

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kotai v. Queen of the North (Ship)*,
2009 BCSC 1405

Date: 20091014
Docket: S062025
Registry: Vancouver

ADMIRALTY ACTION *In Rem* against the Ship, "Queen of the North"
and *In Personam*

Between:

**Alexander Steven Kotai, Maria Giovanna Kotai,
Barney Norman Dudoward, and Robert Peter Smith**

Plaintiffs

And

**The Owner and all Others Interested in the Ship, "Queen of the North",
British Columbia Ferry Services Inc.,
Colin Henthorne, Karl Lilgert, and Karen Briker**

Defendants

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the plaintiffs:

J.A. Hanson

Counsel for the defendant,
British Columbia Ferry Services Inc.:

W.G. Wharton

Place and Date of Trial:

Vancouver, B.C.
April 27, 29, and 30, 2009; and
June 15–19 and 22, 2009

Place and Date of Judgment:

Vancouver, B.C.
October 14, 2009

INTRODUCTION AND BACKGROUND

[1] On March 21, 2006 the ferry, “Queen of the North”, which was owned by the defendant, British Columbia Ferry Services Inc. (“B.C. Ferries”), sailed from Prince Rupert, British Columbia, destined for Port Hardy on the northern tip of Vancouver Island. On board were 59 passengers and 42 crew members.

[2] Just after midnight on March 22, 2006 the “Queen of the North” left Grenville Channel and entered Wright Sound. She was due to make a course correction but failed to do so, and at 0021:20 hours she struck ground on Gil Island and subsequently sank. Most of the passengers and crew were safely evacuated into life-rafts and lifeboats. Sadly, two passengers perished.

[3] This action for damages, one of a number of actions brought as a result of the sinking of the “Queen of the North”, was commenced on March 27, 2006 on behalf of a number of passengers and their dependants. On November 26, 2007 the action was certified as a class action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[4] The statutory framework governing this action is the *Marine Liability Act*, S.C. 2001, c. 6 (the “*MLA*”). Section 37(1) of the *MLA* provides that Articles 1 to 22 of the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974*, December 13, 1974 (the “*Athens Convention*”), which are set out in Part 1 of Schedule 2 of the *MLA*, have the force of law in Canada. Article 3(1) of the *Athens Convention* provides that the carrier is liable for the damage suffered as a result of personal injury to a passenger and the loss of, or damage to, luggage if the incident was due to the fault or neglect of the carrier or its servants acting within the scope of their employment. Article 3(3) presumes fault or neglect, subject to proof to the contrary, if the injury or loss arose from, among other things, the shipwreck or collision of the ship.

[5] Articles 7 and 8 of the *Athens Convention* provide monetary limits on the liability of the carrier and its servants stated in “units of account”, the value of which is based on special drawing rights as defined by the International Monetary Fund.

[6] Article 11 of the *Athens Convention* entitles a servant of a carrier to claim the benefit of the limitation of liability to which the carrier is entitled if he or she acted within the scope of his or her authority.

[7] Article 13 of the *Athens Convention* deprives carriers and servants of the benefit of the limits of liability provided by Articles 7, 8 and 11 if it is proven that the damage resulted from an act or omission “done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”.

[8] The order which certified this action as a class action defined six sub-classes:

- i. Passengers on board the "Queen of the North" during her last voyage whose unpaid claims exceed the limits of liability established under the *Marine Liability Act*, S.C. 2001, c. 6 and who are resident in British Columbia;
- ii. Passengers on board the "Queen of the North" during her last voyage whose unpaid claims exceed the limits of liability established under the *Marine Liability Act*, S.C. 2001, c. 6 and who are not resident in British Columbia;
- iii. Passengers on board the "Queen of the North" during her last voyage whose unpaid claims do not exceed the limits of liability established under the *Marine Liability Act*, S.C. 2001, c. 6 and who are resident in British Columbia;
- iv. Passengers on board the "Queen of the North" during her last voyage whose unpaid claims do not exceed the limits of liability established under the *Marine Liability Act*, S.C. 2001, c. 6 and who are not resident in British Columbia;
- v. "Dependants" of those persons who were passengers on board the "Queen of the North" during her last voyage as that term is defined in the *Marine Liability Act*, S.C. 2001, c. 6, section 4 and who are resident in British Columbia; and
- vi. "Dependants" of those persons who were passengers on board the "Queen of the North" during her last voyage as that term is defined in the *Marine Liability Act*, S.C. 2001, c. 6, section 4 and who are not resident in British Columbia.

[9] The certification order also certified the following questions as common issues:

1. Are the Defendants liable to the members of the Class pursuant to the *Marine Liability Act*, S.C. 2001 c. 6, Schedule 2, Part I?
2. Can the Defendants limit their liability pursuant to the *Marine Liability Act*, S.C. 2001 c. 6, Schedule 2, Part I?
3. What is the scope of a "dependant's" entitlement to compensation under the *Marine Liability Act*, S.C. 2001 c. 6, Part I, section 6(1) and (3)?
4. Are the members of the Class entitled to punitive damages?
5. If the Class is entitled to punitive damages, what is the quantum of such damages, and is the Class entitled to an award of such damages on an aggregate basis pursuant to section 20 of the *Class Proceedings Act*?
6. What is the scope of recovery under the *Marine Liability Act*, S.C. 2001 c. 6, Schedule 2, Part I, in respect of psychological injuries?
7. What were the circumstances surrounding the navigation of the "Queen of the North" during the period it sailed from Sainty Point to Gil Island during her last voyage?
8. What were the circumstances surrounding the evacuation of the "Queen of the North" after it struck Gil Island?
9. What were the circumstances surrounding the sinking of the "Queen of the North"?
10. What were the circumstances surrounding the rescue and relocation of the passengers, who were on the last voyage of the "Queen of the North"?

[10] B.C. Ferries has at all times admitted that it is liable for the sinking of the "Queen of the North" and any damages proven to have resulted from the sinking that are recoverable under the *MLA*. It has settled most of the claims for lost luggage and other personal property. The remaining claims on behalf of the passengers and their dependants in this class action are, for the most part, for personal injury, primarily "psychological injury".

[11] The plaintiffs have abandoned the action as against the personal defendants. They have also abandoned their claim of "recklessness" and have therefore accepted that B.C. Ferries is entitled to the benefit of the limitation of liability

provided by the *MLA*. The plaintiffs have also abandoned their claim for punitive damages.

[12] B.C. Ferries has abandoned its position that the *Athens Convention* precludes recovery for damages of a psychological nature. B.C. Ferries accepts that damages will be recoverable for personal injury in accordance with provincial law. Thus, the first seven questions as defined by the common issues are answered as follows:

1. *Are the Defendants liable to the members of the Class pursuant to the Act?*

This is admitted on a class-wide basis.

2. *Can the Defendants limit their liability pursuant to the MLA?*

Yes.

3. *What is the scope of a "dependant's" entitlement to compensation under the MLA?*

This issue remains alive to the extent that the claims of the individual defendants have to be quantified.

4. *Are the members of the Class entitled to punitive damages?*

No.

5. *If the Class is entitled to punitive damages, what is the quantum of such damages, and is the Class entitled to an award of such damages on an aggregate basis pursuant to section 20 of the Class Proceedings Act?*

No longer applicable.

6. *What is the scope of recovery under the MLA in respect of psychological injuries?*

Recovery will be in accordance with provincial law.

7. *What were the circumstances surrounding the navigation of the "Queen of the North" during the period it sailed from Sainty Point to Gil Island during her last voyage?*

No longer relevant.

[13] As a result of these concessions, the classes have collapsed into four categories:

- i. Passengers who are resident in British Columbia;
- ii. Passengers who are resident outside British Columbia;
- iii. Dependants who are resident in British Columbia; and
- iv. Dependants who are resident outside British Columbia.

[14] What remains to be determined in this action is the value of the claim of each class member. The parties have agreed to a process whereby a number of "mini-trials" are to be conducted to permit the court to assess the values of individual claims. Thus far, there have been six such mini-trials in relation to six claimants, all of whom were passengers on board the "Queen of the North" during her last voyage. I propose to assess the value of each of these six claims at this time. More mini-trials will likely be required, but it is hoped and anticipated that with the court's assessment of the value of these six claims, the parties will be able to settle a number of the outstanding claims.

NATURE OF THE EVIDENCE AT THE MINI-TRIALS

[15] The determination of the value of the individual claims depends upon a consideration of facts that are common to all of the claimants as well as circumstances that are unique to each claimant. The parties filed an Agreed

Statement of Facts with regard to common issues 8, 9 and 10, which forms part of the evidence with respect to each claimant.

[16] In addition to the Agreed Statement of Facts, at each mini-trial evidence was tendered by way of the direct-examination and cross-examination of claimants and other witnesses as well as by way of documents, many of which were entered as exhibits by consent of the parties.

AGREED STATEMENT OF FACTS

[17] The text of the Agreed Statement of Facts, dated April 27, 2009, regarding common issues 8, 9 and 10 is set out below:

A. Common Issue #8: What were the circumstances surrounding the evacuation of "Queen of the North" after it struck Gil Island?

1. At 2000 hours on March 21, 2006, the passengers and vehicle ferry, Queen of the North (the "Vessel"), departed Prince Rupert, British Columbia for Port Hardy, British Columbia. On board were 59 passengers and 42 crew.
2. After entering Wright Sound from Grenville Channel, the Vessel struck the northeast side of Gil Island at approximately 0021.20 on March 22, 2006 (21 minutes and 20 seconds after midnight). The Vessel struck ground near Juan Point.
3. The Vessel sustained extensive damage to its hull, lost its propulsion, and drifted for about one hour and 18 minutes before it sank in 430 meters of water. Passengers and crew abandoned the vessel before it sank. Two passengers were unaccounted for after the sinking and have since been declared deceased.
4. Further particulars of the Queen of the North are as follows:
 - Overall length: 125.0 meters (410 feet)
 - Breadth (Extreme): 19.35 meters (63 feet, six inches)
 - Service Speed: 22 knots
 - Capacities: 157 Automobiles
700 passengers and crew
 - Staterooms: 54
5. Pursuant to the requirements of Canadian Regulations and Transport Canada, regular emergency drills were conducted aboard the Vessel, including emergency evacuation and lifeboat procedures.

6. All emergency equipment, including life-jackets, life rafts, and life boats aboard the Vessel were Transport Canada-approved and inspected.
7. The General Arrangement Plans for the Vessel are attached at Schedule 1 and it is agreed they are accurate in all respects. *[Schedule 1 is not reproduced in these reasons.]*
8. Deck 5 (Saloon Deck), contained passenger common areas, such as the cafeteria and the bar, and also the galley and purser's office. Deck 6 (Promenade Deck) contained passenger accommodation space aft, a port mid-ship lounge, and an enclosed reserved passenger seating area, as well as a lounge and a passenger seating area forward. Deck 7 (Boat Deck) contained another passenger accommodation space aft, the officers' accommodation space amidships, and the wheelhouse at the forward end.
9. The Vessel had received its Steamship Inspection Certificate (SIC 16) on March 2, 2006, which provided the necessary certification for the Vessel to operate as a passenger and vehicle ferry on its intended route.
10. All crew members had their Marine Emergency Duties ("MED") certificates.
11. The area of Wright Sound is shown in the attached photo (Schedule 2). *[Schedule 2 is not reproduced in these reasons.]*
12. At the time of the striking, most passengers were in their staterooms on Decks 6 and 7, in the common area on Deck 5, or outside on deck. The contact was felt by a number of people who were awake. Some slept through the event, and some were awoken by the contact.
13. At the time of the Vessel striking ground, the ship vibrated and there was a loud noise.
14. The Vessel made contact one or more times over a short period of time, and then drifted in a northerly direction.
15. The Vessel hit Gil Island at 17.5 knots.
16. Soon after the impact the Vessel began to list to starboard. The Vessel's engines stopped, and it drifted away from shore.
17. A general alarm was sounded very soon after the Vessel hit the shore, and passengers started to make their way out of the state rooms and onto the deck. An announcement on the public address system directed the passengers to the muster station.
18. Red rocket flares were deployed to indicate distress.
19. Water began to enter the Vessel immediately, including extensive flooding of the engine room. There was a sense of urgency amongst the crew.
20. The crew banged on the doors and urged passengers to evacuate immediately. Many left belongings behind in their state rooms. Some passengers arrived at the muster stations inadequately dressed for the weather.
21. Because the Vessel was listing to starboard, it was necessary to disembark some passengers from the port side. Passengers were directed by the intercom to report to the port side.

22. At the time of striking, there was little or no wind or rain, the seas were relatively calm, and the visibility was good. Air temperature was approximately 7 degrees Celsius. Tidal streams in the sound are one knot or less. Low tide occurred at 2332 and moonrise was at 0339.
23. The passengers put on life jackets and were directed to evacuate the vessel.
24. Passengers were directed to enter one of the three life rafts and one life boat for the disembarkation. The life rafts were covered; the life boat was open.
25. Persons entered the life boat as it was suspended over the side of the Vessel. It was then lowered into the water. There were 32 persons in the life boat.
26. The three life rafts were also lowered into the water using a crane attached to the ferry.
27. While the Vessel remained on an even keel (level fore and aft), she began to develop a starboard list in the minutes following the striking. The starboard list increased but was less than 15 degrees when the abandon ship process was completed. After 0012, the Vessel's starboard list stabilized.
28. The process of abandonment was completed by 0112 with the Master being the last to disembark, using an additional life boat lowered from the starboard side.
29. The disembarkation from the Vessel was orderly, with crew members directing passengers through the evacuation process. During the process of evacuation and the time in the life boat and life rafts, there were no actions displayed by crew or passengers which demonstrated confusion or panic.
30. A picture of the life boat is attached as schedule 3. *(Schedule 3 is not reproduced in these reasons)*
31. The Vessel was listing 15 degrees by the time the last life raft was lowered into the water. The Vessel was settling to stern.
32. The crew were performing head counts throughout the process of evacuation.
33. One raft that was inflated malfunctioned and failed. The raft was cut away. The canopy of one life raft that was deployed did not inflate properly.
34. The engine on the small motorized craft used to tow the life boat and the life rafts away from the Vessel did not start initially.
35. In total, 82 persons were evacuated from the port side; 17 from the starboard.
36. Following the evacuation to the life rafts and life boats, the rafts were towed to a position approximately 250 meters from the Vessel.
37. After the rafts and the life boat had been towed away from the ferry, it began to rain.
38. At 0113, the first small vessel from Hartley Bay arrived at the scene, the "April Augusta." Following the "April Augusta", other small vessels also [started] to arrive at the scene. These included "Miss Yolanda", "Mad Max", "Miss Ardell" and "Crystal Jean", which had already arrived or were arriving at the time of the sinking.

39. In addition to the light from the small vessels as they arrived, between 0113 hours and the sinking of the Vessel, the lights from the Vessel were visible to those in the life boat and life rafts.

B. Common Issue #9: What were the circumstances surrounding the sinking of "Queen of the North"?

40. At 0140 on March 22, 2006, the Vessel sank by stern.
41. At the time of the sinking, the life rafts and life boat were approximately 250 meters from the Vessel.
42. When the Vessel went down, the bow went up, and some windows near the bow were blown out by compressed air.
43. As the Vessel slid into the water, approximately one third of the Vessel, in an upright position, was exposed above the water.
44. A cloud of dust formed at the scene.
45. Life jackets floated free in the debris field.
46. Some but not all of the passengers witnessed the sinking.
47. The weather during this period remained calm, with little or no wind and intermittent rain.

C. Common Issue #10: What were the circumstances surrounding the rescue and relocation of the passengers who were on the last voyage of "Queen of the North"?

48. The passengers sat in their life rafts and in the life boat until help arrived to transport them to Hartley Bay, or the CCGS Wilfred Laurier.
49. The "Lone Star" (a 37-foot shrimper) arrived at the scene at 0144, just after the sinking.
50. At 0154, the "Laurier 1" arrived at the scene. At 0220, "Sir Wilfred Laurier" herself was at the site of the sinking.
51. It continued to rain as the passengers waited in the life rafts and in the life boat.
52. After the Vessel sank, it was dark apart from the lights from the boats in the area and whatever flashlights were on hand.
53. Seventeen (17) passengers boarded the "Lone Star" for transportation to Hartley Bay.
54. Forty-six (46) passengers were taken to Hartley Bay in various smaller vessels.

