis. Evidence of contributory negligence by the plaintiff, for example, might reduce the extent of the defendant’s liability.
that have been formulated in the literature concerning socio-cultural and religious-based harm, such as the work by Marc Ramsay and Vaughan Black, discussed later. Whether harm—psychiatric or otherwise—is foreseeable in a given case, particularly in cases involving individualistic traits which predispose claimants to additional injury, is almost invariably a question of fact. A test that is capable of accommodating factual, context-specific determinations of foreseeability would be more suitable for adjudicating claims in a diverse society than an artificial objective standard which imposes a one-size-fits-all threshold against which all thin-skull claims are judged.

I. Facts of the case

The facts of Mustapha v. Culligan are perhaps among the most memorable in the history of product liability law since Donoghue v Stevenson in the United Kingdom. The plaintiff, Mustapha, had for a period of fifteen years purchased large bottles of water from the defendant, Culligan of Canada, for consumption by his family. On one occasion, when replacing an empty bottle with a full one, Mustapha noticed a dead fly and the remnants of another in the unopened replacement bottle supplied by the defendant. Neither Mustapha nor his family members consumed the contents of the bottle.

The string of events that flowed from this fateful discovery is noteworthy in light of the impact that it had on Mustapha’s mental health. The sight of the dead flies in the water triggered in Mustapha an obsessive compulsive reaction that affected his ability to function productively. Shocked by the “revolting implications” that the dead flies in the drinking water would have had on the health of his family, he became obsessed with cleanliness and was unable to take showers. His personal and professional life suffered, and his business declined.

13. Product liability cases in the line of Donoghue v Stevenson generally involve a claimant discovering a contaminant or foreign object in a product of manufacture, which subsequently results in injury—either physical or psychiatric—to the claimant. Examples of product-liability based psychiatric injury cases in Canada include Taylor v Weston Bakeries, [1976] 1 CCLT 158 (where the victim discovered metal and blue mould in bread) and Curll v Robin Hood Multifoods Ltd (1974), 56 DLR (3d) 129.
15. Ibid.
16. Ibid, where it is noted that the bottle remained unopened.
17. Ibid.
18. Ogilvie, supra note 8 at 87.
19. Ibid.
of a “serious and prolonged nature” and he was diagnosed as suffering from a major depressive disorder, phobia and anxiety.\textsuperscript{20}

Mustapha claimed damages against Culligan for his psychiatric injuries, and was awarded compensation, including general and special damages, at the trial level.\textsuperscript{21} The trial judge, in finding for Mustapha, applied a subjective test for sensitivity, taking into account the plaintiff’s “cultural factors” and particular vulnerabilities to emotional harm.\textsuperscript{22} However, the finding of the trial court was overturned on appeal. The Supreme Court, in affirming the reversal by the Court of Appeal, held that Mustapha’s psychiatric injury was too remote to allow recovery.\textsuperscript{23} While Culligan owed a duty of care to Mustapha and had breached the standard of care by supplying a defective product,\textsuperscript{24} Mustapha’s claim failed on grounds of causation. Although the factual cause of Mustapha’s depressive disorder was the defendant’s negligence, it was not the cause in \textit{law};\textsuperscript{25} Mustapha had failed to demonstrate that a person of “ordinary fortitude” would have suffered severe mental harm upon seeing the dead flies in the water.\textsuperscript{26} In this regard, Mustapha’s reaction to the flies was unusual and extreme, and while his debilitating depressive disorder was imaginable, it was not reasonably foreseeable.\textsuperscript{27}

Mustapha’s claim against Culligan for psychiatric damage raises interesting issues about whether thin-skull claimants are entitled to recover for the full extent to which they sustain injury. At the heart of the Supreme Court’s decision is the finding that hypersensitive individuals do not receive additional protection under the law by the mere fact of their hypersensitivity. Mustapha’s claim for compensation was simply not tenable because the chain of legal causation had, in the view of the Supreme Court, been broken by remoteness and a lack of foreseeability.

Despite its apparent clarity and simplicity, \textit{Mustapha} has left a somewhat uncertain legacy. Questions relating to the interpretation of “hypersensitivity” and its significance for recovery are likely to challenge future courts in thin-skull cases. In particular, to what extent will the classification of a claimant as a primary or secondary victim continue to be relevant in the wake of the Supreme Court’s decision? And under what

\textsuperscript{20} Mustapha, supra note 7 at paras 1 and 10.
\textsuperscript{21} \textit{Ibid} at para 2.
\textsuperscript{22} \textit{Ibid} at para 18.
\textsuperscript{23} \textit{Ibid} at paras 3 and 20.
\textsuperscript{24} \textit{Ibid} at para 7.
\textsuperscript{25} \textit{Ibid} at para 3.
\textsuperscript{26} \textit{Ibid} at para 18.
\textsuperscript{27} \textit{Ibid} at para 15.
circumstances will emotional or personality-based susceptibility to harm constitute a recognized basis for additional compensation? This article will consider each of these issues in turn.

