LEGAL CAUSATION IN MEDICAL MALPRACTICE CLAIMS – THE "ACTUAL HARM" AND "REAL RISK" TESTS*

Table of Contents **Page**

Introduction and factual setting

To some extent this paper is a case comment on *Hemmings v Peng*.[1] More particularly, it focuses on the issue of remoteness of damage (now generally referred to as "legal causation") in the context of a medical malpractice claim.[2]

The plaintiff in *Hemmings* was a 29-year-old woman who suffered a cardiac arrest on the operating table during a Caesarian section, as a result of which she sustained severe brain damage. The plaintiff was morbidly obese, which made her a higher risk patient. The C-section procedure began, in accordance with normal practice, under a regional anesthetic, but the anesthetist decided to convert to a general anesthetic after the plaintiff started to panic and flail about and could not be calmed. The infant was delivered some 8 to 11 minutes into general

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[1] 2024 ONCA 318, reversing in part trial decision found at 2022 ONSC 2674.

[2] "Legal causation", in a similar but not identical sense, can be an issue in criminal cases as well, as for example in *R. v Maybin* 2012 SCC 24 and *R. v Lozada* 2024 SCC 18. In fact, the issue is considered in that context far more frequently than that of tort. This paper does not deal with the issue in the context of criminal law.

anesthesia, but shortly after delivery the plaintiff experienced cardiac arrest and brain damage ensued.

An action was commenced against the treating obstetrician, two obstetricians who provided care at the hospital (one of whom performed the C-section), and the anesthesiologist. An additional defendant was the hospital, which employed a nurse who had conducted an allegedly insufficient telephone consult with the plaintiff several weeks prior to the delivery. Damages were agreed by the parties at $12 million. At trial, judgment was rendered against the treating obstetrician, the anesthetist, and the hospital. The action was dismissed as against the remaining defendants. The appeals made by the treating obstetrician and the hospital were allowed; that of the anesthetist was dismissed. The end result was that only the anesthetist was held liable.

The finding at trial that the treating obstetrician had owed a duty of care to the plaintiff and had breached the applicable standard of care – *i.e.* the finding that he had been negligent – and that his negligence had been a "but for" factual cause of the plaintiff's injuries, was affirmed on appeal. However, his appeal succeeded on the issue of legal causation. It was held that the plaintiff's injuries were too remote to be legally recoverable from him. The finding of negligent conduct on the part of the nurse was not challenged on appeal; instead, the nurse's argument was that her breach of the standard of care did not cause the plaintiff's injuries. Here again the appeal failed on the issue of factual causation but succeeded on the issue of remoteness. Only in the case of the anesthetist did the appeal fail on all issues, although legal causation apparently was not raised in his appeal and in any event was not considered.[3]

The lengthy appeal decision included consideration of issues that do not call for comment in this paper.

Two separate types of causation

Causation is a necessary element in a tort claim. That single term, however, encompasses two separate issues: factual causation, which is generally determined *via* the "but for" test, and "legal causation", which is a more recent, but now generally adopted, label for what traditionally has been identified as remoteness of damage.[4]

(a) Factual causation

As the name implies, factual causation requires a finding that the defendant's wrongdoing was a necessary factual cause of the loss or harm. As mentioned, this is normally determined *via* the "but for" test, which is articulated as follows: "[T]he plaintiff must show on a balance of probabilities that 'but for' the defendant's negligent act, the injury would not have occurred."[5]

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[3] Issues relating to factual, but not legal, causation were indicated to be raised and considered: see paras. 160 and 200-30.

[4] Until famously (within the legal community) overruled in *The Wagon Mound (No. 1)*, the decision in *Re Polemis & Furness, Withy & Co. Ltd.* [1921] 3 K.B. 560 effectively held that the concept of remoteness of damage was a non-issue because a defendant would be liable for all direct consequences of its wrongdoing, whether foreseeable or not.