55. The remaining passengers (36) were taken to Hartley Bay in “Sir Wilfred Laurier”.
56. The women, children, sick and elderly were given priority placement aboard the first vessels to depart the scene for Hartley Bay.
57. The last passengers were evacuated from their life rafts and placed on “Sir Wilfred Laurier” at or around 0300 hours.
58. At Hartley Bay, the passengers were given blankets, hot beverages, and accommodation in a community hall.
59. Eleven (11) persons were airlifted from Hartley Bay to Prince Rupert, including 4 passengers.
60. The balance of the passengers were transported from Hartley Bay to Prince Rupert on board “Sir Wilfred Laurier”.
61. “Sir Wilfred Laurier” arrived in Prince Rupert at approximately 5:00 PM, having departed the vicinity of Hartley Bay at approximately 8:00 AM.
62. The passengers were taken to the Crest Hotel, where they were provided with rooms and each given \$250 to purchase clothing and to replace other personal items.
63. During their time at the Crest Hotel, passengers were asked to prepare lists of personal effects which were lost in the sinking. Some passengers took advantage of this opportunity, and some did not.

WHAT IS A COMPENSABLE “PSYCHOLOGICAL INJURY”?

[18] In this action a number of claimants, perhaps the majority, advance a claim that is based upon a “psychological injury” caused by their experiences in relation to the sinking of the “Queen of the North”. The alleged psychological injuries that are claimed are distinct from any physical injuries sustained during the sinking and evacuation and their subsequent effects.

[19] Thus, a question that is common to most, if not all of the claims, is the nature and degree of injury that qualifies as a psychological injury which entitles a claimant to recover damages. I propose to deal with this issue before reviewing the individual claims.

[20] The defendant submits that where damages are claimed for a “psychological injury” resulting from the claimant having witnessed or participated in a “shocking event” the injury must meet a minimum threshold level. The defendant submits the injury must amount to a “recognizable psychiatric illness”. The defendant submits the same threshold applies whether the claimant is a “primary victim” or “secondary victim”, that is, whether the claimant was or was not a passenger.

[21] The plaintiffs contend that a claimant need only establish that he or she suffered a psychological injury that is “serious and prolonged” and that this threshold may be met at a level that is less than a recognizable psychiatric illness. The plaintiffs submit further that the threshold varies depending on whether the claimant is a primary or secondary victim and that the “recognizable psychiatric illness” test applies only to secondary victims, if it applies at all.

[22] Since these are issues that are relevant to most, if not all of the claims, I propose to deal with them before considering each of the claims individually.

ELEMENTS OF CAUSE OF ACTION BASED ON “NERVOUS SHOCK”

[23] Before addressing directly the question of what is meant by “psychological injury”, I will discuss, in a more general way, what is required to establish a cause of action based on what is often called, by way of shorthand, “nervous shock”.

[24] The case law with respect to the recovery of damages for psychological injury, that is a reaction to a frightening experience or to the injury or death of another person as a consequence of another person’s negligence – so called “nervous shock”, is complicated and not always easy to rationalize. In *Devji v. Burnaby (District)*, 1999 BCCA 599, 180 D.L.R. (4th) 205 [*Devji*], McEachern C.J.B.C. undertook a thorough review and analysis of the authorities. In *Devji*, a young woman was killed in a motor vehicle accident allegedly caused by the defendants’ negligence in failing to safely maintain the city streets. The plaintiffs, the father, mother and two sisters of the deceased, were asked to attend the hospital to identify the victim. The plaintiffs alleged that they subsequently suffered “nervous

shock” injury. The trial judge dismissed the claim on the ground that it was not reasonably foreseeable that psychiatric injury would flow from the defendant’s alleged negligence. The appeal was dismissed.

[25] McEachern C.J.B.C. began his analysis by noting at para. 2 that “because the plaintiff is not physically injured, and may not even come into contact with the defendant, the psychiatric injury alleged is an extra step removed from the negligence of the defendant, and difficult questions of proximity and duty of care arise”.

[26] The Chief Justice noted further at para. 3 that:

[B]ecause psychiatric injury is difficult to prove or disprove, and because the line between physical and mental or emotional injury in a particular case may be obscure, it is often difficult to determine the cases in which liability will be imposed, and the class of persons who will be entitled to compensation.

He then referred to the debate that has taken place between those who would rely solely on principle and say that the “usual test for liability is reasonable foreseeability of particular harm” without additional policy considerations and those who would impose on the foreseeability analysis additional “control mechanisms”, which are driven by policy considerations.

[27] The Chief Justice emphasized at para. 4 that regardless of the approach, “the claim must be for actual psychiatric or emotional injury caused by (not just resulting from) the actionable conduct of the defendant”.

[28] The control mechanisms that courts have employed to define the boundaries of recovery for psychological injury caused by “nervous shock” have been expressed in terms of proximity factors that inform the foreseeability analysis. In *Devji*, reference is made to the English case of *White and Others v. Chief Constable of South Yorkshire and Others*, [1999] 1 All ER 1 (H.L.) in which Lord Hoffman set out the circumstances in which recovery for psychological injury will be permitted, at page. 41:

(1) The plaintiff must have close ties of love and affection with the victim. Such ties may be presumed in some cases (e.g. spouses, parent and child) but must otherwise be established by evidence. (2) The plaintiff must have been present at the accident or its immediate aftermath. (3) The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from someone else.

[29] Chief Justice McEachern also referred to two decisions of our Court of Appeal which helped to define the circumstances in which claims for “nervous shock” may succeed. In *Beecham v. Hughes et al.* (1988), 27 B.C.L.R. (2d) 1 (C.A.), the plaintiff and his wife were injured in a car accident. The plaintiff recovered from his physical injuries but his wife was left permanently injured. His claim for psychiatric injury was denied because it was caused by his profound sorrow rather than the shock of the accident or the defendant’s negligence.

[30] McEachern C.J.B.C. also referred to *Rhodes Estate v. C.N.R.* (1990), 50 B.C.L.R. (2d) 273 (C.A.) [*Rhodes Estate*]. In that case, the plaintiff’s son was killed in a train wreck but the plaintiff did not see the incident. She was misdirected away from the scene of the accident and the location of a memorial service for her son. She was also shown the wrong railway car in which her son had been riding and she received his remains by mail. The plaintiff became seriously and chronically depressed. On a preliminary application the trial court determined that these facts, if proven, would sustain a cause of action. On appeal it was held that the plaintiff’s shock was not reasonably foreseeable. Chief Justice McEachern referred to the following portions of the judgment of Wallace J.A. at pp. 292-3 of *Rhodes Estate*, dealing with the proximity relationship:

It is the proximity relationship of the claimant to the defendant's conduct which provides the evidentiary base from which the court may conclude, as a question of law, that a reasonable person should foresee that his conduct, in such circumstances, could create a risk of "direct" psychiatric injury and so give rise to a duty of care to avoid such a result.

...

The requisite proximity relationship is made up of a combination of various relational elements or factors. These include, inter alia, relational proximity (the closeness of the relationship between the claimant and the victim of the defendant's conduct); locational proximity (being at the scene and observing

the shocking event); temporal proximity (the relation between the time of the event and the onset of the psychiatric illness).

[31] In *Devji, supra*, at para. 54, McEachern C.J.B.C. stated:

[T]here seems to have been disagreement throughout the common law world as to whether foreseeability as a legal principle stands alone as the sole test of liability; or whether, as one might say in the modern idiom, proximity informs foreseeability, such that where there is insufficient proximity, there is no foreseeability. Alternatively, it may be argued that even where there is reasonable foreseeability, policy employs proximity as a mechanism to limit recovery.

[32] Chief Justice McEachern expressed the opinion that to succeed in a claim based on “nervous shock” the plaintiff must establish “not merely foreseeability but also proximity and something more” (para. 67). In deciding that the plaintiffs’ claim could not succeed, His Lordship said at paras. 73-76:

The real question, however, is whether the plaintiffs' experience in viewing Yasmin's body in these circumstances - particularly considering the fact they had been informed that she had died - is the kind of experience that can give rise to a claim for damages for nervous shock.

I have already mentioned "usual fortitude" on the part of the plaintiffs, which has been assumed in the cases. For the purpose of determining liability (although not necessarily for fixing damages), I consider it necessary to make that same assumption. The eggshell skull rule has no application until after liability has been determined: see *White* (supra, at 17).

The law in this province, as formulated by *Rhodes*, requires that the plaintiffs, in order to succeed, must experience something more than the surprise and other emotional responses that naturally follow from learning of the death of a friend or relative. Instead, there must be something more that separates actionable responses from the understandable grief, sorrow and loss that ordinarily follow the receipt of such information. In *Rhodes*, Taylor and Wood J.J.A. described the requisite experience as alarming and startling (and therefore sudden and unexpected), horrifying, shocking and frightening, and Southin J.A. referred to a "fright, terror or horror".

The nature of the experience by which an injury is alleged to have been suffered is one of the "controlling mechanisms" that serve to limit the reach of liability for nervous shock in this province. It seems to me that the principle shock suffered by the plaintiffs was in learning of Yasmin's death; after that, grief, sorrow and regret would follow immediately, and would continue for an unlimited period. The experience of viewing the body, however, cannot be equated to the shock and horror that would be experienced, for example, at the scene of an accident witnessed by the plaintiffs because the features of surprise, shock, horror and even fear are absent in a hospital setting.

[33] More recently, the Supreme Court of Canada had occasion to pronounce upon the law in this area in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 [*Mustapha*]. *Mustapha* deals with the requirements of a successful action for psychological injury resulting from a shocking event and discusses what amounts to a psychological injury. Interestingly, both the plaintiffs and the defendant rely on it in support of their contrary submissions on this issue.

[34] In *Mustapha*, the plaintiff was in the process of replacing an empty bottle of drinking water with a full one when he saw a dead fly and parts of another dead fly in the unopened replacement bottle. He became obsessed with this event and its potential implications for his family and developed a major depressive disorder, phobia and anxiety. He sued the supplier of the water and recovered damages. The Court of Appeal overturned the award on the basis that the injury was not reasonably foreseeable. The Supreme Court of Canada dismissed the further appeal on the ground that the damages were too remote in law to allow recovery.

[35] McLachlin C.J.C., giving the judgment of the Court, analyzed the case in terms of conventional negligence principles. At para. 3, she said:

A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. I shall examine each of these elements of negligence in turn. As I will explain, Mr. Mustapha's claim fails because he has failed to establish that his damage was caused in law by the defendant's negligence. In other words, his damage is too remote to allow recovery.

[36] With regard to the first question, whether the defendant owed the plaintiff a duty of care, Chief Justice McLachlin stated at paras. 4-6:

The first question to consider in an action for negligence is whether the defendant owed the plaintiff a duty of care. The question focuses on the relationship between the parties. It asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Whether such a relationship exists depends on foreseeability, moderated by policy concerns: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).

In many cases, the relationship between the plaintiff and the defendant is of a type which has already been judicially recognized as giving rise to a duty of

care. In such cases, precedent determines the question of duty of care and it is unnecessary to undertake a full-fledged duty of care analysis. As stated by A. M. Linden and B. Feldthusen, categories of relationships that have been recognized and relationships analogous to such pre-established categories need not be tested by the *Anns* formula: *Canadian Tort Law* (8th ed. 2006), at p. 302; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 35-36.

The relationship between the parties in this case does not belong to a novel category. It has long been established that the manufacturer of a consumable good owes a duty of care to the ultimate consumer of that good: *Donoghue v. Stevenson*. It follows that Culligan owed Mr. Mustapha a duty of care in the supplying of bottled water to him.

[37] There was no challenge to the trial judge's finding that the defendant had breached the standard of care by creating an unreasonable risk of harm in providing contaminated water.

[38] As to the third question – did the plaintiff sustain damage? – McLachlin C.J.C. stated at paras. 8-9:

Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort. As Lord Lloyd said in *Page v. Smith*, [1996] 1 A.C. 155 (H.L.), at p. 188:

In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests in law. [Emphasis added.]

This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. 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. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor

and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

[39] Finally, with regard to the issue of causation and remoteness, the Chief Justice stated at paras. 11-18:

The fourth and final question to address in a negligence claim is whether the defendant's breach caused the plaintiff's harm in fact and in law. The evidence before the trial judge establishes that the defendant's breach of its duty of care in fact caused Mr. Mustapha's psychiatric injury. We are not asked to revisit this conclusion. The remaining question is whether that breach also caused the plaintiff's damage in law or whether it is too remote to warrant recovery.

The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).

Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617, at p. 643).

The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held - albeit within the duty of care analysis - that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."

As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in *Vanek*, at paras.

59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, per Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damage. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damages at law.

I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant. In this case, however, there was no evidence to support a finding that Culligan knew of Mr. Mustapha's particular sensibilities.

It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by Culligan's negligence, Mr. Mustapha must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. This he failed to do.

Does the Plaintiff have to prove a "Recognizable Psychiatric Illness"?

[40] With that general review of the law surrounding "nervous shock", I now turn to the question of whether the claimants must prove that they suffered a recognizable psychiatric illness in order to succeed. In this discussion, I will return to *Mustapha* in due course, but first I will deal with the origins of the requirement to establish a recognizable psychiatric illness. The expression seems to have first emerged in the judgment of Lord Denning in *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), where he said:

In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant.

[Emphasis added.]

[41] Since *Hinz v. Berry* there have been numerous cases, in this jurisdiction and elsewhere, where the threshold requirement is said to be a "recognizable psychiatric illness". Thus, in *Beaulieu v. Sutherland* (1986), 35 C.C.L.T. 237, (B.C.S.C.), Legg J. dismissed a claim based on "nervous shock" on the ground that the plaintiff failed to prove that she suffered mental illness as a result. Mr. Justice Legg stated at 238-39:

The legal authorities to which I shall refer later in these reasons require me to first assess the following factors:

1. The circumstances of the accident and their immediate effect upon the plaintiff.
2. The proximity of relationship of the plaintiff to the deceased.
3. The nature and extent of the grief and shock and whether the plaintiff suffered mental illness.

[Emphasis added.]

[42] Legg J. also referred to the following statement of Windeyer J. in *Mount Isa Mines Ltd. v. Pusey* (1970), 125 C.L.R. 383, 45 A.L.J.R. 88 at 92 (C.A.):

Sorrow does not sound in damages. A plaintiff in an action for negligence cannot recover damages for a "shock", however grievous, which was not more than an immediate emotional response to a distressing experience, sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had. It is in that consequential sense that the term 'nervous shock' has come into the law.

[43] In *Heighington v. The Queen in Right of Ontario* (1987), 41 D.L.R. (4th) 208 (Ont. H.C.) Holland J. remarked at 223:

It has been long settled that a claim will be allowed in negligence cases for what is called "nervous shock", that is, injury to the nervous system, amounting to some organic damage or to severe psychic injury like hysteria or neurosis: see Fleming, *The Law of Torts*, 6th ed. (1983), pp. 146-7. This

type of damage is also referred to as "any recognizable psychiatric illness": *Hinz v. Berry*, [1970] 2 Q.B. 40 at p. 42 (C.A.); *Duwyn et al. v. Kaprielian* (1978), 22 O.R. (2d) 736 at p. 755 (C.A.). Liability is based upon negligent conduct creating a foreseeable risk of nervous shock.

[44] In *Beecham, supra*, Taggart J.A. stated at 638:

The term "damages for nervous shock" has been used as a form of shorthand to describe the cause of action. No doubt the word "shock" may be used to describe the effect on the claimant of seeing and hearing others suffering from injuries sustained in an accident. However, in my opinion the term tends to obscure the necessity for the claimant to show through the application of the relevant principles of negligence law that the negligent conduct of the defendant caused injuries to others whose suffering was seen and heard by the plaintiff, who was shocked by the experience and, as a result, developed a recognizable psychiatric or emotional illness.

...

The plaintiff must show he suffers from some medically recognizable psychiatric or emotional illness, but damages will only be awarded if he shows the negligent conduct of the defendant caused the illness.

[Emphasis added.]

[45] There have been some attempts by trial courts to lower or remove the threshold requirement of a recognizable psychiatric illness. In *McDermott v. Ramadanovic Estate* (1988), 27 B.C.L.R. (2d) 45 (S.C.), a young child was in a car that was involved in a crash and witnessed her parents die in the front seat. There was no medical evidence that she suffered any "psychological illness". Southin J. held that it was not necessary to demonstrate a recognizable psychiatric illness in order to recover damages for the emotional injury. She concluded there was no difference in principle between a scar of the flesh, which was compensable, and a "scar of the mind", and held that the latter was compensable as well. As Southin J. put it at 49 and 52-53:

Damages are awarded for scars on the body. It appears to have been accepted early in this century that a woman should receive damages for impairment of her physical attractiveness.