II. Whither the primary/secondary victim dichotomy?
There was no attempt to categorize Mustapha as either a “primary” or “secondary” victim of psychiatric injury in the Supreme Court’s decision, and for good reason. Whether Mustapha was directly endangered by the defendant’s carelessness, which would in turn determine whether he was a primary victim, was not a crucial factor in the determination of liability. Yet, an issue that will likely face Canadian courts in the post-Mustapha era is the significance of the primary/secondary victim dichotomy, what weight (if any) to attach to it, and its larger implications for the tort of negligence in Canada.

Traditionally, whether a duty of care is owed to a plaintiff claiming for psychiatric injury was contingent upon the plaintiff’s status as either a primary or secondary victim. While courts generally continue to approach the issue of recovery for psychiatric injury with a certain degree of reluctance, developments in the common law over the course of the past century have resulted in the judicial recognition of situations in which recovery for psychiatric injury is more likely to be available.

It is now generally accepted in the common law of England that victims of nervous shock can be divided into primary and secondary victims. Primary victims fall within the “range of foreseeable physical injury” by directly experiencing traumatic events such as disasters and accidents, and are eligible to recover if their psychiatric injury arises from fear for their own

28. Ogilvie, supra note 8 at 91.
29. See, e.g., Dulieu v White & Sons, [1901] 2 KB 669 at 681 [Dulieu], in which Kennedy J outlined a test for shock arising from “reasonable fear of immediate personal injury to oneself,” and Hambrook v Stokes Brothers, [1925] 1 KB 141, which broadened the scope of recovery to claimants who suffer shock arising from reasonable fear to themselves or to their children, as a result of witnessing a tragic event or accident through their own unaided senses.
30. See Linden & Feldthusen, supra note 4 at 425, where they note that “Tort law was slow to grant protection to the interest in mental tranquility.” Linden & Feldhusen later observe, at 434, that “[i]n the last few years, with reasonable foresight being used as an umbrella theory, more specific contours of liability for psychiatric injury are coming into focus as the recurring cases are sorted out.”
32. See Page v Smith, [1995] 2 All ER 736 [Page], per Lord Lloyd.
Personal safety. Secondary victims, on the other hand, suffer shock not from fear of their own safety, but as a result of witnessing serious injury or death to others with whom they have a close relationship of affection. In both cases, the requirements of physical and temporal proximity to the accident must be satisfied in order to successfully establish a claim in psychiatric injury.

Interestingly, the decision by the House of Lords in the 1995 case of Page v. Smith added a new twist to the primary/secondary victim distinction by articulating special rules on remoteness for primary victims who sustain psychiatric injury. These rules facilitate recovery for primary victims by blurring the boundary between physical and psychiatric damage. A primary victim would therefore not need to demonstrate foreseeability of psychiatric injury if physical injury were a reasonably foreseeable consequence of the tortfeasor’s carelessness. Hence, a primary victim’s physical and psychiatric injuries will be considered together as components of the same “bundle” of actionable harm flowing from the defendant’s carelessness. Secondary victims, on the other hand, would still need to demonstrate foreseeability of psychiatric injury, and other control factors, in order to recover.

While the primary/secondary distinction has generally been cited with approval in the Canadian jurisprudence, the rule in Page v. Smith has been received far less favourably, not just in Canada but in other parts of the Commonwealth. The Canadian approach is generally unsympathetic to the “slightly improved position” of the primary victim recognized by the House of Lords vis-à-vis psychiatric injury, with some commentators suggesting that the Supreme Court in Mustapha actually rejected the approach in Page. As mentioned earlier, it is noteworthy that there is no discussion of Mustapha’s status as a victim in the Supreme Court’s decision. It might be inferred from the judgment that whether Mustapha

33. Cooke, supra note 31 at 75 and 80-82; McFarlane v EE Caledonia Ltd, [1994] 2 All ER 1; Dulieu v White & Sons, supra note 28.
34. See generally Alcock, supra note 31; Frost v Chief Constable of South Yorkshire Police, [1999] 2 AC 455; and Taylor v A Novo (UK) Ltd, [2013] EWCA Civ 194 (re-affirming the requirement of proximity both in time and in space for secondary victims.)
35. Page, supra note 32.
36. See Linden & Feldthunen, supra note 4 at 439.
37. Ibid at 428, n 6. See however, Ogilvie, supra note 8 at 89-90, who observes that the Supreme Court cited with approval Lord Lloyd’s assertion in Page v Smith concerning the “elusive and arguably artificial distinction” between physical and mental injury. This suggests that the Canadian Supreme Court is not entirely unsympathetic to the decision in Page, by adopting an approach which favours “a more positive assimilation of physical and mental injury,” and by recognizing that “nothing is to be gained by treating them as different kinds of injury.” See also Mustapha, supra note 7 at para 8; Page, supra note 32 at 759 (per Lord Lloyd).
was a primary or a secondary victim is not a critical factor in determining his eligibility to recover. The Supreme Court chose instead to focus on whether his losses were remote, taking into account his hypersensitivity.