[5] *Ediger v Johnston* 2013 SCC 18 at para. 28; *Nelson (City) v Marchi* 2021 SCC 41 at para. 96. Stated slightly differently: "without the defendant's negligent act, the injury would not have occurred".

(b) Legal causation

Legal causation, on the other hand, asks whether the harm "is too remote to warrant recovery"[6] regardless of whether the defendant's wrongdoing was a factual cause of the plaintiff's harm or loss. Stated differently, the remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable".[7]

Legal causation does not, however, apply equally to all claims. "[T]he rules developed in legal causation, such as foreseeability, do not readily apply in [equitable compensation claims]… [While] the common law imports ideas of foreseeability (or reasonable contemplation) and remoteness into its assessment of causality…[those] considerations do not readily enter into Equity's assessment of fiduciary accountability".[8]

The general test

The general test for legal causation (remoteness of damage) is outlined in the leading *Mustapha* decision as follows:

> Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility"…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 defendant…and which he would not brush aside as far-fetched…[9]

As discussed below, that passage contains problematic language.

Overview

Following is an overview of the two basic principles governing the issue of legal causation.

(i) While reasonable foreseeability is the underlying general principle, it is not sufficient that some generic kind or type of harm (such as "property damage" or "bodily injury") was foreseeable to a reasonable person in the position of the defendant. It is necessary that *the actual harm* suffered by the plaintiff (although only to the first level of specificity – this will be explained below) was foreseeable; and

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[6] *Mustapha v Culligan of Canada Ltd.* 2008 SCC 27 at para. 11.
[7] *Mustapha*, at para.12; *Berendsen v Ontario* 2009 ONCA 845 at para. 56.
[8] *Southwind v Canada* 2021 SCC 28 at para. 75.
[9] *Mustapha*, at paras. 12-13 (original emphasis).

(ii) While foreseeability of a *bare possibility* of that actual harm is insufficient, there is no requirement that the harm be foreseeable as a *probability* (in the sense of a greater-than-50% chance of occurrence). Reasonable foreseeability of the actual harm as a "real risk" (which, by judicial definition, is generally a particular form of *possibility*) is sufficient.

Unfortunately, clarity in the case law has been in short supply.[10]

A - FORESEEABILITY OF THE ACTUAL HARM SUFFERED

Two separate foreseeability analyses

As mentioned above, the first of the two hurdles to be overcome when considering the issue of remoteness of damage is the obligation to show that *the actual harm* suffered by the plaintiff was, in all the circumstances, and at a particular minimum level of likelihood (*i.e.* as a "real risk"), a reasonably foreseeable consequence of the defendant's wrongdoing.. (The requirement for the minimum level of likelihood is the second hurdle and is discussed below.) As outlined below, a similar but not identical foreseeability analysis is made when determining whether the defendant owed the plaintiff a duty of care.

(a) Duty of care foreseeability analysis

The nature of the duty of care foreseeability analysis is described in the following comments:

> The reasonable foreseeability inquiry requires the court to ask whether the type of injury to the plaintiff, or to a class of persons to which the plaintiff belongs, was reasonably foreseeable to someone in the defendant's position…The question [in this case] therefore is whether someone in [the defendant's] position would reasonably have foreseen economic loss to the [plaintiffs], or the class of plaintiffs to which they belong, as a result of their negligence.[11]
>
> [I]t is well established that damages must be foreseeable as to kind, but not extent…[12]
>
> [If] the requisite close and direct relationship is shown…the first stage of the *Anns/Cooper* framework will be complete, as long as the risk of injury was reasonably foreseeable.[13]

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[10] In regard to the second principle, see our consideration below of the decision in *Michaluk (Litigation Guardian of) v Rolling River School Division No. 39* 2001 MBCA 45 (under the heading Inappropriate Terminology). As for the first principle it is our view, as explained below (under the heading The Wrong Question was Asked in Hemmings), that the issue was misconstrued at both court levels in *Hemmings*.