...

Certain physical scars are permanent but cause no continuing physical pain. No distinction now appears to exist in the cases between scars which cause physical pain and scars which do not and scars which cause pecuniary loss and scars which do not. That is to say, I know of no case which refuses to

give an award for a scar either because it causes no physical pain or because it causes no pecuniary loss.

...

As I have said the evidence in this case does not establish that Lorraine suffers from any "recognizable psychiatric illness".

But what is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable although it causes no pecuniary loss why should a scar on the mind be any the less compensable? In both cases, there are serious difficulties of assessment. That has not been allowed to stand in the way of the Court's making awards for non-pecuniary losses. Nor has it prevented awards for pain caused by physical injury which is, to use Mr. Fleming's words, "a bad memory".

And too, pain from a physical injury is not the result of a "recognizable psychiatric illness". It is the result of the interplay of tissue, nerves and brain. But to the sufferer what is the difference between physical pain and emotional pain? Indeed, the former may be easier to bear, especially with modern analgesics, than the latter.

Therefore, with the greatest of respect, I reject Lord Denning's limitation (if he intended it as a limitation of law) of recovery to cases of "recognizable psychiatric illness".

[46] Southin J.A. re-asserted this position in *Rhodes Estate, supra*, but none of the other members of the five-member panel signed on with her view of the law.

[47] In *Cox v. Fleming* (1993), 13 C.C.L.T. (2d) 305 (B.C.S.C.), Ryan J. appears to have adopted the opinion of Southin J.A. expressed in *McDermott, supra*, and *Rhodes Estate*. In *Cox*, the plaintiff sought damages for "nervous shock" against the estate of a driver whose negligence had caused the death of his son. The plaintiff's son was not killed immediately but died after many hours of struggle with gross and disfiguring head injuries which increased the distress of his parents. Ryan J. reviewed the evidence relating to Mr. Cox's reaction following the event, including evidence from his wife, friend, co-workers and evidence from a psychiatrist who treated Mr. Cox.

[48] In terms of the nature of the injury, at para. 63, Ryan J. noted:

After the death of his son and before this trial, Mr. Cox sought professional help. Dr. Uhlmann, a psychiatrist who treated Mr. Cox in Powell River, said that he came regularly for his appointments and that he was willing to undergo different treatments for his illness. Mr. Cox took anti-depressants

and attended grief counselling workshops. Nothing helped him. [Emphasis added.]

[49] After referring to *Rhodes Estate*, Ryan J. identified the issue in terms of causation rather than whether the type of injury was compensable. At para. 69 she stated:

The question in this case is whether Mr. Cox was affected by the horror of the accident itself, or whether his illness is caused by a reaction to the fact that his son is dead as a result.

[50] Ryan J. then referred to the evidence regarding the illness at para. 70:

I have reviewed the reports of Dr. Uhlmann found in Exhibit 2 of this trial and Dr. Uhlmann's evidence at trial. Since May of 1987, he treated Mr. Cox for grief and depression following the loss of his son. It was not until counsel for the plaintiff suggested that Mr. Cox may be suffering from "nervous shock" that Dr. Uhlmann looked at the possibility that Mr. Cox may be suffering from post-traumatic stress disorder, an illness which most closely resembles the description of "nervous shock" found in the legal literature. Dr. Uhlmann said that Mr. Cox fulfilled most of the criteria of this disorder as described in the Diagnostic and Statistical Manual of Mental Disorders.

[51] Ryan J. then went on to consider the evidence of Dr. O'Shaughnessy and concluded at para 77:

I accept the evidence of Dr. O'Shaughnessy. Mr. Cox is not suffering from post-traumatic stress disorder. The sight of his child, so badly injured however, has had an impact on Mr. Cox. In *Rhodes*, Southin, J.A. identified this type of impact as an "emotional scar". In finding this type of injury compensable, Southin, J.A. referred to her trial decision in *McDermott v. Ramadanovic Estate* (1988), 27 B.C.L.R. (2d) 45 where she awarded a 13 year old girl \$20,000 for "the emotional scar of seeing...her parents killed before her eyes."

In my view, the plaintiff has established that the horror of the aftermath of the accident in which his son was involved, caused a permanent impact on his mind, and that this injury was foreseeable within the meaning set out in the *Rhodes* case. In so finding, it goes without saying that I am satisfied too, that the scene at the hospital following so soon after the accident can properly be said to be a part of the "aftermath" of the accident. Mr. Cox suffered from the emotional scar of seeing his child badly deformed and dying in the aftermath of the motor vehicle accident.

[52] It is not entirely clear to me whether Ryan J. found that the plaintiff was not suffering any “recognizable psychiatric” illness or whether she merely concluded that it was not post-traumatic stress disorder (“PTSD”).

[53] Southin J.A.’s “scar on the mind” analysis was adopted by Molloy J. in *Mason v. Westside Cemeteries Ltd.* (1996), 135 D.L.R. (4th) 361 (Ont. C.J.), a case in which the plaintiff sued for damages as a result of the defendant losing the cremated remains of her parents. I note that the action was framed in both bailment and negligence. In awarding damages of \$1,000 for mental distress, Molloy J. said at 379-80:

In tort cases, courts have for the most part refused to award damages for emotional upset unless this has caused physical symptoms or some recognizable psychiatric illness. It has repeatedly been said that grief alone is not compensable in damages: see Linden, Canadian Tort Law 5th ed. at pages 363-379. Where damages for mental shock have been awarded, this has tended to be in addition to damages for physical injuries sustained or as a result of somebody having witnessed the injury or death of a loved one: *Abramzik v. Brenner* (1967), 65 D.L.R. (2d) 651 (Sask C.A.); *Heighington v. Ontario* (1987), 60 O.R. (2d) 641, affd. on other grounds 69 O.R. (2d) 484 (C.A.). It is difficult to rationalize awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition. Trivial physical injury attracts trivial damages. It would seem logical to deal with trivial emotional injury on the same basis, rather than by denying the claim altogether. Judges and juries are routinely required to fix monetary damages based on pain and suffering even though it is well known that the degree of pain is a subjective thing incapable of concrete measurement. It is recognized that emotional pain is just as real as physical pain and may, indeed, be more debilitating. I cannot see any reason to deny compensation for the emotional pain of a person who, although suffering, does not degenerate emotionally to the point of actual psychiatric illness. Surely emotional distress is a more foreseeable result from a negligent act than is a psychiatric illness. I agree with the observations and conclusions of Southin J. in *McDermott v. Ramadanovic Estate* (1988), 44 C.C.L.T. 249 (B.C.S.C.) awarding damages of \$20,000 to a 13 year old plaintiff for emotional scars caused by watching the death of her parents in a car accident. Although the plaintiff’s emotional suffering did not amount to a psychiatric condition it was nevertheless real and more painful to her than the physical injuries she sustained (the pain and suffering award for the physical injuries being assessed at \$5,000). Southin J. observed that damages are awarded for physical scars even if there is no ongoing pain or associated pecuniary loss. She then stated:

But what is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable

although it causes no pecuniary loss why should a scar on the mind be any less compensable?

I agree. And I would add that it seems equally illogical to me that mental distress damages should be recoverable in a case based on contract but not in a negligence case. I recognize the undesirability of lawsuits based on nothing more than fright or mild upset. However, in my view the more appropriate way to control these frivolous actions is by limiting recovery based on foreseeability (and perhaps proximity or directness) and by awarding limited damages and imposing cost sanctions in cases of a trivial nature.

[54] On the other hand, in *Bruneau v. Bruneau* (1997), 32 B.C.L.R. (3d) 317 (S.C.), Maczko J. accepted the requirement of proof of a recognizable psychiatric illness in “nervous shock” cases.

[55] The issue of the threshold test was discussed in *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 180 D.L.R. (4th) 748 (Ont. C.A.). In that case, an 11 year old child drank some grape juice that was tainted with some type of hydrocarbon that made it taste bad. Although the child did not become ill or have any lasting effects, her parents experienced stress and anxiety as a result of the incident. The plaintiffs could not establish any recognizable psychiatric illness but the trial judge relied on *Mason, supra*, to award damages, including damages for “anxiety or distress” and “mental emotional and psychological distress”. The Court of Appeal reversed the decision on the ground that the type of damage was not reasonably foreseeable. While the appeal decision did not turn on the issue of “recognizable psychiatric illness”, the Court did refer to that issue. At paras. 25-26 McPherson J.A. giving the judgment of the Court said:

In Canadian law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions - first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness. See Linden, *Canadian Tort Law, supra*, at pp. 389-92.

The leading case in Ontario in the domain of psychiatric damage clearly and succinctly enunciates the requirement that the plaintiff establish both propositions. In *Duwyn v. Kaprielian* (1978), 22 O.R. (2d) 736 (C.A.), a mother experienced an extreme psychological and emotional reaction when she arrived at the scene of a minor automobile accident and saw her young

son, uninjured but screaming, inside the car. Morden J.A. stated, at pp. 747 and 754-55:

[T]he test of liability for nervous shock is the foreseeability of nervous shock. This puts the law of negligence concerned with this kind of claim, at least according to its verbal formulation, in line with general negligence law.

...

The law is relatively clear that the kind of "nervous shock" for which recovery may be had involves something more than general emotional upset. I refer to Lord Denning in *Hinz v. Berry*, [1970] 2 Q.B. 40 at 42, where a wife saw her husband fatally injured:

In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant.

[56] McPherson J.A. considered whether the Court should reassess whether the "recognizable psychiatric illness" factor and concluded that it should not for two reasons: (1) any remarks would be obiter; and (2) any reassessment should take place against the backdrop of a real fact situation where it is reasonably foreseeable that some form of psychiatric damage would occur.

[57] The issue came before our Court of Appeal in *Graham v. MacMillan*, 2003 BCCA 90, 10 B.C.L.R. (4th) 397. In that case the plaintiff husband was walking his dogs across the defendant's property when the defendant punched him and knocked him down an embankment. The plaintiff's wife, who witnessed the assault, suffered anxiety and panic attacks. She sought damages for "nervous shock". In a brief oral judgment dismissing her claim, Mackenzie J.A. said at paras. 5 and 7-8:

The narrow issue on this appeal is whether the appellant must prove a recognized psychiatric condition as a condition of recovery. The appellant was an eye-witness to the assault on her husband and it is not disputed that that she satisfies the other conditions for proximity set out in the authorities.

...

It was accepted in *Rhodes* that a psychiatric illness was a condition for recovery although Southin J.A., in separate concurring reasons, avoided the term and preferred "scar on the mind", referring to her earlier judgment in *McDermott v. Ramadonovic Estate* (1988), 27 B.C.L.R. (2d) 45 (S.C.). *McDermott* involved a teenaged plaintiff who witnessed her parents killed before her eyes in a horrific accident and she continued to be haunted by the painful memory of the accident that was beyond non-compensatory grief. In *Devji*, the family members who were the plaintiffs in that action suffered from several recognized psychiatric illnesses documented in unchallenged psychiatric opinions.

The "scar on the mind" characterization of Southin, J.A. was not accepted by the other members of the Court in *Rhodes*. It was referred to by Ryan J., as she then was, in *Cox v. Fleming*, [1993] B.C.J. No. 177 (S.C.) in awarding compensation to the father of a fatal accident victim for a "permanent impact on his mind" caused by the horror of seeing his son in hospital after the accident while he was dying. In my view, the weight of authority supports a recognized psychiatric illness as a condition for liability but in any event I do not think that the anxiety experienced by the appellant, distressing as it was, meets the degree of intensity and permanence indicated as a threshold for recovery in *McDermott* and *Cox*.

[Emphasis added.]

[58] Thus, despite the attempts to lower the barrier, I am satisfied that in British Columbia, at least up to the point of *Mustapha, supra*, a plaintiff who asserted a claim for damages for psychological injury in a "nervous shock" case had to meet the threshold test of establishing a recognizable psychiatric illness. While the threshold has been criticized and may be difficult to defend on principle, it appears to be one of the control mechanisms that have been employed to maintain what is perceived to be a fair balance between plaintiffs and defendants. The question then is whether *Mustapha* suggests or requires that the test should be otherwise.

[59] In *Mustapha*, there was no issue whether the plaintiff's psychological injury was in fact the sort that could found a cause of action. The medical evidence proved that Mr. Mustapha developed a recognizable psychiatric/psychological illness, namely a major depressive disorder with associated phobia and anxiety. Mr. Hanson, counsel for the plaintiffs, submits, however, that the court put forward a different and less stringent test as to the kind or degree of damages that will be compensable at law provided the other elements are satisfied. In making that submission, Mr. Hanson focuses on the following words of McLachlin C.J.C. at

para. 9 and her lack of any direct mention of the phrase “recognizable psychiatric illness”:

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.

[60] Mr. Wharton, counsel for the defendant, submits that the Court was not intending to posit a test that was different from that which the courts in many jurisdictions, including Canada, have applied since *Hinz v. Berry, supra*. Mr. Wharton submits that the Chief Justice’s words reflect that test and merely state the same test in different words. Mr. Wharton points out that while the Chief Justice did not use the words “recognizable psychiatric illness”, she stated that “personal injury at law connotes serious trauma or illness” and cited, with apparent approval, particular portions of *Hinz v. Berry, supra*; *Page v. Smith*, [1996] 1 A.C. 155 (H.L.); and Allen Linden, and Bruce Feldthusen, *Canadian Tort Law*. 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006), in which the test is stated to be a “recognizable psychiatric illness”.

[61] Thus, in *Hinz v. Berry*, at 42:

Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant.

[62] And in *Page v. Smith*, at 189:

Shock by itself is not the subject of compensation, any more than fear or grief or any other human emotion occasioned by the defendant’s negligent conduct. It is only when shock is followed by recognizable psychiatric illness that the defendant may be held liable.

[63] And in *Canadian Tort Law*, at 425-26:

To this day the courts steadfastly refuse to allow tort damages for every emotional upset and insist upon some physical symptoms like a heart attack or a miscarriage or some “recognizable psychiatric illness”, like schizophrenia or morbid depression. [References omitted.]

[64] In the end, I am not able to conclude that the Court in *Mustapha, supra*, intended to change the law with respect to the threshold level of psychological or psychiatric injury that is required in order to be compensable where the psychiatric or psychological injury is caused by exposure, whether direct or indirect, to a shocking or frightening incident caused by the defendant's negligence. I am not satisfied that *Mustapha* has the effect of overturning *Graham v. MacMillan, supra*, which remains the law in this province in my opinion.

[65] It is important to remember that in *Mustapha* the question of a threshold for damages was not an issue that had to be decided. It was clear that Mr. Mustapha suffered a psychiatric illness. I would expect that if McLachlin C.J.C. had intended to change the law with regard to the long-standing "psychiatric illness" test she would have addressed the issue more directly, would have expressly rejected that test and would have provided reasons for doing so.

[66] In my view, it is not for me to cast aside binding authority of our Court of Appeal and formulate a new test for the degree of psychological disturbance that is compensable.

[67] Furthermore, the proposed new test of "serious and prolonged" or something more than "minor and transient" would not, in my view, provide a particularly helpful benchmark for the court, lawyers or litigants. How would the court measure and decide what is "serious"? Would the seriousness of the psychological disturbance be measured by reference to its impact on the emotional state or feelings of the plaintiff, a very subjective matter, or by reference to the effect of the disturbance on the plaintiff's ability to pursue his or her usual activities, or by reference to other factors or by some combination of factors?

[68] The requirement that the plaintiff must prove that he or she suffered a recognizable psychiatric illness introduces a degree of objectivity and certainty to the law through the mechanism of expert medical evidence. PTSD is a psychiatric illness that is often alleged to result from exposure to frightening or shocking events. A medical expert will assess the patient with reference to the diagnostic criteria

established by the medical community that must be present to make a diagnosis. These criteria require the medical specialist to consider the persistence of symptoms and their impairment of social and occupational impairment. The court is thereby provided with evidence that enable it to judge the seriousness of the disturbance and its longevity.

[69] Accordingly, I conclude that there remains a requirement that the claimants prove not just psychological disturbance or upset as a result of the defendant's negligence but also that their psychological disturbance rises to the level of a recognizable psychiatric illness.

Is the threshold different depending on whether the plaintiff is a primary or secondary victim?

[70] The plaintiffs submit that a person who suffers psychological harm as a consequence of being in an accident caused by the defendant's negligence (a primary victim) need not establish the same threshold degree of damage as a plaintiff who suffers psychological harm as a result of witnessing a shocking accident or incident (a secondary victim).