In focussing on the issue of remoteness in evaluating Mustapha’s claim, the Supreme Court wisely avoided the artificial strictures of evaluating eligibility to recover based on a rigid test of physical endangerment. A categorical approach based rigidly on the primary/secondary dichotomy would exclude recoverability for psychiatric injuries without enquiring sufficiently into the type of endangerment and the nature or severity of the claimant’s actual or anticipated injuries. Physical endangerment” is a term capable of encompassing a wide variety of situations, as well as a vast spectrum of anticipated or actual injuries that vary in severity—from bruises and lacerations to skin cancer and food poisoning. An approach that treats all injuries as part of a single bundle would not be nuanced or flexible enough to evaluate whether there is a sufficient causal link between the endangerment in question and the specific mental injury suffered by the plaintiff. To take an example, an act of carelessness that creates a danger of very mild physical discomfort to the plaintiff—such as temporary gastric pains arising from the failure to adequately re-heat food for consumption—might not, as a matter of law, be sufficient grounds on which to pursue a claim in psychiatric injury, even if there is mental harm or illness accompanying the physical endangerment.

A second factor that militates against using a victim’s classification to evaluate recoverability is the practical difficulty of fitting some claimants into one of the two categories. Not all forms of actionable harm are amenable to a simplistic reduction to physical or psychiatric injury. In some cases, the defendant’s carelessness may give rise to the impression of there being a primary victim, when in fact there is none. In Farrell v. Avon Health Authority, for instance, a new father who was negligently given someone else’s dead baby to hold was allowed to recover for his psychiatric injuries. Further, a young boy was allowed to recover in Froggatt v. Chesterfield & North Derbyshire Royal Hospital NHS Trust, upon overhearing a negligent misdiagnosis involving a close relative. Interestingly, in the CJD Litigation; Group B Plaintiffs v.

38. At a very basic level, physical endangerment may involve an impact to the claimant, or in other cases, a situation where the claimant’s physical safety is threatened by virtue of falling within a zone of physical proximity to a disaster or accident. See, e.g., Toronto Railway Co v Toms (1911), 44 SCR 268 (decided at a time when damages were only available in cases with actual injury or at least the presence of a physical impact), and later cases such as Austin v Mascarin, [1942] OR 165 (which recognized the possibility of damages arising from a reasonable fear for one’s personal safety).
40. [2002] All ER (D) 218 (Dec).
Medical Research Council, the court refused to classify a claimant who had been negligently injected with human growth hormone (that could lead to Creutzfeld-Jacob disease) as either a primary or a secondary victim. Although the court recognized liability, it was wary of making a pronouncement on the classification of the claimant’s status as a “victim,” out of concern that any such pronouncement would have an impact on future cases. These instances highlight the artificiality of using physical endangerment as a test for whether mental damage is foreseeable, taking into account the possibility that psychiatric damage can flow not only from careless acts that can potentially wound or bruise, but also from the negligent communication of incorrect or misleading information.

The Supreme Court’s approach is generally consistent with judicial trends in Ireland and in other parts of the Commonwealth to avoid rigid distinctions based on the victim’s status. In Curran v. Cadbury (Ireland) Ltd., McMahon J held that workplace cases of nervous shock victims need not necessarily be classified as primary or secondary. Furthermore, even individuals who are traditionally considered “primary victims” may not be able to recover if their mental injuries are sustained gradually rather than as a result of nervous shock. The Irish Supreme Court in Fletcher v. The Commissioners of Public Works in Ireland noted, for instance, that even victims who are “endangered” will not necessarily be eligible to recover if their condition is produced by anxiety or irrational fear, rather than the sudden perception of a frightening event.

In light of the difficulties in applying the primary/secondary victim dichotomy uniformly to all claimants citing special or unusual vulnerabilities, the Supreme Court was on the right track in choosing to adroitly side-step the issue by refusing to give Mustapha’s classification any weight. This allowed the Court to focus on the salient issues pertaining to causation of damage, where the remoteness of Mustapha’s claim constituted the primary barrier against successful recovery. Although the primary/secondary victim distinction was not explicitly overruled, its utility as a tool for evaluating the presence of a duty of care may be severely limited, particularly in cases such as Mustapha’s, where the

42. [2000] 2 ILRM 343.
43. In Fletcher v The Commissioners of Public Works in Ireland, [2003] IESC 13, the plaintiff was negligently exposed to asbestos. Despite the fact that he had not contracted either asbestosis or lung cancer, and that the risk of contracting mesothelioma was “very remote,” the plaintiff continued to worry about his health and was diagnosed as suffering from “reactive anxiety neurosis.” See also Owen McIntyre, “Liability to ‘Fear-of-Disease’ Victims for Negligent Exposure to Asbestos—the Position of the ‘Worried Well’ under Irish Law” (2004) 6:2 Envtl L Rev 111 at 112-113.
concept of endangerment or harm cannot easily be reduced to a simplistic dichotomy.