[71] The distinction between primary and secondary victims was made in *Page v. Smith, supra*, and has been applied in some decisions of this court. However, it is my view, that the distinction is not supported by *Mustapha, supra*. In any event, I believe that any distinction between primary and secondary victims that may exist goes to the duty/foreseeability analysis and not to the question of the damages threshold.

[72] The central issue in *Page v. Smith* was whether in all "nervous shock" cases the plaintiff must prove that injury by "nervous shock" was reasonably foreseeable, or whether if the plaintiff was involved in an accident only reasonable foreseeability of physical injury must be shown.

[73] Lord Lloyd of Berwick stated the following at 187-89:

Foreseeability of psychiatric injury remains a crucial ingredient when the plaintiff is the secondary victim, for the very reason that the secondary victim is almost always outside the area of physical impact, and therefore outside the range of foreseeable physical injury. But where the plaintiff is the primary victim of the defendant's negligence, the nervous shock cases, by which I mean the cases following on from *Bourhill v. Young* ["bystander" cases], are not in point. Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury.

...

[The floodgates argument] is a very important consideration in claims by secondary victims. It is for this reason that the courts have, as a matter of policy, rightly insisted on a number of control mechanisms. Otherwise, a negligent defendant might find himself being made liable to all the world. Thus in the case of secondary victims, foreseeability of injury by shock is not enough. The law also requires a degree of proximity: see *Alcock's case* [1992] 2 All E.R. 1, 14. This means not only proximity to the event in time and space, but also proximity of relationship between the primary victim and the secondary victim. A further control mechanism is that the secondary victim will only recover damages for nervous shock if the defendant should have foreseen injury by shock to a person of normal fortitude or "ordinary phlegm."

None of these mechanisms are required in the case of a primary victim. Since liability depends on foreseeability of physical injury, there could be no question of the defendant finding himself liable to all the world. Proximity of relationship cannot arise, and proximity in time and space goes without saying.

[74] The primary/secondary victim distinction was accepted in *Falbo v. Coutts*, 2000 BCSC 434, and in *Dawe v. B.C. Children's Hospital*, 2003 BCSC 443, but only in relation to the question of reasonable foreseeability and the proximity control mechanisms.

[75] The Ontario Court of Appeal rejected the distinction in the *Mustapha* case (*Mustapha v. Culligan of Canada Ltd.* (2006), 275 D.L.R. (4th) 473). At paras. 37-39, McPherson J.A. stated:

The *Page v. Smith* dichotomy has been the subject of considerable criticism, both in the House of Lords and by academics: see for example, *White, supra*, per Lord Goff; Lewis N. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson, Canada 2003) at 432; Louise Bélanger-Hardy, *supra*; Justice Kenneth C. Mackenzie, *supra*.

Essentially, the criticisms are threefold. First, removal of the requirement for foreseeability of the *type* of harm incurred, in relation to the primary victim cases, runs contrary to the fundamental principle of tort law as established in

The Wagon Mound No. 1 [*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound.)*, [1961] A.C. 388 (H.L.)] and *The Wagon Mound No. 2* [*Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty.*, [1967] 1 A.C. 617 (P.C.)] (the particular type of injury must be foreseeable). In Lord Goff's view, in *White, supra*, at pp. 474-475, "Lord Lloyd [in *Page*] dethroned foreseeability of psychiatric injury from its central position as the unifying feature of this branch of the law." Secondly, the distinction between primary victims and secondary victims is an artificial one that camouflages the policy choices that have to be made and moreover, is problematic in application. The case at bar is a good example of this problem, as I shall explore in a moment. As Bélanger-Hardy, *supra*, at p. 564, notes, [Citing H. Teff, "Liability For Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" (1998) 57(1) Cambridge L.J. 91 at 113] the distinction "allows artificial criteria to displace the more natural question: should the defendant be liable to the plaintiff in all the circumstances?" Finally, the critics observe that the majority in *Page* have misunderstood the thinskull plaintiff principle, which relates only to quantum of damages once liability has already been established. As Lord Wright explained in *Bourhill v. Young*, [1943] A.C. 92 (H.L.) - a seminal nervous shock case - at 109-110:

No doubt, it has long ago been stated and often restated that if the wrong is established the wrongdoer must take the victim as he finds him. That, however, is only true ... on the condition that the wrong has been established or admitted. The question of liability is anterior to the question of the measure of the consequences which go with the liability.

I find these criticisms persuasive. In particular, the view that the *Page v. Smith* distinction is artificial and not always easy to apply resonates in this case. Is Mr. Mustapha indeed a "primary victim", or is he a bystander or "secondary victim"? Is he both? Or neither? An argument can be made that he falls into any of these four categories.

[76] When the case went to the Supreme Court of Canada, McLachlin C.J.C. made no mention of the primary/secondary dichotomy. It is, in my opinion, simply unnecessary to make any distinction given the analysis set out in *Mustapha*.

[77] I am not prepared to conclude that a primary victim is entitled to recover damages for psychological injury of a kind and degree that would not be recoverable by a secondary victim.

ELEMENTS OF THE CLAIMS IN DISPUTE IN THIS CASE

[78] In the present case, there is no issue that the defendants owed the claimant passengers a duty of care or that B.C. Ferries' employees breached that duty of care and that B.C. Ferries is vicariously liable for any loss and damage that is proven to

have resulted from its employees' negligence. The issues are whether the claimants suffered damage that is compensable at law and whether the defendants' breach of their duty of care caused that damage in fact and at law.

[79] I will review each of the claims in turn.

ASSESSMENT OF INDIVIDUAL CLAIMS

Joshua Snow

Review of evidence and findings of fact

[80] Joshua Snow was ten years old at the time of the sinking of the "Queen of the North" and thirteen when he testified. He is a very articulate young man.

[81] Joshua lived with his parents in Sooke, British Columbia. He was travelling on the "Queen of the North" with his aunt, Megan Wagoner, returning from visiting family in Prince Rupert. The trip to Prince Rupert was the first occasion that Joshua had been on the "Queen of the North" but he had travelled on other ferries a number of times. Joshua went to sleep in the stateroom he and his aunt had rented shortly after boarding the "Queen of the North". He woke briefly when the "Queen of the North" docked at Bella Bella then went back to sleep. Sometime later his aunt woke him up and told him they had to get on deck. Joshua put on a jacket over top of his pyjamas, put on his shoes and went to the muster station where a number of people had gathered. Joshua's recollection was that people were running around, there was a lot of noise and once in a while he heard a loud scream.

[82] Joshua testified that he felt nervous and quite scared because he did not know what was happening. Joshua said a crew member directed them into a topless lifeboat where he found a seat and sat down, with his aunt, near the front of the boat. The boat was then lowered quickly into the water, which Joshua found frightening because he is afraid of heights. Joshua said that two children whom he had met on the trip up to Prince Rupert were also in the lifeboat and were crying,

sometimes hysterically. He said his aunt was sobbing and she sounded scared. Joshua testified that he was not crying.

[83] Joshua said that most of the people in the lifeboat were fairly calm but some were panicking “slightly”, which he described further as “talking loudly”. One of the crew members led the children in a chorus of “Row, Row, Row Your Boat”, which seemed to calm them down.

[84] Joshua did not see the “Queen of the North” go down.

[85] Joshua believes that he was picked up by the boat “Lone Star”. He sat in the back of the boat under cover and was taken with his aunt to Hartley Bay where he was taken to the community centre and given food and water. Joshua found a book in the community centre and read while he waited. Joshua felt relief when he was able to speak to his parents by telephone.

[86] Joshua was transported to Prince Rupert where he met another aunt and his uncle at the Crest Hotel. They took him to their home. A few hours later his parents arrived at Prince Rupert. They were obviously very happy to see one another.

[87] The next day, Joshua, his parents and a number of other people were flown to Victoria in an airplane that B.C. Ferries chartered.

[88] In describing the effects of his experience regarding this incident, Joshua testified that he was more cautious after the sinking. He said he was more reserved, more careful and less social. He still played with friends but was less likely to spend time away from home. Joshua said that he gained some weight; he thought about 15 pounds over a few months.

[89] Joshua testified that beginning a week or so after the sinking he began to experience nightmares. He said that once or twice a month he would relive the experience in his dream, except that he did not get off the “Queen of the North”. He would then wake up before he died. He said that in the dreams the whole sequence of events would repeat, sometimes many times. At times he woke up sweating. He

said that in the morning after having nightmares he was tired. Joshua testified that he had nightmares three or four times a week on average. Sometimes he had trouble falling asleep because he feared having nightmares. Joshua testified that his nightmares stopped about 7 1/2 to 8 months after the sinking, coincident with his family's move to Ontario.

[90] Joshua did not tell anyone about his nightmares until after he moved to Ontario. He said he did not like to burden his parents with his problems. Joshua was unhappy about moving to Ontario and was angry with his mother. He said that during an outburst with his mother when he was venting his anger about moving he told her about the nightmares he had experienced. Joshua's mother arranged for him to see a counsellor but Joshua saw the counsellor only once. He said that after talking to the counsellor he felt much better.

[91] Joshua testified that he feels no ongoing consequences of the incident and that the only consequences that he felt were the nightmares.

[92] In cross-examination, Joshua confirmed that he did not sustain any physical injuries as a result of the incident. He said that he was "scared a little bit" with parts of the incident but not "super-scared". Joshua said that before he got in the lifeboat and when he was in the lifeboat on the water he was not "extremely scared" but that he was scared when the lifeboat was being lowered to the water. In his examination for discovery, Joshua stated that when he was in the lifeboat he was "fairly calm".

[93] In his examination for discovery, Joshua stated that his mother told him that he was more cautious and reserved after the incident and that he really did not notice it himself. Joshua maintained, however, that he had those feeling on his own "somewhat".

[94] Joshua admitted that he continued to go to school normally and took part in the same activities after the incident as before the incident.

[95] Joshua's mother, Tracy Snow, also gave evidence in support of this claim. She learned of the sinking at about 2:20 a.m. the day of the sinking and was able to

talk to Joshua at about 4:00 a.m. She said that he sounded as though he was in shock.

[96] Ms. Snow testified that the first few days after the incident Joshua seemed “pretty cranked up, pretty wired” with a lot of “frantic energy” and then crashed and would not talk about the accident. Ms. Snow said that Joshua returned to school but over the next little while he withdrew a little and stayed closer to home. Ms. Snow first learned of the nightmares a week or so after the family moved to Ontario.

[97] Ms. Snow testified that Joshua tends to keep things inside him.

[98] In cross-examination, Ms. Snow said there was nothing about Joshua’s behaviour after the incident that suggested anything was amiss. Likewise, after the first session with the counsellor, she saw nothing in Joshua’s behaviour to suggest there was a need for any further counselling.

[99] Ms. Snow also agreed that Joshua has taken ferries since the sinking and has not reported any difficulties to her.

[100] No medical evidence was led with regard to the emotional or psychological effects of this experience on Joshua.

Analysis and assessment

[101] I accept what Joshua told me about his experiences as a survivor of the sinking of the “Queen of the North” and how they affected him. He understandably experienced some fear during the whole rescue process and for a time had nightmares or troubled dreams, although they did not affect his normal day-to-day activities to any great extent. His mother never noticed that he was having any difficulties.

[102] I do not dispute that Joshua experienced some emotional upset and distress for a period of a few months, which is understandable. However, the evidence does not establish that Joshua Snow suffered a psychological injury within the meaning of that term that emerges from the authorities. Even if the test to be applied was a

serious and prolonged injury, I would have to find that this claim fails to meet that standard.

[103] In the circumstances, I must conclude that Joshua Snow is not entitled to compensation from the defendant for his emotional upset.

Leslie Wilson

Review of evidence and findings of fact

[104] Mr. Wilson was born April 12, 1942, in Scotland. He moved to British Columbia in 1947 and grew up in Port Hardy where his father was the local family doctor. Mr. Wilson completed high school and obtained a Bachelor's Degree in 1964. He was married in 1967 and has three grown children. From my observations of Mr. Wilson in the witness box, he is a man who believes in meeting life head-on and overcoming whatever challenges it has to offer.

[105] Mr. Wilson was returning with his wife from the Queen Charlotte Islands where they had been visiting his son, daughter-in-law and grandchildren. This was the third trip that Mr. Wilson had made on the "Queen of the North". He had travelled on other ferries a number of times as well. Mr. Wilson has some experience on a number of different kinds of boats, including whaling vessels, tug boats and commercial sports fishing boats. Some years ago he received some marine emergency training and obtained a Marine Emergency Duties (MED) certificate.

[106] After having a light meal on board the "Queen of the North" and checking out the movie, which he had previously seen, Mr. Wilson and his wife went to their stateroom between 9:30 p.m. and 10:00 p.m. Shortly before midnight, the Wilson's decided to retire for the night. While Mrs. Wilson got ready for bed, Mr. Wilson went up to the purser's office to check the weather reports. Mr. Wilson said everything was quiet and serene and the "Queen of the North" was "hauling down Grenville Channel." Mr. Wilson read the weather report and began to chat with the purser. At about 12:10 a.m., he was just about to say goodnight when he heard and felt a horrendous crash. The "Queen of the North" lurched and Mr. Wilson nearly lost his

balance and fell but was able to steady himself on a counter. He heard more crashes then felt that they were in smooth water again. The lights flickered then steadied. Then the alarm bells rang.

[107] Mr. Wilson ran up the stairs, down the corridor and into his stateroom. His wife was up and was tying her shoes.

[108] Within two to three minutes, Mr. Wilson felt what he thought was a five degree list to starboard and Mr. Wilson concluded that the “Queen of the North” was taking on water, which caused him great concern. He feared the “Queen of the North” might roll.

[109] Mr. Wilson and his wife grabbed their life jackets and went on deck. They were fully clothed and were wearing their shoes. They were directed first to the starboard side and then to the port side. When he went down the stairs to cross over to the port side, Mr. Wilson said he looked down the stairwell and saw water.

[110] When they reached the boat deck the crew were swinging out the lifeboat and a life-raft was swung down.

[111] Mr. Wilson testified that “no one panicked but the fear was palpable”.

[112] Mr. Wilson and his wife were directed into a life-raft packed with people. There was not enough room for everyone to sit on the bench so Mr. Wilson and his wife had to sit on the floor of the raft amongst the ropes and other people’s feet. Mr. Wilson ended up sitting in an awkward position in the raft. As the life-raft was lowered, it swung against the hull of the “Queen of the North”. When it was a few feet from the ocean surface it was fully released and fell the rest of the way.

[113] Mr. Wilson said the floor of the raft was very cold and that icy cold water was dripping down the back of his neck because the roof was not working properly. He also felt the sharp toes of the boots of a person seated behind him in his back. Mr. Wilson believes he stayed in that position for approximately two hours until some of the survivors were taken from the raft and he could find a seat.

[114] Mr. Wilson testified that the life-rafts were all pulled together. He described the atmosphere as “very subdued, quite tense”. Some people were whimpering. Two of the passengers, a commercial pilot and a flight attendant, were reassuring other survivors.

[115] Mr. Wilson said that some of the people in the life-raft were occasionally able to get a glimpse of the “Queen of the North” but he was not in a position to see the ship because of the roof of the life-raft. Another passenger who was able to see gave a running account of the sinking. The passenger said, “She’s going vertical” and Mr. Wilson then heard a thunderous roar and screech, the sound of windows popping, gurgling, hissing, and rumbling, then eerie silence. Mrs. Wilson began to cry and Mr. Wilson said he got emotional.

[116] Mr. Wilson and his wife were taken on board the “Lone Star” and taken to Hartley Bay. On the way to Hartley Bay, Mr. Wilson assisted the skipper by keeping the windscreen clear so that he could see out. When they arrived at Hartley Bay, Mr. Wilson felt highly stressed and fatigued. He described it as a combination of relief at being saved and nervousness about the situation. Mr. Wilson said he felt some pain in his back where the boots had been digging in. He felt strained and fatigued but was running on adrenalin.

[117] Mr. Wilson said the most frightening moment of all was when he looked down the stairwell on the “Queen of the North” and saw black water. He thought of the “Titanic”.

[118] Mr. Wilson spoke in glowing terms of the people of Hartley Bay and the assistance they provided to the survivors. They provided clothing, blankets, food and hot coffee and other beverages. Mr. Wilson, who has high blood pressure, lost his medication and was taken to a nursing station to obtain more medication.