III. The dangers of adopting an “objective” test

When faced with claims from hypersensitive victims, an important challenge facing courts lies in determining the circumstances under which personality-based socio-cultural, religious or psychiatric vulnerabilities can provide a legal basis for an award of additional compensation to reflect the higher extent of the victims’ losses. A noteworthy feature of the Supreme Court’s decision is its application of the person-of-ordinary-fortitude test in rejecting Mustapha’s claim on grounds of remoteness. In choosing to follow the path laid down in the English and Canadian precedents, the Supreme Court affirmed the test for ordinary fortitude that had been articulated in cases such as *White v. Chief Constable of South Yorkshire Police* and *Vanek v. Great Atlantic and Pacific Co. of Canada Ltd.* Objective tests of this nature have had a long (though at times controversial) history in the evolution of tort law. It is therefore not entirely surprising that the Supreme Court applied a version of the “reasonable person” test—based on the notion of an individual who possesses the resilience and emotional fortitude expected of most Canadians—in determining whether Mustapha’s

44. *Mustapha, supra* note 7 at paras 14 and 15.
45. *Supra* note 9. The ordinary-fortitude standard was applied in this case to police officers who suffered mental distress after assisting with rescue operations at a major sporting disaster in England. It was held that the police officers fell short of the standard of mental robustness required of them and were consequently not eligible to receive compensation for their psychiatric injuries.
46. *Supra* note 9. In this case, a couple became obsessed about the health of their 11-year-old daughter after she consumed some contaminated Beatrice Grape Nectar juice at school. The child was ill for a relatively short time, but displayed no alarming symptoms apart from nausea and regurgitation, and was able to return to school the next day. Nevertheless, the couple continued to be extremely worried about possible effects that did not materialize. As a result of this mental strain, the father was admitted to hospital at a later point. It was held that the parents’ reaction to their daughter’s initial illness was not reasonably foreseeable. Accordingly, the parents were not allowed to recover as they lacked the reasonable robustness and fortitude expected of Canadians.
47. One example of such an objective standard is the reasonable person, or the man on the Clapham omnibus. Like the person of ordinary fortitude, the reasonable person is a hypothetical standard central to the tort of negligence against which the conduct of the defendant is compared. The standard dates back to cases such as *Vaughan v Menlove* (1837), 3 Bing NC 468 and *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205 at 224, and continues to be applied in contemporary Canadian jurisprudence. See *Hill v Hamilton–Wentworth Regional Police Services Board*, 2007 SCC 41 at para 69, [2007] SCR 129, where McLachlin CJ states: “the general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances.” It has been observed by Linden and Feldthusen that despite some criticism of the reasonable-person standard, there has been little evidence of any alteration in this age old standard. See *Linden & Feldthusen, supra* note 4 at 148.
psychiatric injury fell within the bounds of recoverability. The obsessive compulsive reaction that was “triggered” in Mustapha was deemed to be abnormal and extreme; a reaction that the “ordinary” Canadian would not experience upon witnessing a dead insect (or two) in a bottle of water.

Adherence to an objectivized test for liability might appear, at least at first glance, to be justified or even necessitated by constraints faced by decision-makers in the field of tort law. Advocates for an objectivized test might argue that it serves as a control mechanism to ensure that the scope of negligence liability is kept within manageable limits. In their quest to demarcate the boundary between admissible and inadmissible claims, decision-makers arguably perceive the need to formulate some sort of reference point or threshold beyond which no recovery is legally permissible. In this regard, an objective standard furnishes a theoretically attractive and perhaps convenient tool—based on the notion of the ordinary person—with which to evaluate the plaintiff’s reaction and a basis of comparison to measure it against.

Yet, while an objective standard might seem theoretically attractive, how it is applied in practice often hinges on the decision-maker’s individual construction of the ideal or model plaintiff. Tort scholars are quick to point out the dangers of relying exclusively on a test of idealized personhood, based on a one-size-fits-all standard, for measuring whether a vulnerable claimant’s response to a tortious act is admissible for the purpose of awarding additional damages. Part of the difficulty with such a standard is its inability to adequately evaluate vulnerabilities that run the gamut from underlying psychiatric conditions, socio-cultural factors and religious beliefs that predispose a claimant to additional mental or physical harm. A single tortious stimulus may produce a range of different responses from tort victims in a cross-section of society, depending on factors that range from age and gender to social conditioning, religion and cultural upbringing. Therefore, deducing what is considered an admissible response to a tortious stimulus often hinges upon the decision-maker’s interpretation of “normalcy.” The concern with the practical application of such a test is the risk that decision-makers may imbue the fictional standard of the ordinary Canadian with biographical traits that they perceive to