[119] In the morning, Mr. Wilson and a number of other people were taken on board the “Sir Wilfred Laurier” and taken to Prince Rupert. While going up the ladder, Mr. Wilson’s hand got pinched between cables.

[120] At Prince Rupert, Mr. Wilson went to the Crest Hotel where the passengers were given what Mr. Wilson described as “prompt and considerate” treatment. The next day he was flown to Port Hardy. Mr. Wilson testified that at that point he thought it was all over, but it was just beginning.

[121] Mr. Wilson testified that the only physical injuries he suffered were a pinched hand, a sore right elbow and soreness in the small of his back, all of which subsided within a month.

[122] In terms of the emotional or psychological impact, Mr. Wilson said that following the incident he had a great sense of fatigue or lassitude for a period of time, as though he could not cope, although he was not incapacitated. He just did not feel like doing things around the house. He did not see a doctor; he felt lucky to be alive. That feeling lasted about a month.

[123] Mr. Wilson testified that since this incident he has developed anxiety relating to things to do with the ocean, which he never had previously, even though he has experience with the ocean and has been in some risky situations. Mr. Wilson says that he still travels by ferry but he will not remain on the car deck and has to be in a place on the ship where escape is easiest. He checks the location of life jackets and checks the evacuation route. His anxiety makes going to see his grandchildren on the Queen Charlotte Islands less enjoyable. He now goes to bed fully clothed with everything he needs to evacuate close at hand. When he hears any noise he becomes frightened.

[124] Mr. Wilson has a small boat of his own but has only used it once since the incident because of his anxiety about going out on the water. He gets dry mouth and tension in his neck, sweaty palms and tense muscles in his legs if he goes out on the boat.

[125] Mr. Wilson also described what he called flashbacks. The first of them occurred two days after the sinking. He was listening to news coverage of the event and for a moment felt like he was back on the “Queen of the North” in the corridor.

These flashbacks last only a brief time, perhaps three to five seconds, before they fade and the world around re-asserts itself. Mr. Wilson testified that during the first six months after the sinking, he had flashbacks a couple of times a month after which they diminished in frequency to approximately once every three months. The duration of each episode has also become shorter. Mr. Wilson describes these experiences as more than just a memory. Mr. Wilson said he sort of freezes up for perhaps half a minute then it begins to fade. He described how he gets a dry mouth, a vivid picture of being on the “Queen of the North”, fear for his life and that of his wife, and then reality returns. He said that these flashbacks have a certain draining effect. He does not know when they will occur but usually are prompted by some reference to the “Queen of the North”.

[126] Mr. Wilson said he has not seen a doctor because of these flashbacks. In his words, “What can [the doctor] do? It will wear itself out.”

[127] Mr. Wilson believes that this experience has changed his life. He feels older. He says that, on the positive side, he has come to appreciate life more; on the negative side, he has the flashbacks.

[128] Mr. Wilson confirmed that on March 25, 2006, he wrote a letter to B.C. Ferries praising its passenger assistance program and expressing the utmost gratitude and appreciation to all of the employees of B.C. Ferries. Mr. Wilson said that at that point he had nothing negative on his radar and felt that B.C. Ferries deserved some sympathy and thanks. He said that his elbow and back were a bit sore but he was not a whiner or a wimp. There was some pain but it was not getting worse and he did not want to make an issue out of it.

[129] Mr. Wilson said he never sought counselling even though he was aware that B.C. Ferries made counselling available. He thought he was getting over it by himself.

[130] Dr. Andre de Wit, a general practitioner in Port Hardy, saw Mr. Wilson on one occasion only on November 5, 2008. Mr. Wilson’s complaint to Dr. de Wit was of the

recurrent flashbacks. Dr. de Wit expressed the opinion that Mr. Wilson did not have any residual physical injury from the incident. He said that he had some diagnostic features of posttraumatic stress disorder as classified with DSM-IV but did not meet all the criteria for that diagnosis. In his report at p. 3, Dr. de Wit stated the following regarding the DSM-IV criteria:

He certainly does meet criterion A1 due to the threat to his and his wife's physical well being and the real potential for an adverse outcome. Although he does relive the incident when reminded of it, he does not seem to be frequent occurrence as described in criterion B. Criterion C describes persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness and I think he does not meet this criteria because he has been able to travel on ferries except he does avoid the upper deck. I do not see any persistent symptoms of increased arousal as per criterion D. His symptoms have certainly been present for more than one month, which meets criterion E, but I do not feel that the disturbance has caused impairment in social occupation or other areas of functioning other than causing him some distress as per criterion F.

I do think that this incident certainly cause him some discomfort and stress as I described in this report and I believe that he will always have some symptoms, but probably not severe enough to cause permanent or partial disability, but rather uncomfortable feelings and hopefully with the conclusion of this case, he will be able to get on with his life.

[131] Dr. de Wit readily conceded that he has no expertise in psychology or psychiatry. When Dr. de Wit referred to “flashbacks”, he used that term to mean a memory of the incident that caused Mr. Wilson discomfort. Other things that appeared to cause Mr. Wilson discomfort were the ongoing legal process, the publicity surrounding the incident and being interviewed by the media.

[132] In summary, Dr. de Wit was of the view that Mr. Wilson experienced emotional discomfort and stress at the time of the incident, continues to experience some emotional discomfort and stress when reminded of the incident and expects the symptoms will pass with time.

Analysis and assessment

[133] Mr. Wilson suffered very minor discomfort in his back as a result of where he was forced to sit in the life-raft. He also suffered a very minor injury to his hand when it was pinched as he was boarding the “Sir Wilfred Laurier”. These minor discomforts

went away quickly and were so insignificant that he did not mention them to Dr. de Wit.

[134] In terms of the emotional effects of the experience, having to evacuate the ship in these circumstances obviously was upsetting for Mr. Wilson even though he is a calm and stoic individual. He has experienced some incidents of “flashback” or vivid memories of the incident. Each of these is of relatively short duration and they do not appear to have negatively impacted Mr. Wilson’s ability to carry on with his normal activities to any appreciable degree. Mr. Wilson’s emotional reaction does not flow from and is not related to his minor physical injuries. They flow from his experience with the evacuation and sinking of the ship.

[135] Mr. Wilson’s experience on the “Queen of the North” has given him a sense of hyper-vigilance when he takes ferries but this has not prevented him from travelling by ferry when he needs to.

[136] In my view, Mr. Wilson experienced the kind of anxieties that many people experience and endure for a period of time following a frightening event. I am not satisfied that his emotional stress, discomfort or anxiety rises to the level where they constitute a psychological injury. Dr. de Wit was of the view that Mr. Wilson displayed some features of PTSD but did not meet the criteria that is necessary to diagnose that psychological disorder.

[137] Simply put, I conclude that Mr. Wilson’s emotional reaction falls into the category of that which “people living in society routinely, if reluctantly accept” and does not constitute a psychological injury for which the defendant must compensate him.

[138] With respect to physical injury, Mr. Wilson suffered some minor and transient discomfort in his back because of where he was placed in the life-raft. In my view, that minor injury was caused by the defendant’s negligence and he is entitled to modest compensation. I am not satisfied that the pain that Mr. Wilson developed in his elbow was caused by the defendant’s negligence. Further, it is my opinion that

the minor injury he suffered when his hand was pinched is too remote in law to be compensable. I conclude that Mr. Wilson is entitled to a modest award of \$500.

Barney Dudoward

Review of evidence and findings of fact

Mr. Dudoward's evidence

[139] Mr. Barney Dudoward, now age 66, is a member of the Tsimshian First Nation. He is a commercial fisherman and resides in the small northern coastal community of Waglisla, which was formerly called Bella Bella. Mr. Dudoward is the father of five children and two step-children, ranging in age from 20 to 34 years of age. He also has seven grand-children. Mr. Dudoward has been married to his current wife, Mercy, for nine years and they have lived together for a total of 18 years.

[140] Mr. Dudoward went to school until grade 9, when his father died in a plane crash and Mr. Dudoward left school to work in a fish reduction plant in Port Edward. Mr. Dudoward has been a commercial fisherman for the past 40 years. He has also worked at other jobs, including driving taxi, driving bus and driving snow ploughs. Mr. Dudoward obtained his Masters Fishing Certificate in 1998 and has a Marine Emergency Duties (MED) certificate.

[141] Mr. Dudoward had been a passenger on the "Queen of the North" dozens of times before her last sailing. On March 21, 2006, Mr. Dudoward was returning to his home in Waglisla after visiting his mother and brother in Prince Rupert. He had not rented a stateroom for the 11-hour voyage and was intending to sleep in the forward lounge where seven or eight other people were located.

[142] After he got on board, Mr. Dudoward had something to eat, watched part of a movie and read until about midnight, when he decided to lie down to sleep. Before he was able to fall asleep, Mr. Dudoward heard a noise that sounded like the ship

was grounding. He did not feel the ship impact the ground but he knew at once that something was terribly wrong. Mr. Dudoward thought they were grounding in a bay.

[143] The “Queen of the North” began to list and Mr. Dudoward ran outside onto the port-side boat deck. He ran back inside to retrieve his handheld VHF radio and went back a second time to get his reading glasses. At this point, Mr. Dudoward thought the “Queen of the North” had been grounded and did not think it was in danger of sinking. Mr. Dudoward said that when he got on deck the third time everything was in turmoil – the lights were on and the crew was launching life-rafts. He still thought the ship was grounded.

[144] Mr. Dudoward helped other people into a lifeboat before he got in and the boat was then lowered to the water. He said the evacuation was fairly smooth – no one was screaming and there was no panic. The crew members were directing passengers and passengers were following those directions.

[145] The lifeboat Mr. Dudoward was in towed a life-raft away from the “Queen of the North”. Mr. Dudoward felt safe and did not think the “Queen of the North” was going to sink. He could hear talk on the radio and learned that people were coming out from Hartley Bay. A short time later, he could see the lights of boats arriving. Sometime later, Mr. Dudoward saw the “Queen of the North” go down, stern first and he heard windows popping out. He thought it had slid off a shelf. Mr. Dudoward had a feeling of sadness because he really liked the “Queen of the North”.

[146] When Mr. Dudoward got aboard “Miss Yolanda”, a 37-foot fishing boat, he felt safe. He knew the “Sir Wilfred Laurier” was en route to the scene. Mr. Dudoward said he did not experience horror, just disbelief.

[147] At Hartley Bay, Mr. Dudoward went with the others to the community centre where he had some coffee and a donut and phoned his wife and son to let them know he was alright.

[148] The next day, Mr. Dudoward travelled on the “Sir Wilfred Laurier” to Prince Rupert. He said that it still felt like a bad dream and it was not sinking in with him that

the “Queen of the North” had gone down. Mr. Dudoward was provided with money to purchase new clothes and was offered a room at the Crest Hotel but declined the room because his mother lives in Prince Rupert.

[149] Mr. Dudoward said he did not sleep much that night; he kept thinking about what happened and felt sad.

[150] The next day, Mr. Dudoward took a chartered plane to Waglisla where his wife met him and took him home. Mr. Dudoward testified that after he arrived home he more or less stayed in the bedroom and watched television. There was considerable coverage of the sinking on the news and Mr. Dudoward recorded some of the news items. Mr. Dudoward said he did not feel like talking about the incident with his wife and son.

[151] Mr. Dudoward testified that he spent most of his time in the house, watching television, on the computer and sleeping, albeit poorly, until June, 2006 when he went fishing. He said that he became irritable and short-tempered and began to argue with his wife.

[152] Mr. Dudoward said that following the sinking he recorded news broadcasts to “make it real”.

[153] At trial, Mr. Dudoward testified that he believes that all of his problems arose within the first few months of the sinking of the “Queen of the North”. He said he had dreams about the sinking and had flashbacks when, all of a sudden, thoughts of the sinking and of the two people who drowned came into his head. He said he has not had those dreams for the last year or so, but he still thinks about the event frequently.

[154] Mr. Dudoward complains of a lack of patience since his experience on the “Queen of the North”. He said he used to be mellow but now gets angry easily. Small things upset him. Mr. Dudoward also complains about a lack of concentration and poor memory.

[155] Mr. Dudoward said he tends to take out his frustration on his wife and their relationship has suffered. They have separated twice since the incident. They separated in June 2006 and Mr. Dudoward went to Prince Rupert to stay with his mother. He fished that summer and in November he began to drive taxi in Prince Rupert. He and his wife tried to reconcile but it only lasted three or four days. He and his wife have since reconciled.

[156] Mr. Dudoward testified that he declined a halibut fishing trip with his cousin because he was not comfortable going out on the water. Mr. Dudoward said he does not feel like working on his boat the way he used to and he procrastinates about maintenance work. He also said that now he does not like to sleep on his boat as he used to and will now go on shore when he ties up for the night.

[157] Mr. Dudoward still travels on ferries but will not sleep while on board and is more cautious. In cross-examination, Mr. Dudoward admitted that he told the media that his experience would not stop him from going out on the water and he agreed that it did not. He agreed there has never been a time when the experience has prevented him from using a ferry when he needed to or from going out on his own boat.

[158] Mr. Dudoward testified that he has been living with his wife again for the past year or so and is trying to deal with his lack of patience on his own by “walking away from confrontation.” He said he hopes things are going okay with his wife now. He also said he feels that he is closer to his children since the accident.

[159] Mr. Dudoward said he still thinks about the sinking a great deal, particularly if he is idle. His thoughts are of the bow of the ship disappearing beneath the waterline and of the two people who were lost. In cross-examination, Mr. Dudoward said that his images of the event are predominantly of things that might have happened, not things that did happen. He has images of the sinking but he often dwells on what might have happened, for example, if there had been more people or vehicles on board, or if the ship had rolled. He agreed that what actually happened was not a scene of horror on the “Queen of the North”. Rather, it was a fairly calm evacuation

from the vessel of a small number of people into life-rafts that occurred pretty much without incident.

[160] Mr. Dudoward described other stressful events in his life. His brother, with whom he was close, had a serious alcohol problem and sometime in the spring of 2007, prior to April, he was apparently showing his girlfriend how he could commit suicide by hanging but was not intending to actually kill himself. He tied a rope to something, put it around his neck and stood on a chair. The chair collapsed and he nearly choked to death before his girlfriend was finally able to cut him free.

Mr. Dudoward's brother eventually died of a drug overdose in September 2007, which caused Mr. Dudoward much grief.

[161] Mr. Dudoward is estranged from one of his sons as a result of an incident that occurred 10 years ago when, following an altercation, his son stabbed and seriously wounded him.

[162] Mr. Dudoward's father died in a plane crash in 1961, which caused Mr. Dudoward to turn to alcohol, as a result of which he got into some trouble drinking to excess and fighting.

[163] Mr. Dudoward suffered a marital breakup from his second wife when she had him removed from the house. He did not see his three children for many years. Mr. Dudoward said the breakup affected him primarily because he lost contact with his children. The same wife had stabbed Mr. Dudoward on an earlier occasion at a party when she was drunk.

[164] Mr. Dudoward admitted having a history of serious alcohol abuse, particularly binge drinking, in the past but testified he last drank in October 2008.

[165] Following the sinking incident, Mr. Dudoward was provided with an opportunity to have counselling but he did not feel at that time that he needed counselling. He never mentioned any problems resulting from the sinking to his regular doctors. He did not think they were counsellors and could help him.

[166] Mr. Dudoward confirmed that prior to the sinking of the “Queen of the North” his son was drinking excessively and was dealing with some criminal charges that caused him some stress, including arguments and conflict with his wife.

Dr. Wilensky’s Evidence

[167] Dr. Marshall Wilensky, a registered clinical psychologist, gave evidence on behalf of Mr. Dudoward. Dr. Wilensky has for a number of years used a technique developed in the United States for treatment of victims of trauma called Eye Movement De-sensitization and Reprocessing (“EDMR”). Dr. Wilensky’s practice is now focussed on EDMR, although he also does psychological assessments.

[168] Mr. Dudoward was referred to Dr. Wilensky in April 2007 for treatment of post-traumatic effects following the sinking of the “Queen of the North”. Dr. Wilensky saw Mr. Dudoward on four consecutive days, April 16-19, 2007, and used EDMR therapy. Dr. Wilensky testified that Mr. Dudoward was able to engage with the treatment program but it was brief and incomplete.

[169] Dr. Wilensky then saw Mr. Dudoward again on June 3, 2008 when he conducted a Structured Clinical Interview for Diagnostics related to PTSD. Mr. Dudoward also completed the following questionnaires:

- An Impact of Event Scale-Revised (“EIS”), which he completed three times: once in April 2007; once sometime between August 2007 and May 2008; and once in June 2008.
- A Trauma Symptom Inventory; however, Dr. Wilensky testified this instrument had no reliability in this case and he did not rely on it in formulating his opinion.
- A Beck Depression Inventory II.

[170] As a result of his testing and interviewing, Dr. Wilensky provided an Assessment dated June 30, 2008 in which he expressed the opinion that Mr.

Dudoward's injury as a result of his experience on the "Queen of the North" on the night of the sinking meets the diagnostic criteria for PTSD under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV-TR") published by the American Psychiatric Association. Dr. Wilensky specified Mr. Dudoward's symptoms as chronic, meaning that they persisted for three months or more.

[171] The criteria for diagnosing PTSD in accordance with the DSM-IV-TR and the information obtained from Mr. Dudoward during the structured clinical interview, as summarized by Dr. Wilensky, are set out below:

- A. The person has been exposed to a traumatic event in which both of the following were present:
 - (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others and
 - (2) the person's response involved intense fear, helplessness or horror.
 - He experienced an event that involved the threat of death. He felt the imminence of "oblivion". [Dr. Wilensky did not ask Mr. Dudoward what he meant by the word "oblivion".]
- B. The traumatic event is persistently re-experienced in one (or more) of the following ways:
 - (1) recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions;
 - He has distressing recollections of the event when talking about it. "I'm thinking about it all the time. What if..."
 - (2) recurrent distressing dreams of the event;
 - Occasional bad dreams last year, none now.
 - (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, include those that occur on awakening or when intoxicated);
 - "Most of the time."
 - (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event; and
 - "Same thing goes through my head all the time."

- (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
- No.
- C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
 - (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma;
 - “I can talk about it.” “People don’t usually ask.”
 - (2) efforts to avoid activities, places or people that arouse recollections of the trauma;
 - “I force myself to fish.” “Something I used to love to do.”
 - (3) inability to recall an important aspect of the trauma;
 - No.
 - (4) markedly diminished interest or participation in significant activities;
 - Fishing, being with people.
 - (5) feeling of detachment or estrangement from others;
 - Not as close with wife.
 - (6) restricted range of affect (e.g., unable to have loving feelings; and
 - Unclear, marital difficulty.
 - (7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).
 - Foreshortened future “No future.” “Everything day to day.”
- D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
 - (1) difficulty falling or staying asleep;
 - Difficulty falling asleep. Wakes in the night. Bedding all over.
 - (2) irritability or outbursts of anger;
 - Wife and family say so. Easily irritated.
 - (3) difficulty concentrating;
 - “Somebody tells me something and I forget in five minutes.”
 - (4) hyper-vigilance; and
 - Not apparent.
 - (5) exaggerated startle response.

- “I’m jumpy now.” “I feel something inside when I hear a loud noise.”
- E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.
 - Duration more than one month.
- F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.
 - [Nothing specific was noted on the interview sheet under this criterion but in his testimony Dr. Wilensky said this criterion was positive because “he just talked about the distress in the night and also the constant rumination of near death”.]

[172] In cross-examination, Mr. Wharton put the following propositions to Dr. Wilensky and received the following responses:

- Many people who have never experienced a traumatic stressor could meet other symptom-based criteria for PTSD under the DSM-IV-TR. Dr. Wilensky agreed with this proposition.
- Life stressors, such as parental divorce, illness, death of close family members or serious relationship difficulties can generate PTSD symptoms. Dr. Wilensky agreed with this proposition.
- No testing instrument currently exists that can reliably assess what the level and quality of a person’s life was before a traumatic event, nor are there instruments that can reliably separate the effect of one prior trauma or life experience from another. Dr. Wilensky agreed with this proposition.
- The impairment of functioning, such as work, recreation, socializing and activities of daily living are significant to the confirmation of a diagnosis of PTSD as well as to the level of affect attributable to the PTSD. Dr. Wilensky agreed with this proposition.
- In situations of secondary gain, such as litigation, compensation, or other benefit, the person assessing PTSD under the DSM-IV-TR must rule out malingering before confirming the diagnosis. Dr. Wilensky was of the view that it is not possible to rule it out but that a forensic psychologist would

attempt to rule it out. With regard to this proposition, I note that the DSM-IV-TR does not state that malingering must be ruled out, rather that it should be ruled out.

- Structured interviews entirely reliant on self-reporting can assist a person attempting to over-report their symptoms to mislead the psychologist. Dr. Wilensky agreed with this proposition. He agreed that if a person is inclined to over-report, the structured interviews and checklists could have a coaching effect. He agreed that persons may intentionally misrepresent symptoms or, alternatively, there may be symptom transference, where the person transfers symptoms he or she was feeling because of some other cause to the circumstance being investigated.
- Because of the need of a treating psychologist to build trust and communication with the individual, it is difficult to challenge or fully explore potential exaggeration or symptom misreporting. Dr. Wilensky agreed with this proposition.
- Research has shown a high rate of symptom exaggeration/malingering in compensation-seeking samples. Dr. Wilensky agreed that research has shown a significant level of symptom exaggeration in compensation-seeking samples.
- Tests exist which can assist a psychologist in determining whether a person is likely providing excessive endorsement of symptoms or distress. Dr. Wilensky agreed with this proposition.
- The only validity tests that Dr. Wilensky utilized were the validity scales in the TSI. Dr. Wilensky agreed with this statement.
- Only a small minority of individuals exposed to traumatic events develop PTSD. Dr. Wilensky put the number at between 18 and 25 percent.

- In order to fully assess the existence and extent of a psychological injury, the forensic assessor must fully explore:
 - (a) previous personality and psychological functioning;
 - (b) current co-morbid conditions and stressors; and
 - (c) the previous and post-event functioning of the individual.

Dr. Wilensky agreed with this proposition.

[173] Mr. Wharton then took Dr. Wilensky through the diagnostic criteria for PTSD, under the DSM-IV-TR. Dr. Wilensky agreed that if there was no intense fear, helplessness or horror under criterion A(2), it would not be appropriate to categorize the person as having PTSD.

[174] Dr. Wilensky also agreed that the traumatic event referred to in A(1) is the thing that the person actually experiences or feels and it is the person's reaction to that event that the symptoms under criteria B to D refer to.

[175] Dr. Wilensky confirmed that when he first saw Mr. Dudoward for treatment he assumed that Dr. Kaushansky had done an initial screening for PTSD that had been positive, although he was not provided with Dr. Kaushansky's file materials. Dr. Wilensky agreed that generally symptoms of PTSD will show up within the first nine months after the trauma and that a delayed onset greater than nine months is rare.

[176] With regard to other stressful events in Mr. Dudoward's life, Dr. Wilensky agreed with Mr. Wharton that being abruptly separated from three young children all under the age of six, which happened to Mr. Dudoward, could be an emotionally crushing event. He also agreed that being stabbed and seriously injured by his son and by his wife could be potentially traumatic events in Mr. Dudoward's life. Likewise, he acknowledged that having a son in trouble with addiction problems and marital difficulties can be the source of great stress for a person. He agreed as well

that the event when Mr. Dudoward's brother accidentally nearly killed himself and his subsequent death from a drug overdose could have been traumatic events for Mr. Dudoward. Dr. Wilensky said that he could not say for sure whether when Mr. Dudoward completed the EIS there was a "cross-over" from some of the other traumatic events in his life.

[177] Dr. Wilensky conceded that Mr. Dudoward's statement to him in April 2007 during the structured interview that he had occasional bad dreams last year concerning the "Queen of the North" but "none" now was inconsistent with his response on the EIS completed in April 2007 that within the past 7 days he was distressed or bothered "moderately" by dreams about the event.

[178] Mr. Wharton suggested to Dr. Wilensky that the mere fact that a person who has gone through a close call ruminates on it and wonders what would have happened if it had gone differently makes it PTSD. Dr. Wilensky's response was:

No. Once or twice or five times, or even twenty times. But hundreds and hundreds of times, I think it's an abnormal response.

Dr. Kaushansky

[179] Mr. Dudoward saw a psychologist, Dr. Kaushansky, in November 2006 at the request of the plaintiffs' counsel, although Mr. Dudoward could not recall this contact. Mr. Dudoward answered a questionnaire on or about November 27, 2006 in which he gave the following information:

- He did not sustain any physical injuries during the incident.
- He said that he constantly thinks about the accident – what happened on the boat, what could have happened, and how lucky they were that they got off the boat and that it didn't sink immediately.
- Since the incident, he has not suddenly acted or felt as if the accident were happening again, as if he was reliving it. He said he thinks he is still in denial

and it hasn't sunk in yet. He tried to put it to the back of his mind and must continue with what he is doing.

- Since the incident, he has not had the feeling of being very upset when something reminded him of the accident. He said he doesn't need a reminder as it's on his mind constantly.
- He could not recall any time since the incident when he had physical reactions when something reminded him of the accident.
- He has not avoided activities or situations since the incident because they remind him of the accident.
- He could not recall since the incident having any loss of interest in activities that he used to enjoy.
- He did not think that since the incident he has felt distant or cut off from other people with whom he was once close.
- He said there was no change in his ability to start and complete tasks since the accident.
- He had the same group of friends as he had before the accident.
- There had been no changes in his use of alcohol, prescription or recreational drugs since the accident.

[180] In his summary report, Dr. Kaushansky concluded that Mr. Dudoward did not meet the criteria for a diagnosis of PTSD. It appears to me, however, that Dr. Kaushansky did not do any comprehensive testing or conduct a structured interview with Mr. Dudoward. His investigation appears to have been a preliminary screening.

Analysis and Assessment

[181] The defendant challenges the opinion of Dr. Wilensky that Mr. Dudoward suffers from PTSD on a number of bases. First, Mr. Wharton says that Dr. Wilensky was not aware that Dr. Kaushansky had screened Mr. Dudoward negatively for PTSD on November 27, 2006 and that it is rare for a person to develop the disorder more than eight months after the incident. The screening by Dr. Kaushansky was not a full assessment. Also, Dr. Wilensky agreed that it is rare but not unheard of for PTSD to develop after a delay of that length.

[182] Second, Mr. Wharton says that initially Dr. Wilensky did only a superficial evaluation because he assumed that Dr. Kaushansky had screened Mr. Dudoward positive for PTSD. Dr. Wilensky's focus initially was treatment, not diagnosis or assessment. In my view, that fact does not detract significantly from Dr. Wilensky's ultimate opinion.

[183] Third, Mr. Wharton argues that Dr. Wilensky's check-list investigations, which are dependent on self-report, are questionable in cases where financial gain plays a role and because of the possibility of symptom transference. Mr. Wharton further submits that there is some question of whether Mr. Dudoward properly understood the time frame to which the questions were directed. He argued that the testing did not provide any kind of validity testing. He submitted further that Dr. Wilensky failed to verify Mr. Dudoward's understanding of the questionnaires, failed to explore and further evaluate or corroborate Mr. Dudoward's test responses, failed to further explore other major life stressors that might have been at the root of Mr. Dudoward's problems and failed to make any effort to rule out malingering.

[184] Having observed Mr. Dudoward on the witness stand, I am satisfied that he was being truthful and answered all questions put to him honestly and to the best of his recollection and ability. I distinctly had the impression that Mr. Dudoward has advanced his claim in large measure as part of the process that he believes needs to be completed in order to overcome his psychological issues. To put it bluntly, I am satisfied his is not in this for the money.

[185] Mr. Wharton did a very thorough job of attacking Dr. Wilensky's opinion but the defendant did not put forward any criticism of the opinion or of the methodology used to arrive at the opinion from another psychiatrist.

[186] It seems apparent to me from listening to the evidence that making a diagnosis of PTSD is far from an exact science. Dr. Wilensky accepts that there are limitations, including the possibility of symptom transference. Dr. Wilensky had to take all of the information that he was able to glean from testing instruments and from his structured interview and apply his knowledge, training and expertise to arrive at a conclusion. In the end, I accept the opinion of Dr. Wilensky and find that Mr. Dudoward has PTSD.

[187] I also find that his experience surrounding the sinking of the "Queen of the North" is the cause of Mr. Dudoward's psychiatric injury. That there may be other factors that contributed to the injury does not detract from the fact, as I find it, that but for the defendant's negligence, Mr. Dudoward would not have suffered the psychiatric injury.

[188] With regard to the quantum of damages, Mr. Hanson relies on two cases. The first is *Carpenter v. Whistler Air Services Ltd.*, 2004 BCSC 1510. In that case, Mr. Carpenter and his wife were passengers on a float plane operated by the defendant that stalled and crashed shortly after take-off. The pontoons ripped off on impact and the plane sank to the bottom of the lake and filled with water. Mr. Carpenter and his wife were trapped inside. Mr. Carpenter was able to free his wife, who had lost consciousness, and himself from the plane.

[189] As a result of the crash, Mr. Carpenter suffered physical injuries, including water in his lungs, an injured back and a number of other superficial injuries. His main injury was psychiatric in nature. He initially had a significant degree of post-traumatic stress and subsequently suffered significant cognitive changes. By the time of trial Mr. Carpenter's PTSD symptoms had resolved for the most part but his depressive disorder and anxiety continued unabated resulting in impairment of his

cognitive abilities, his management skills and his interpersonal skills. The trial judge accepted the following submission regarding Mr. Carpenter's condition:

The near-death experience to which he and Jan were subjected has created a lasting loss of enjoyment in nearly every aspect of Ken's life. He suffers from memory loss, anxiety attacks, lack of confidence and self-motivation, a decrease in drive and energy, chronic depression and a diminished interest in maintaining professional or social contacts. In addition, Ken has clearly lost his remarkable passion for his job, and now seeks to avoid the very activity that used to make him happiest in life.

The above symptoms have caused Ken considerable embarrassment and frustration, and have severely strained his professional and social relationships. He has suffered a loss of intimacy with Jan as a result of the accident, and no longer enjoys the same relationship with his grandchildren that he once had.

[190] Non-pecuniary damages were assessed at \$55,000. Mr. Hanson suggests that the quantum of damages attributable to Mr. Carpenter's physical injuries, if those were the only injuries, would likely have been in the area of \$15,000 and therefore suggests that the non-pecuniary damages attributable to the psychological injuries is in the area of \$40,000.

[191] The second case referred to by Mr. Hanson is *Niedzialkowski v. Barnett*, 2002 BCSC 772. In that case, the plaintiff was injured when the car that she was driving was rear-ended. She sustained physical injuries of a soft-tissue nature that the trial judge concluded caused her considerable pain for a period of time and reduced the level of physical activity she could enjoy prior to the accident. The plaintiff also suffered significant aggravation of a pre-existing psychological condition, namely depression and anxiety. Non-pecuniary damages were assessed at \$60,000.

[192] On the basis of these decisions, Mr. Hanson submits that Mr. Dudoward is entitled to compensation in the amount of \$40,000 for his psychological injury.

[193] The damages in *Niedzialkowski* were to compensate the plaintiff for aggravation of her pre-existing psychological condition as well as to compensate her for significant and long lasting physical injuries. In my view, it is not possible to attempt an assessment of the amount of damages that were attributable to the

aggravation of the psychological condition and those that were attributable to the physical injuries.

[194] In my view, the psychological injury suffered by Mr. Carpenter and its effect on his functioning and enjoyment of life is much greater than that sustained by Mr. Dudoward. After this incident Mr. Dudoward continued to operate his fishing vessel until November 2006 when he moved to Prince Rupert and began to drive a taxi cab. He has not been prevented from using ferries when he needs to, or from going out on his own boat, although he tends to be more cautious when travelling on a ferry.

[195] Mr. Dudoward separated from his wife on two occasions but they are once again living together and Mr. Dudoward indicated things are going well between them. If anything, his experience has strengthened his relationship with his children.

[196] Mr. Dudoward's "flashbacks" and unpleasant dreams of the sinking have diminished over time. He said he has not had any dreams in the past year or so and the flashbacks also do not occur as regularly as they used to. Mr. Dudoward testified that his anxiety is diminishing.

[197] It appears that Mr. Dudoward's symptoms and their effect on his day-to-day functioning are not so serious that he continues to seek further treatment.

[198] I have concluded that an award of \$12,000 would be appropriate compensation for Mr. Dudoward by way of non-pecuniary damages. In addition, the parties have agreed on the figure of \$1,922 as the amount of special damages for Mr. Dudoward in the event that he was found to be entitled to non-pecuniary damages.