48. A number of commentators have argued in favour of abolishing the reasonable person test, on the ground that it is insufficiently accommodative of individuals who differ from dominant conceptions of “ordinariness” or normalcy, such as children and minority groups. See, e.g., Antony Duff, Intention, Agency & Criminal Liability: Philosophy of Action and the Criminal Law (Oxford: Basil Blackwell, 1990); Mayo Moran, Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard (Oxford: Oxford University Press, 2003).
be compatible with their own subjectively-held views of strong-nerved resilience.49

In this vein, adopting a test based on the hypothetical person of ordinary fortitude might subject claimants to a politically alienating or culturally polarizing standard of “resilience” if the test is applied in a way that uncritically dismisses psychological, religious or cultural sensitivities which depart from the “Canadian mainstream,” unless the tortfeasor had notice of those sensitivities. Of course, not all socio-cultural particularities or “personality quirks” will necessarily form the basis for a thin skull claim, such as a heightened propensity to worry about cleanliness that is triggered by a revolting sight of flies in bottled water—a condition that undoubtedly exacerbated Mustapha’s reaction to the “traumatizing stimulus” in question. However, it is also important to acknowledge that not all harm flowing from vulnerabilities of a religious, cultural or psychological nature should necessarily be viewed as falling beyond the realm of reasonable foreseeability or recoverability.

An interesting example of a thin-skull case that Marc Ramsay suggests ought to be recognized by the law of negligence on grounds of religion is that of an injured Jehovah’s Witness who refuses a blood transfusion on faith-based grounds, thereby suffering damages that exceed those initially caused by the defendant’s negligence.50 The damages sustained by the victim in this case may extend beyond the initial physical injuries to include psychiatric illness and additional physical harm flowing from those initial injuries.51 One possible alternative scenario to Ramsay’s example would be a Jehovah’s Witness who develops severe depression after being negligently given a blood transfusion.52 The key difference

49. See Moran, ibid at 314-315, who suggests that the reasonable-person test would function more effectively without the “person” while retaining the “reason.”
50. One example is provided by the case of Janiak v Ippolito, [1985] 1 SCR 146 [Janiak] (concerning an injured victim who refused surgery because of an overwhelming fear of such procedures), where it was held that not every personality trait or state of mind can provide the legal basis for additional compensation.
52. The issue of Jehovah’s Witnesses seeking additional compensation for damages arising from their treatment refusal decisions has been the subject of litigation not only in Canada but also in the United States. See, e.g., cases such as Williams v Bright, 632 NYS (2d) 760 (NY Sup Ct App 1995); Munn v Algee, 730 F Supp 21 (ND Miss 1990) [Munn].
53. There is a line of authority in Canada upholding the principle that a medical professional can be liable in tort to a patient for performing an unauthorized blood transfusion, particularly if the patient had expressed objection to such a procedure. See, e.g., Malette v Sliman (1990), 72 OR (2d) 417, where the patient, a Jehovah’s Witness, who was brought in a state of unconsciousness to a hospital, had given written instructions in the form of a card refusing any blood transfusion. The physician who performed such a transfusion against the wishes of the patient was held liable for battery.
between this latter Jehovah’s Witness example and Mustapha’s case is that the former involves an established “state of mind” that is protected, or at least accommodated, under Canada’s legal framework, while the latter condition is evidenced primarily by symptoms or behaviour manifesting itself after the tortious act. Imposing a blanket exclusionary principle that rejects all “non-mainstream” religious/cultural factors or psychiatric vulnerabilities would have the dramatic effect of barring claims from potentially deserving claimants, such as the injured Jehovah’s Witness, on grounds of remoteness. While clearly not all thin-skull claims based on cultural or religious arguments should be entertained, a monolithic ordinary-fortitude test does not appear to provide a sufficiently nuanced tool with which to distinguish between deserving cases involving physical or psychiatric injury flowing from psychological, cultural or religious vulnerabilities on the one hand and otherwise remote claims on the other.

Taking into account the Jehovah’s Witness example, it might be surmised that thin-skull cases can be based on cultural or religious factors in at least two different scenarios, where the possibility of mitigation is concerned. In one scenario (with the pre-transfusion Jehovah’s Witness who refuses the transfusion) mitigation is physically possible, but the plaintiff’s state of mind or belief system precludes such mitigating action, resulting in the progressive or dramatic worsening of the injury initially caused by the defendant’s negligence. In the second scenario (with the Jehovah’s Witness who was negligently given an unauthorized transfusion) the plaintiff’s personality-based trait (religious beliefs) aggravates the mental injury or harm (or perception of harm) resulting from the

54. There is a growing body of literature which explores the intersection between culture, religion and vulnerability to harm. See, e.g., Black, supra note 3 (tracing developments in the common law in which cultural factors lead to a finding of additional liability compared to cases where the specific cultural elements are absent); Ramsay, supra note 51 at 399 (arguing in favour of extending protection to “religious thin skulls” and distinguishing them from ordinary cases of failure to mitigate).