Lawrence Mitchell

Mr. Mitchell's evidence

[199] Mr. Mitchell is a 46-year-old longshoreman who lives in Prince Rupert. He is married and has three grown children from that marriage. Mr. Mitchell had travelled on ferries frequently prior to his being on the last sailing of the "Queen of the North".

[200] After boarding the ferry, Mr. Mitchell had a meal, watched a movie and then went to bed in his stateroom around 10:00 p.m. He was awakened when he felt the “Queen of the North” lurch and heard alarm bells ringing. He put on some clothes and went out on deck where he saw a crew member who had cut his head. It was at that point that Mr. Mitchell believed the situation was serious. He returned to his stateroom, got fully dressed, retrieved his lifejacket and then went back out on deck. By that time the “Queen of the North” was listing. Members of the crew were trying to deploy a lifeboat. Mr. Mitchell assisted other passengers to put on and fasten their lifejackets. Mr. Mitchell described the scene as very calm, although there was a lot of activity with the crew.

[201] Mr. Mitchell said he knew the ship was sinking and that they had to get off. He was thinking that he did not want to end up in the cold water and did not want to die from exposure while floating around in the water.

[202] Mr. Mitchell got into a covered life-raft with other people and it was lowered to the water. Karen Briker, who was in the same life-raft, was very distraught and Mr. Mitchell comforted her. When he was in the life-raft, Mr. Mitchell heard others say the ferry was going down. Someone flipped up the flap covering the raft and Mr. Mitchell could see the ship go under the water.

[203] Mr. Mitchell testified that the most traumatic time for him was when he came out of his stateroom. He said he had the feeling that “this could be it”, he could die. In cross-examination he agreed, however, that once he was in the life-raft he felt safe.

[204] Eventually, Mr. Mitchell boarded the “Sir Wilfred Laurier” where he had something to eat and was given dry clothes. He and the others were taken to the Crest Hotel in Prince Rupert where, after being given some money and toiletries, he met his wife and daughter. The next day, Mr. Mitchell went to Vancouver on the chartered plane. He returned to his supervisory job on the docks four days after the sinking but had to leave because he could not concentrate on his work and he was afraid someone would be injured.

[205] On March 31, 2006, Mr. Mitchell spoke to a counsellor. He was able to return to his employment. In September 2007, at the urging of his wife, Mr. Mitchell returned to Prince Rupert and took up a position as a longshoreman.

[206] Mr. Mitchell testified that his experience on the “Queen of the North” did not prevent him from working or interacting with his family but it affected how he worked. He also said it affected his sleep. Mr. Mitchell further testified that since this incident he is hyper-vigilant when he travels on any public transport.

[207] Mr. Mitchell testified that he had a couple sessions with Dr. Wilensky and that they were very helpful in relieving his anxiety and putting things in perspective.

[208] When asked by Mr. Hanson whether and how this event changed his life, Mr. Mitchell stated that he now values life more, cares more about people and has enhanced safety concerns.

[209] In cross-examination, Mr. Mitchell agreed that he has a cool head in serious situations and said “that is the nature of being a survivor”.

Medical evidence

[210] On May 29, 2006, Mr. Mitchell reported to his doctor, Dr. Amor Kloppers, that he was experiencing dreams or nightmares following the sinking and was suffering some anxiety. A referral was made for counselling at a mental health clinic. It does not appear that Mr. Mitchell saw Dr. Kloppers again with any complaints arising from this incident.

[211] On November 28, 2006, Mr. Mitchell was screened for PTSD by Dr. Kaushansky. In response to the question of whether he had experienced disturbing memories, thoughts or images of the accident, Mr. Mitchell said that he has memories of being on deck and thinking, “This is it”. He said he did not obsess about it but thought about it all the time. Dr. Kaushansky’s impression was that Mr. Mitchell did not meet the criteria for PTSD.

[212] Mr. Mitchell was assessed by Dr. Wilensky, who had him complete various questionnaires and completed a structured clinical interview. Dr. Wilensky met with Mr. Mitchell for EMDR treatments on January 31 and March 22, 2007 and met with him for assessment purposes on June 3, 2008. Dr. Wilensky's medical-legal report dated June 30, 2008 contains the following statements:

TEST RESULTS:

On the measures sensitive to the symptoms of Posttraumatic Stress Disorder, Mr. Mitchell endorsed items that indicated mild symptomology in 2007. At follow-up, there were no significant symptoms endorsed. At follow-up, he endorsed sufficient items on the self-report measure of depression to place himself in a mildly depressed clinical group.

SUMMARY AND CONCLUSIONS:

Mr. Mitchell had the misfortune to be a passenger on the ferry, the Queen of the North, when it sank in 2006. He was rescued without physical injury. However, it appears that he sustained a psychological injury from the traumatic event. Although his symptom picture does not currently meet all of the criteria for a diagnosis of Posttraumatic Stress Disorder, nonetheless there is evidence of distress, disruption of his employment, resultant distress of his wife and residual vulnerability. These symptoms were a direct result of his traumatic experience of the sinking of the Queen of the North on March 22, 2006.

Analysis and assessment

[213] Mr. Mitchell's experience with regard to the sinking of the "Queen of the North" did not cause him prolonged or significant emotional distress. The only effects appear to have been a brief period of anxiety, some minor interference with sleep for a short period of time and a heightened sense of security, including extra vigilance when using public transportation.

[214] There was no functional impairment in Mr. Mitchell's work, family or other social activities.

[215] In my view, the evidence fails to establish any compensable psychological injury.

Frank Bolton

Review of evidence and findings of fact

Mr. Bolton's evidence

[216] Mr. Bolton is 42 years old. At the time of the sinking of the "Queen of the North" he was working as a labourer at a fish farm in Port Hardy. He travelled to and from Port Hardy to his home in Prince Rupert on the "Queen of the North" on a regular basis.

[217] On March 21, 2006, Mr. Bolton was travelling to Port Hardy to return to work. He shared a stateroom with Kirby and Dionne Jackson. After the ship departed Prince Rupert, Mr. Bolton had something to eat and then met some other passengers with whom he spent some time drinking beer in his stateroom. Mr. Bolton then retired for the night. He took out his hearing aids, went to bed and was asleep when the "Queen of the North" struck Gil Island. He was awakened by Kirby Jackson shaking him and telling him the ship was sinking. Mr. Bolton did not feel or hear the "Queen of the North" hit Gil Island. At first, Mr. Bolton thought Mr. Jackson was joking until he opened the door of the stateroom and saw the waterline.

[218] Mr. Bolton had apparently gone to sleep wearing his pants and shirt so he put on his shoes, grabbed his jacket and went to his muster station, which was not far from his stateroom. Mr. Bolton said he was a bit worried but became less anxious when he saw that the sea was calm. Mr. Bolton thought the ship was grounded. Mr. Bolton and Kirby Jackson boarded a covered life-raft and were lowered to the water without incident. He said the loading of the lifeboats was orderly. Crew members were giving directions and the passengers were following those directions. There was no pushing or shoving.

[219] Mr. Bolton testified that he could not find any oars so he helped paddle the raft away from the ship using his hands. The raft that Mr. Bolton was in was secured to the lifeboat and towed away from the "Queen of the North".

[220] Mr. Bolton testified that he saw the “Queen of the North” sink. He thought he saw it slide off Gil Island before it sank. He said it was “kind of scary” watching the ship sink – just like the movie, “Titanic”.

[221] Eventually, the life-raft that Mr. Bolton was in was taken to the “Sir Wilfred Laurier”. He described feeling disappointed in himself when he was being taken to the “Sir Wilfred Laurier” because he was “kind of scared” and was not thinking about his children. Mr. Bolton travelled to Prince Rupert on the “Sir Wilfred Laurier”. He met up with his wife and children at the Crest Hotel and they stayed the night there at a room provided by B.C. Ferries. That evening Mr. Bolton attended a dinner and prayer meeting put on by the local community in Prince Rupert. Mr. Bolton testified he had trouble sleeping that night. He was doing a lot of thinking and was just glad to have his children with him.

[222] Mr. Bolton said that when he returned to his home the next day he had a lost or empty feeling – like he had lost a part of his soul on the “Queen of the North”. He saw his physician, Dr. Ryeburn, because of his feeling of emptiness.

[223] Mr. Bolton also said that the first night in his home after the sinking he woke up in the middle of the night and panicked because it was very dark and it reminded him of the stateroom. He slept the rest of the night on the couch and has slept on the couch ever since.

[224] Mr. Bolton believes he returned to his job at the fish farm in Port Hardy on May 2, 2006 and continued to take the ferry back and forth from Prince Rupert to Port Hardy but said that he found it difficult to travel back and forth on the ferry and had difficulty sleeping in the floating bunk houses at his workplace. He said that the generator was turned off at night which he found upsetting. Mr. Bolton said that when he was home he had difficulty sleeping at night and often slept during the day, which affected his parenting and caused further discord with his wife.

[225] Mr. Bolton separated from his wife in October 2006. He now lives in a one bedroom apartment. His children spend half of their time with him. Mr. Bolton

believes his experience with the sinking of the “Queen of the North” is responsible for his losing his wife and children.

[226] Mr. Bolton said that for the next year after he separated from his wife he felt anger and frustration. He was not sleeping well and argued often with his wife. He distanced himself from friends.

[227] Mr. Bolton testified that he lost weight after the accident but has since regained that weight.

[228] Mr. Bolton has a history of alcohol abuse but said that his abuse of alcohol has increased since this incident. He said that when his children go back to their mother’s home after being with him, his alcohol problem really kicks in and he has to drink half a mickey of whiskey to go to sleep, and then drinks the other half when he wakes up. He said he does not drink when his children are with him.

[229] Mr. Bolton also testified that his marijuana use has increased since this event and that he now smokes marijuana every day.

[230] Mr. Bolton testified that he saw counsellors to try to deal with the emotional effects of the incident. He saw a counsellor provided by B.C. Ferries as well as counsellors at the mental health unit in Prince Rupert.

[231] Mr. Bolton testified that he often has “flashbacks” about the sinking and of the flares and debris in the water. Sometimes he has bad dreams of the flares and the boat sinking. In his dreams he is in the life-raft arriving at the coastguard vessel and feeling badly that he did not think of his children. Mr. Bolton also testified that he is more frustrated and absent minded since the accident and has less ambition.

[232] Mr. Bolton was asked about other incidents that have affected him. He spoke of a life threatening incident when he was struck by a heavy anchor five days before seeing a mental health worker on October 26, 2006. He related an incident in November 2006 when he fell after a bout of drinking and hit his head and broke his collarbone. He also spoke of an incident in the fall of 2007 when he was mugged

and seriously injured. He woke up in the hospital and felt glad to be alive. He spent some time in the hospital. Mr. Bolton admitted the mugging incident affected him quite a bit and he isolated himself from other people.

[233] Mr. Bolton admitted that he had suffered depression for some years prior to the sinking of the “Queen of the North” and was suicidal off and on. He sought medical help for his depression and was taking anti-depressants off and on for a long time.

[234] Mr. Bolton believes that his experience on the “Queen of the North” was responsible for the fact that he now has his children with him only half of the time.

[235] As for any physical injuries sustained as a result of the sinking of the “Queen of the North”, Mr. Bolton said he had some aches and pains in his lower arms and back for three or four weeks. He thinks the pain was from holding onto the life-raft. Mr. Bolton received some analgesic medicine from Dr. Ryeburn for the pain. In cross-examination, Mr. Bolton agreed that he had tendonitis before the sinking incident and was having problems with his left arm well before the accident. Mr. Bolton said that on April 3, 2006, Dr. Ryeburn, told him he had carpal tunnel syndrome in both arms and recommended that he should use wrist braces but he did not get the braces for a long time. Mr. Bolton also agreed that he had a long history of back problems.

[236] Mr. Bolton agreed with Mr. Wharton that he was not consistent in taking Celexa, which was prescribed for his depression and anxiety. He agreed that when he took the drug it relieved his symptoms and “things were pretty good”. On August 29, 2007, when Mr. Bolton took his daughter to see a mental health nurse, he told the nurse that he had stopped his anti-depressants about seven months ago and “has been doing really well”. However, on January 4, 2008, Mr. Bolton saw his doctor about his alcoholism and reported that he was depressed and wanted to resume taking Celexa.

[237] Mr. Bolton agreed with Mr. Wharton that for a long time he has on occasion had suicidal thoughts and that he has suffered from alcohol abuse for a very long time. He also agreed that he had a difficult relationship with his wife prior to this incident because of her alcohol abuse, severe mood swings and physical abuse towards him. He also agreed that being separated from his children was very hard on him. Financial difficulties contributed to his stress as did the fact that his son had some health problems.

Dr. Ryeburn's evidence and medical records

[238] Dr. Ryeburn, a general practitioner who has seen Mr. Bolton for some time, testified that Mr. Bolton suffers from anxiety and depression with some of the features of PTSD. He agreed with defence counsel that symptoms that exist with PTSD can also arise from causes other than PTSD.

[239] It appears from the medical records that Mr. Bolton suffered from depression for a number of years before his experience with the sinking of the "Queen of the North". He had been prescribed an anti-depressant, Celexa, to treat his depression but had a history of non-compliance in taking the prescribed medication. Dr. Ryeburn confirmed that he had treated Mr. Bolton for depression and anxiety for several years and that when Mr. Bolton was compliant in taking Celexa that drug was effective in treating the symptoms.

[240] Dr. Ryeburn's clinical records of treatments following the sinking of the "Queen of the North" indicate the following:

March 23, 2006

Mr. Bolton appeared anxious and complained of tenderness in his arms, neck and back. Dr. Ryeburn's assessment was situational anxiety superimposed on chronic untreated depression and musculoskeletal aches and pains.

April 3, 2006

Dr. Ryeburn's assessment was that anxiety persisted, for which he prescribed Celexa; and bilateral carpal tunnel syndrome, for which he prescribed wrist braces.

May 1, 2006

Mr. Bolton complained of stress, anxiety and poor sleep. Dr. Ryeburn assessed him as suffering anxiety and symptoms of carpal tunnel syndrome and noted non-compliance in not following through with prescribed treatments.

July 11, 2006

Mr. Bolton said his mood was okay but complained of anxiety. Dr. Ryeburn assessed him as suffering depression with anxious/PTSD features and renewed the prescription for Celexa.

September 28, 2006

Mr. Bolton had stopped taking Celexa and was assessed as suffering depression and anxiety. Celexa was prescribed.

October 26, 2006

Mr. Bolton had lost his medication and had been off Celexa for a week and contemplated suicide. Dr. Ryeburn assessed him as being depressed, anxious and suffering substance abuse. He prescribed Celexa.

October 30, 2006

Mr. Bolton reported to Dr. Ryeburn that he was feeling better.

March 15, 2007

Mr. Bolton reported he had stopped taking Celexa and was experiencing stress and insomnia. Dr. Ryeburn prescribed Celexa.

January 4, 2008

Mr. Bolton sought help with his alcohol abuse. He also reported he had stopped taking Celexa and was depressed. Dr. Ryeburn again prescribed Celexa.

[241] The clinical notes of a mental health nurse whom Mr. Bolton saw in October 2006 indicate that he reported that he has been suicidal “for a long time”. He first attempted suicide when he was 15 and had contemplated suicide on a number of occasions since then.

Analysis and assessment

[242] With regard to physical injuries, I find that Mr. Bolton suffered from carpal tunnel syndrome prior to this incident and also had pre-existing back problems. I am satisfied that Mr. Bolton’s experience in the life-raft aggravated to some extent pre-existing symptomatic conditions. However, the physical injuries were of a minor nature.

[243] With regard to the claim for psychological injury, it is not suggested that Mr. Bolton’s emotional distress following the sinking of the “Queen of the North” is directly related to, flows from or is connected with the minor physical trauma to his arms and back as a result of helping to paddle the life-raft. It is said to result from the traumatic nature of the sinking and his experience in surviving that event, not from any physical injuries that he suffered.

[244] Mr. Hanson submits that Mr. Bolton’s experience on the “Queen of the North” caused a worsening of his mental health, an aggravation of a bad situation, namely the anxiety and depression from which he was suffering before the incident due to other stressors in his life.

[245] I am satisfied that following this incident Mr. Bolton continued to experience depression and anxiety. It is clear that before the incident he had suffered depression for which he had been prescribed medication, namely Celaxa. In my view, the issue with respect to Mr. Bolton's claim is not whether he meets the threshold test of having a recognizable psychiatric or psychological injury. While the evidence does not persuade me that he suffers from PTSD, it is not necessary, for Mr. Bolton to prove that he has PTSD in order to establish a recognizable psychiatric or psychological injury. In my view, chronic depression that requires treatment with the continued use of medication will satisfy the threshold test for compensation. The issue with regard to this claim, as I see it, is one of causation. Is the defendant's negligence the cause, in fact, of his depression?