55. It has been observed that the Canadian Charter of Rights and Freedoms does not indemnify a practitioner of a certain religion against all costs incidental to the practice of that religion. While freedom to practice the religion is protected under the Charter, the practitioner may have to bear some of the costs of adherence, particularly in cases where religious beliefs or practices conflict with the application of Canadian law. See, e.g., Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 [2009] 2 SCR 569 at 611-613 [Hutterian Brethren].

56. Ramsay suggests, for instance, that religious beliefs that preclude ordinary mitigation are comparable to the plaintiff’s susceptibility to cancer in Leech Brain. Ramsay also cites as a “religious thin skull,” which precludes ordinary mitigation, the example of Friedman v New York, 54 Misc (2d) 448 (NY Cl Ct 1967), which involved a Jewish woman who jumped off a ski lift that had been shut down owing to the negligence of the defendant, and suffered facial lacerations as a result. The decision to jump off the ski lift was motivated by the religious conviction held by the plaintiff, in accordance with strict rabbinic teachings, that it was impermissible for two unmarried persons to be together unaccompanied after nightfall. See Ramsay, supra note 51 at 404 in 14 and accompanying main text.
defendant’s negligence. There is no mitigation possible in the ordinary sense\textsuperscript{57} because the aggravating factor in a thin-skull case is inherent to the plaintiff’s belief system or personality and cannot generally be removed or attenuated through a conscious course of action on the part of the plaintiff without a radical overhaul of the belief system. An appropriate test for measuring legal causation in thin skull cases should be contextually attuned to the specific mechanics of harm—to help decision-makers determine the conditions under which psychological or other factors can form the basis for an actionable “thin skull” claim.

This article suggests that a multi-factorial contextual test for legal causation that focuses on the causal nexus between negligence and harm can help to obviate some of the concerns relating to a fictional objective standard. A test of contextual foreseeability is preferable to one that is based on an idealized notion of personhood in that it delinks the test for liability from a hypothetical fictionalized individual, and situates the claim in the more specific context of causality. Under this test, claims for injuries arising from cultural, psychiatric or religious vulnerabilities are not rejected, \textit{ipso facto}, by virtue of their peculiarity, or divergence from the Canadian mainstream, but viewed in light of their causal connection with the tortfeasor’s wrongful act, including a consideration of whether the victim was aware of the risk of injury by engaging in potentially dangerous or high-risk activities.\textsuperscript{58} Such a test would help forge a more equitable balance between limiting the scope of recovery, and ensuring that vulnerable claimants in society do not find their claims rejected on the sole basis of their divergence from the “Canadian mainstream,” or judicial interpretations of “ordinariness.” Underlying psychological factors and conditions, including religious beliefs, that might predispose an adherent to a higher degree of emotional or physical harm, should not be categorically dismissed as failure to mitigate, but should be examined

\textsuperscript{57} That is, where the plaintiff freely chooses not to mitigate through an autonomous exercise of discretion and thus has to bear the consequences of that choice when additional compensation is denied for losses that could reasonably have been avoided. This may well be the case even if the disposition or inclination to make such an autonomous choice was present in the plaintiff before the injury or accident. See, e.g., \textit{Munn}, supra note 52 at 29.

\textsuperscript{58} Awareness of danger is an important consideration when adherents to a particular belief system choose to subject themselves to a higher degree of risk by giving priority to their religious prohibitions or practices over basic safety precautions. One example is of a Sikh motorcyclist who chooses to wear his turban instead of a helmet and who is later injured in an accident caused by the negligence of another driver. See Redko, supra note 10 who observes that some provinces in Canada already exempt practicing Sikh motorcyclists from wearing the helmet, as seen in legislation such as the Safety Helmets Standards and Exemptions Regulation to the Highway Traffic Act, CCSM c H60 (Man Reg 167/2000) and the Motorcycle Safety Helmet Exemption Regulation to the Motor Vehicle Act, RSBC 1996, c 318 (BC Reg 237/99).
in the context of causality, the balance of rights between the plaintiff and the defendant, as well as whether the victim’s claim regarding freedom of religion is constitutionally protected under the *Charter of Rights and Freedoms.*

The current treatment of hypersensitivity under the Canadian tort of negligence can benefit from some of the insights propounded by scholars who have explored the significance of religious or socio-cultural vulnerabilities in the recoverability of civil damages. Marc Ramsay for instance proposes an interesting battery of tests to distinguish between “religious thin skulls” (admissible claims for the purpose of recovery) and ordinary cases of failure to mitigate (not admissible). These tests can be extended not only to Mustapha’s scenario, but to thin skull claims involving hypersensitivity in general.