[246] Mr. Wharton submits that it has not been established that Mr. Bolton's emotional and psychological complaints following the sinking of the "Queen of the North" were caused in fact by the defendant's negligence. He submits that numerous other unrelated problems and stressors are the cause of Mr. Bolton's continuing complaints.

[247] In *Hall v. MacDougall*, 2007 BCSC 1296, Brine J. summarized the law as it relates to a claimant's burden of proving causation in fact in the context of a psychological injury claim. At paras. 9-12, he said:

9 The primary test for causation is the "but for" test. Mr. Hall has the burden of proving, on a balance of probabilities, that "but for" the sexual assaults by MacDougall, his psychological damage would not have occurred. This test was recently restated by McLachlin C.J. in *Resurfice Corp. v. Hanke*, 2007 SCC 7 para. 23:

The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone":
Snell v. Farrell, [1990] 2 S.C.R. 311 at p. 327, *per* Sopinka J.

10 In particular circumstances where the "but for" test is unworkable, causation may be established if the defendant's conduct "materially

contributed" to the occurrence of the injury. See *Athey v. Leonati*, [1996] 3 S.C.R. 458 para. 15-17.

11 In *Resurface Corp.*, McLachlin explained that the material contribution test as an exception to the "but for" test and should only be applied if: (1) it is impossible for the plaintiff to prove that the defendant's conduct caused injury using the "but for" test and the impossibility is beyond the plaintiff's control, and (2) it is clear that the defendant breached a duty of care to the plaintiff thereby exposing him to an unreasonable risk of injury and the plaintiff suffered from that injury. She stated at para. 25:

In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend the basic notions of fairness and justice to deny liability by applying a "but for" approach.

12 In *Nash v. MacDougall*, 2007 BCSC 563, para. 62-69, Fisher J. recently considered the application of the "but for" and the "material contribution" causation tests in relation to psychological injuries stemming from sexual assault. She noted that the principles set out in the trial decision of *Blackwater v. Plint*, 2001 BCSC 997, aff'd 2005 SCC 58, were most helpful and indeed consistent with the requirements as explained in the subsequent analysis in *Resurface Corp.* She cited the *Blackwater v. Plint* framework at para. 68, which followed Major J's framing of the causation issue in *Athey*. Fisher J. noted that the first two examples fit neatly into the "but for" test and the third can be characterized as "material contribution":

- (1) If the psychological injury would have occurred at the same time, without the injuries sustained in the sexual assault, then causation is not proven;
- (2) if it was necessary to have both the sexual assaults and other life circumstances for the psychological injury to occur, then causation is proven since the psychological injury would not have occurred but for the sexual assaults;
- (3) if the sexual assaults alone could have been a sufficient cause, and the other life circumstances alone could have been a sufficient cause, then it is unclear which was the cause in fact of the psychological injury. The trial judge must determine, on the balance of probabilities whether the defendant's sexual assault(s) materially contributed to the psychological injury.

[248] The distinction between the principles of causation and assessment of damages must be kept in mind. In *Blackwater*, 2001 BCSC 997, aff'd 2005 SCC 58, at para. 9, McLachlin C.J. described in thus:

78 It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[249] It is clear that Mr. Bolton suffered from bouts of depression before March 21, 2006, including thoughts of suicide. It appears that he was able to keep his depression reasonably in check when he took his Celexa medication as prescribed. Unfortunately, he was not always compliant with the prescription. Since his experiences on the "Queen of the North" on the night of the sinking, Mr. Bolton has also suffered bouts of depression and anxiety, particularly when he goes off his Celexa. While there are a number of stressors that have impacted upon Mr. Bolton's mental well-being, both before and after the sinking, I am persuaded that he experienced an aggravation of his condition as a direct result of his experiences surrounding the sinking. Mr. Bolton has experienced episodes of depression and anxiety since the sinking of the "Queen of the North" that are different in nature from those which he experienced before. They include troubling thoughts of the event, an inability to sleep in the dark and feelings of emptiness. I am satisfied that Mr. Bolton's experiences surrounding the sinking of the "Queen of the North" caused an aggravation of his former condition, for which he is entitled to compensation.

[250] However, it is also clear that Mr. Bolton was a fragile individual emotionally before this incident. It is likely that he would have continued to suffer depression, although not with the added features, if it had not been for the defendant's negligence. I am also of the opinion that Mr. Bolton would have experienced marital difficulties because of the other factors, including abuse by his wife, even if he had not been a survivor of the sinking of the "Queen of the North".

[251] The defendant is not liable for the whole of Mr. Bolton's damage. It is only liable to the extent that its negligence made the damage worse. Furthermore, Mr. Bolton has an obligation to mitigate his damage by taking his prescribed medication, which appears to be quite effective in treating his depression, and has at times failed in that regard.

[252] With regard to quantum, Mr. Hanson submits that an appropriate award would be \$17,500. He refers to two cases. The first is *Hetherington v. Insurance Corp. of British Columbia* (1994, 2 B.C.L.R. (3d) 396 (S.C.)), which concerns psychological injury only. In *Hetherington*, the Court dismissed a small claims judgment of \$6,000 in favour of a woman who suffered severe anxiety and depression for a period of approximately four months as a result of a frightening experience when she was awoken in the middle of the night when a pickup truck driven by the defendant crashed through the front of her house and ended up in the living room, causing extensive property damage but no personal injury. The issue on appeal was not whether the respondent suffered nervous shock but whether her psychological injury was caused by the circumstance of the vehicle crashing into her house or by her distress at how long the repairs took and whether the damage was too remote in law. The appeal court upheld the finding of causation. It also concluded that the award of damages, while perhaps on the high side, was not so high as to justify interference and upheld the award.

[253] The second case, *Dadson v. Gallo*, 2007 BCSC 1504, was concerned with physical injuries only. The plaintiff, who sustained soft-tissue injuries that were painful for four to six months, was awarded non-pecuniary damages of \$15,000. In my view, it is very difficult to find much guidance in physical injury cases.

[254] Having regard to the minor nature of the physical injuries sustained by Mr. Bolton and taking into account the fact that damages for his psychological injury must be assessed on the basis that the defendant's negligence has not caused the whole of his condition but has aggravated a pre-existing symptomatic condition, I assess Mr. Bolton's claim at \$7,500.00.

Kirby Jackson

Review of evidence and findings of fact

Mr. Jackson's evidence

[255] Mr. Jackson is a 38-year-old single father of three children. Mr. Jackson is a member of the Gitxaala First Nation. He lives now in Prince Rupert but lived most of his life in Kitkatla.

[256] Mr. Jackson was sailing on the "Queen of the North" to Port Hardy where he worked at a fish cannery. Mr. Jackson had been aboard the ferry many times before.

[257] Mr. Jackson shared a stateroom with Frank Bolton. He, Mr. Bolton and another passenger were drinking and talking. The other man returned to his own stateroom and Mr. Bolton went to sleep. Mr. Jackson went on deck around 11:30 p.m. to have a cigarette. While he was smoking his cigarette he heard waves crashing on the shore, then saw land and felt the ferry strike ground. The jolt of the impact nearly knocked him down but he struck a door and managed to stay upright. Mr. Jackson said the ship dragged along the shore for a ways then drifted away from the island. By that time the ship was listing to starboard.

[258] Mr. Jackson ran back to his stateroom and woke Mr. Bolton. Mr. Jackson said he was pretty scared at that point. He knocked on the door of his cousin's stateroom and yelled that the ship was sinking but there was no response. Mr. Jackson said he did not want to leave without knowing where his cousin was but knew he had to get to the muster station. Mr. Jackson said that at the muster station he saws lots of terrified people. He said he was pretty terrified as well and was wondering if he would make it home. In cross-examination, Mr. Jackson admitted that when he was on deck at the muster station he did not see any panic or confusion and the loading of the life-raft was an orderly process.

[259] Mr. Jackson got into a life-raft with Mr. Bolton and others and the raft was lowered to the water. He agreed that the lowering of the life-raft was not too

frightening. Mr. Jackson was fully clothed and had a coat so he was warm. Some of the occupants paddled the raft away from the “Queen of the North”. Mr. Jackson said he just sat there wondering where his cousin was and whether he would ever see his children again.

[260] Mr. Jackson saw the “Queen of the North” go down and described it as sort of like the “Titanic” – the bow came out of the water and as the ship sank, stern first, he could hear windows popping. At that point he wondered if his cousin was still onboard.

[261] Mr. Jackson was taken aboard a lifeboat and then into a fishing boat and was taken to Hartley Bay, where he was re-united with his cousin. Mr. Jackson went to the home of his grandfather in Hartley Bay where he was able to telephone his family. The next day he went to Prince Rupert aboard the “Sir Wilfred Laurier”. Mr. Jackson met his parents and his children at the hotel in Prince Rupert. He was happy to see them and happy to be alive. Mr. Jackson was provided with a hotel room and his children stayed with him that night. He said he just felt happy to be alive.

[262] Mr. Jackson returned to his job in Port Hardy in early May and worked there continuously through 2006 and 2007 until he was laid off because the company he worked for was restructuring. He continued to take the ferry between Prince Rupert and Hartley Bay on a regular basis. He was able to work on and around small boats, on floating barges and was able to sleep in a floating bunkhouse.

[263] Mr. Jackson said he did not sustain any physical injuries as a result of the incident. When asked about emotional consequences of his experience, Mr. Jackson could not recall any emotional issues during the first month after the accident. He testified that he no longer likes going out on boats and does not go out fishing, something he used to do. He said that being on the water brings back memories of the accident and he feels frightened.

[264] Mr. Jackson testified that once in a while he has anxiety attacks and has trouble breathing and sharp pains in his chest. He thinks about all his problems and how to get rid of them. He also testified that he does not sleep well and sometimes has troubling dreams about the accident and wakes up with cold sweats. He dreams about being on the ferry or about the people who drowned. The dreams usually occur after he has heard something on the news about the “Queen of the North”. The dreams were more frequent the first month or two after the accident. Mr. Jackson also testified that loud noises sometimes make him jump.

[265] In cross-examination, Mr. Jackson said that after the first few months following the accident he thought less about it unless something brought the subject up, such as attending his examination for discovery or people asking how the lawsuit was progressing.

[266] Mr. Jackson said that he drank socially before the accident but his drinking has escalated since the incident to the point where he gets drunk all the time. He thinks he drinks more now because he is frustrated with all his problems. Mr. Jackson also smokes marijuana on a daily basis. He says the marijuana helps him sleep. In cross-examination, Mr. Jackson admitted that his marijuana use today is about the same as it was before the accident.

[267] Mr. Jackson has seen or spoken to a number of doctors and counsellors, including: Dr. Nelson, his family doctor; Mr. Epp, a counsellor; Dr. Kaushansky, whom Mr. Jackson does not recall seeing; Dr. Altar; and Ms. Carlson, a counsellor at the Northern Health mental health clinic in Prince Rupert. Mr. Jackson testified that he is still seeing Ms. Carlson about what is going on in his life and his problems. When asked what problems he was having he said lots of financial problems and family problems, mostly with his children. In cross-examination, Mr. Jackson admitted that the first time he sought assistance at the mental health clinic after the accident was in February 2008 and that most of his concerns at that time centered around his missing his children and financial problems.

[268] Mr. Jackson separated from his wife before this incident occurred. Following the separation, he had the children in his care for about 4 ½ years but shortly after the sinking of the “Queen of the North” there was an incident in his home, unrelated to the sinking, that resulted in the children going to Calgary to live with their mother. Mr. Jackson said this event was extremely painful and stressful for him and shook him to the core. Mr. Jackson did not see his children for about two years after they went to live with their mother. Mr. Jackson conceded that most of his depression was due to his children being away from him. He also admitted that he has struggled with alcoholism and depression for a long time.

[269] When asked how his experience with the sinking of the “Queen of the North” has changed his life, Mr. Jackson could only say that he no longer goes out fishing to get his own food.

Medical report and clinical records

Dr. J.C. Nelson

[270] Counsel for the plaintiffs tendered a medical-legal report dated August 11, 2008, from Dr. Nelson. In the history portion of the report Dr. Nelson recorded the following:

This man says he is depressed. He states his depression is mainly due to the loss of his children who are now living in Calgary with their Mother for the last months. He also attributes his depression to the recent loss of his job at the fish farm based out of Port Hardy. ...He says he thinks about the ferry “once in awhile” when he hears about it “on the news or through people talking.” He dreams about it sometimes.”

[271] Dr. Nelson provided the following opinion:

I believe this man is depressed. The causes of his depression are multifactorial. These include the following: 1) loss of children, 2) poor finances and lack of work, 3) drug and alcohol abuse, and 4) recurrent thoughts of the sinking of the Queen of the North. I have no test results to support this.

... I believe that substance abuse is one of his main problems.

This man is not disabled. He is actively [seeking] full time employment and has up until recently held a steady job at a fish farm. He says he “loves to work.”

I find it difficult to give an accurate prognosis at this time. I am hoping that if he can stay sober that his symptoms will improve.

Northern Health Clinical records

[272] The clinical records from the Northern Health clinic in Prince Rupert contains the following self-reports by Mr. Jackson:

February 20, 2008

[C]ame to this office to get “help for his nightmares and his depression”. Relayed he was on the Queen of the North the night it sank and that since that time he has been anxious and bothered by nightmares. Drinking and marijuana use increased since then.

August 19, 2008

States that he was a passenger on the Queen of the North when it sunk. Had been seeing Dr. Ted Alters in Terrace (difficult as he does not have a license nor vehicle, and travel is expensive) ... Following the sinking, counselling services were offered – he did not think he needed it. – Feeling lonely and depressed since his 2 kids (who he had for 4 ½ years) moved to Calgary, Alberta to live with their mom.

September 4, 2008

Kirby states that things are okay.

September 11, 2008

Kirby states that he had a good week.

September 18, 2008

Kirby states that he was doing okay, until yesterday. He spoke with an RCMP officer who informed him [about a incident unrelated to the sinking accident].

October 2, 2008

Kirby states that he received bad news. His children were coming to attend their grandfather’s wedding and a visit.

October 15, 2008

Kirby states that things are okay. ... Finds he gets depressed thinking of his kids, when sitting at home. ... No flashbacks or nightmares.

January 26, 2009

Kirby states that things have been good and he has been busy. ... States that he was interviewed for a number of hours at the Courthouse – regarding the sinking of the Queen of the North. He had some dreams (reflecting on the good times) but no nightmares of the crash.

February 9, 2009

Kirby states that things are okay.

May 1, 2009

Kirby states that things are good.

May 15, 2009

Kirby reports that he is under a lot of stress (mostly financial) and finds that he is smoking more as a result.

Dr. Kaushansky

[273] On March 16, 2007, Dr. Kaushansky conducted a screening for PTSD and concluded that Mr. Jackson did not meet the criteria for a diagnosis of that disorder.

Analysis and assessment

[274] As with Mr. Bolton's claim, Mr. Hanson submits that Mr. Jackson's experience during the sinking of the "Queen of the North" made a bad situation worse and aggravated his psychological problems.

[275] Mr. Wharton submits that it has not been proven that Mr. Jackson suffers from any recognizable psychiatric illness and, in any event, that it has not been proven that Mr. Jackson's emotional or psychological problems were caused, in fact, by the defendant's negligence. I agree.

[276] Mr. Jackson reported some initial anxiety following the sinking and sought the assistance of counsellors at three visits before returning to work on May 2, 2006. Mr. Jackson did not seek any further counselling, which he knew was available through B.C. Ferries, until March 2007 when Dr. Kaushansky spoke to him on behalf of counsel for the plaintiffs. Mr. Jackson was referred to Dr. Altar but only saw him on one occasion. He did not seek any further assistance for any emotional issues until February 2008 when he went to the Northern Health Authority Clinic. A few days later he reported to Dr. Nelson that he was feeling better and wanted to return to work. Mr. Jackson only attended one of five planned counselling sessions with Mr. Epp.

[277] In my opinion, other events in Mr. Jackson's life, including being away from his children whom he dearly loves, financial problems, lack of work and drug and

alcohol abuse, are most likely the cause of his depression and anxiety, as opposed to his experience on the “Queen of the North”.

[278] I have to conclude that Mr. Jackson’s claim for compensation must fail.

“B.M. Joyce J.”