Building upon the battery of tests proposed by Ramsay (which relate primarily to religious thin skulls), a modified list could be formulated to take into account psychiatric and personality-based vulnerabilities as well as socio-cultural and religious sensitivities. This modified list would consist of the following considerations. First, the thin-skull claimant must be able to adduce strong evidence of a clinically recognized psychiatric vulnerability or religious/cultural beliefs that pre-date the tortious event, resulting in additional injury, and were not the result of a post-accident revelation. This pre-existing-condition requirement seeks to prevent claimants from fabricating or concocting religious views (or other “sensitivities” or vulnerabilities) after the tortiously-caused injury so as

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59. Redko, *ibid* at 71-73.

60. In this respect, Ramsay suggests that whether religious beliefs are respectful of human dignity and equality may be an important factor in determining whether such beliefs are an admissible ground for claiming a thin-skull condition. In this respect, an injured patient who rejects medical treatment on the ground that the treating physician is of an “inferior race,” and whose condition worsens as a result, would be treated as a claimant who has failed to mitigate his losses. His racist views would not qualify as a religious belief that exempts him from ordinary mitigation because of its conflict with the basic constitutional principle of equality. Hence, to be eligible as a “religious thin skull” claimant, the religious belief in question should recognize, or at least not reject, the equality of human individuals. Underlying this principle is that a religious belief seeking protection under the law should be respectful of the autonomy and basic civil liberties of other individuals in society. See Ramsay, *supra* note 51 at 421, n 58 and accompanying main text.

61. See, e.g., *Blackstock v Foster* [1958] SC (NSW) 341 and *Janiak, supra* note 50, both of which preclude the victim from relying on a post-injury revelation or malignancy to claim additional damages or to reject mitigating action that would otherwise have alleviated the extent of the eventual injury suffered.

62. The underlying condition requirement as a test for the admissibility of thin-skull claims has been applied in a number of Canadian decisions. See, e.g., *Yoshikawa v Yu* (1996), 73 BCAC 253 (CA); *Marconato v Franklin,* [1974] 6 WWR 676 (BC SC).
to avoid their duty to mitigate. Second, the religious beliefs in question (if applicable) must be respectful of the equality and dignity of others in order to serve as the basis for a successful claim for additional relief on the ground of hypersensitivity. Hence, under Ramsay’s conception of relief for “religious thin skulls,” racist beliefs that induce one to reject medical treatment from healthcare professionals of a certain ethnicity would be treated as a case of failure to mitigate, while the religious convictions of a Jehovah’s Witness in refusing therapies involving blood products might form the basis for an actionable thin-skull claim. Ramsay suggests that our commitment to equality under Canada’s constitution requires us to recognize underlying religious beliefs—provided such beliefs are consistent with constitutional norms of equality—as forming the basis for a legitimate thin-skull claim that ought to be distinguished from ordinary failures to mitigate.

Even if the above requirements are satisfied, a third qualifying criterion is that of weak perfectionism, which prescribes that a plaintiff is expected, in the absence of any strong moral prohibition, to place one’s health and well-being over and above temporary goals, particularly in cases where the pursuit of those goals might entail severe cost to one’s constitution. The concept of weak perfectionism distinguishes between goals that might form an admissible basis for a thin-skull claim (such as compliance with a religious prohibition), and goals that are unreasonable because they do not place sufficient value on life and health. These considerations, taken together, would help courts etch out a multi-factorial test for contextual foreseeability that distinguishes between claims for which no additional compensation can be awarded, and underlying conditions that might form the basis for a viable “thin skull” action.

63. Mitigation is not a legal duty, as such, but failure to mitigate in most cases would result in the plaintiff being denied recovery for losses or injuries that could reasonably have been prevented. The essence of some thin-skull cases, however, is that the claimant is seeking compensation for additional injuries due to (or perhaps in spite of) the fact that reasonable mitigation was not feasible, or in some cases, impossible.

64. See text accompanying note 60.

65. See Ramsay, supra note 51 at 399-400, and at the main text accompanying note 59, citing R v Keegstra, [1990] 3 SCR 697. See also Dennis Klimchuk, “Causation, Thin Skulls, and Equality” (1998) 11 Can J L & Jur 115 at 138 (arguing that a victim’s religious beliefs constitute a “zone of equality,” and that the tortfeasor must take responsibility for the consequences of those beliefs by violating the victim’s autonomy and entering into the zone where the victim’s benefit or detriment is evaluated according to those beliefs).

66. See Ramsay, ibid at 418 note 50 and accompanying main text. Ramsay argues that a victim’s religious choices, if consistent with the factors enumerated, are “constitutionally immune” to perfectionist evaluation.

67. Ibid at 409 and 410 notes 27-28 and accompanying main text.
Incorporating a test of contextual foreseeability that is inherently respectful of religious, socio-cultural and psychological diversity, whilst adhering to the principle of weak perfectionism, would confer the additional advantage of being more cohesive than the present test—which treats the defendant’s knowledge of the plaintiff’s hypersensitivity as a proviso or qualification to the general rule—by integrating awareness of the plaintiff’s condition into a single test for foreseeability that examines the contextual nexus of causation, rather than construing it as a separate prong in the analysis of liability. Knowledge of the plaintiff’s hypersensitivity would preclude a defendant from relying on the person-of-ordinary-fortitude test as a shield against liability. However, whether or not the defendant had such knowledge is an integral factor in the foreseeability analysis for legal causation and should be treated as such, instead of an exception to the general rule against recovery for hypersensitive claimants.

Another important element that ought to be taken into consideration in any contextual-foreseeability test for remoteness is whether the claimant was aware—either at an actual or constructive level—of the risk of physical injury when engaging in a potentially dangerous activity, such as high-risk sports or the operation of machinery. A wilful or conscious refusal to take appropriate safety precautions in such cases—even if the refusal is based on socio-cultural or religious grounds—may override even strong evidence of an underlying hypersensitivity or vulnerability that predated the accident. This consideration is perhaps implicitly governed by Ramsay’s weak-perfectionism criterion that the claimant in question be expected to make appropriate adjustments to their belief systems in order to protect their personal health and well-being. That being said, the advantage of a multi-factorial test is that it does not treat these factors as exhaustive or as criteria to be viewed in isolation, but rather as cumulative elements to be weighed in accordance with the fact-specific context of each case.

In sum, a multi-factorial contextual foreseeability test for legal causation that evaluates the causal nexus between a victim’s psychiatric injury and the tortfeasor’s negligence provides a more flexible tool for determining the admissibility of claims for additional compensation

68. See, e.g., Hutterian Brethren, supra note 55, where it was held that the Charter does not indemnify religious adherents against all costs incidental to the practice of their religions.
in thin-skull cases. To qualify as an admissible thin-skull case, the plaintiff must demonstrate clear evidence of an underlying condition that was present prior to the tortious act that resulted in the initial injury; the underlying condition being a factor that exacerbated the injury, either by aggravating its severity, or by precluding ordinary mitigation. However, in order to ensure that the bounds of liability are kept in check, the underlying condition of the psychiatric injury victim must be protected by, or at least compatible with, Charter values respecting equality.

Despite the merits of the Supreme Court’s decision in Mustapha v. Culligan, the issues at stake are far larger than just Mustapha’s thin-skull claim. A multi-factorial contextual foreseeability test would provide a more flexible tool with which to accommodate and protect a broader range of vulnerabilities suffered by deserving claimants—vulnerabilities that would otherwise fall through the net of “ordinary fortitude.” While the fictional standard of the person of ordinary fortitude holds appeal and might even work in clear-cut cases (such as Mustapha’s case), it is perhaps time for Canadian tort law to jettison this rigid, artificial standard in favour of a test that is more respectful, tolerant and accommodative of thin-skull cases involving personality-linked vulnerabilities and mental conditions that fall by the wayside of the “Canadian mainstream.”

Conclusion
The law of tort relating to psychiatric injury has evolved considerably since the epoch of “physical endangerment” as the basis for liability. Yet uncertainty still abounds in the area of legal causation in adjudicating thin skull claims involving some element of religious, cultural or psychiatric vulnerability.

Despite its apparent clarity and simplicity, Mustapha v. Culligan has the potential to provoke and inspire new lines of inquiry into the scope of protection afforded to hypersensitive plaintiffs. On the one hand, the Supreme Court’s decision has demonstrated, quite aptly, that eligibility for recovery should not be based on rigid categorizations of victimhood, but on a test for remoteness. Yet, one of the key concerns with the objective test adopted by the Supreme Court for legal causation is the danger that it

69. This approach recognizes that whether a particular injury—psychiatric or otherwise—is connected to a negligent act by legal causality is a question not only of law but one of fact, and can only be determined by a careful weighing of the plaintiff’s rights against those of the defendant. The difficulty of formulating a single rule or standard for evaluating thin skull claims is acknowledged in the recent literature. See, e.g., Redko, supra note 10 at 44 and 78-79, advocating an individualized approach that consists of a balancing exercise between the plaintiff’s and defendant’s rights in each particular case.
may uncritically exclude deserving cases (falling outside the “mainstream” of the Canadian public) from the ambit of protection.

This article has argued against adopting a rigid classification of victimhood in psychiatric injury cases. It proposes as well the adoption of a more flexible test—a multifactorial contextual foreseeability test that focuses on the causal nexus between the defendant’s negligence and the plaintiff’s injuries—without categorically excluding claims solely on the basis of their psychological, cultural or religious particularity or divergence from the “mainstream.” A contextual approach to adjudicating thin-skull claims that is free from rigid, artificial hypothetical standards would represent an important step toward greater equity and impartiality in constructing a fairer system of recovery for vulnerable victims of negligence in an increasingly multicultural Canada.