[11] *1688782 Ontario Inc. v Maple Leaf Foods Inc.* 2020 SCC 35 at para. 131.

[12] *Hodgkinson v Simms* [1994] 3 S.C.R. 377 at para. 95.

[13] *Nelson (City) v Marchi*, at para. 19.

> Under the *Anns/Cooper* framework, a *prima facie* duty of care is established by the conjunction of proximity of relationship and foreseeability of injury.[14]

The first two of those remarks expressly refer to the need for foreseeability of the generic type or kind of harm or loss that was sustained by the plaintiff, while the latter two appear to indicate, or at least suggest by way of omission, that foreseeability of injury *of any kind* will be sufficient when considering whether the defendant owed a duty of care to the plaintiff. The correct approach is set out in the initial two comments.[15]

(b) Remoteness foreseeability analysis

As in the duty of care analysis, the issue here involves the foreseeability of harm or loss to the plaintiff arising from the defendant's wrongdoing. There is, however, a subtle and perhaps (depending on the circumstances) important difference, one which is outlined in the following statements:

> Remoteness, at its core, turns on the reasonable foreseeability of *the actual injury* suffered by the plaintiff.[16]

> Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on *the actual injury* suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury…[17]

Thus, in the remoteness analysis, the requirement is not (as it is in the duty of care analysis) that the generic type or kind of harm or loss that was sustained by the plaintiff was reasonably foreseeable to the defendant, but rather that *the actual injury* suffered by the plaintiff was reasonably foreseeable (at the "real risk" level of likelihood).

Foreseeable at what level of specificity?

The requirement for reasonable foreseeability of the "actual injury" sustained by the plaintiff is itself ambiguous. It leads to the question: at what level of specificity must the injury have been foreseeable? Should it, for example, have been foreseeable in *Hemmings* not just that brain damage might be suffered, but that (say) frontal lobe brain damage might be sustained? Or, taking it one level further, that a particular type of frontal lobe brain damage might occur? Those questions can continue to be asked down a spiral of levels of specificity. As indicated in the passage from *Mustapha* reproduced above,[18] it appears that the required foreseeability is limited to the first level of classification. The passage shows that foreseeability only of some mental, as opposed to some physical, injury was necessary there. There was no need for foreseeability of the specific type or subtype of mental injury that the plaintiff sustained.

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[14] *1688782 Ontario Inc.*, at para. 30.
[15] *Rankin v J.J.* 2018 SCC 19 at para. 24.
[16] *Deloitte & Touche v Livent Inc. (Receiver of)* 2017 SCC 63 at para. 79 (emphasis added).
[17] *Nelson (City) v Marchi*, at para. 97 (emphasis added), and at para. 99: "Remoteness asks whether *the specific injury* was reasonably foreseeable" (emphasis added).
[18] See footnote 9, *supra*.

Therefore, the requirement in *Hemmings* was reasonable foreseeability of brain damage of some (any) kind or type, regardless of magnitude or severity.[19] (The second issue – the level of likelihood at which brain damage of some kind was required to have been foreseeable – is considered below.)

The wrong question was asked in Hemmings

Insofar as the treating obstetrician was concerned, the trial judge framed the remoteness question as follows: "[W]as it reasonably foreseeable [that the plaintiff] would suffer a cardiac arrest from an anesthetic complication?"[20] That was not, however, the correct question.[21] "It is not necessary that one foresee the 'precise concatenation of events'; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred".[22] Legal causation (remoteness) turns on the type of harm that was foreseeable, and more particularly whether the actual harm ultimately suffered was foreseeable (as a "real risk"), not the manner in which that harm occurred.

As stated in another recent appellate decision, "The question of legal causation is whether *the actual injury* suffered by [the plaintiff] is sufficiently related to the [defendant's] breach."[23] The onus resting with the plaintiff in *Hemmings* was to show that the actual injury that was suffered – brain damage – was reasonably foreseeable (at a "real risk" level of likelihood). There was no need for foreseeability of *the process or method* by which the brain damage occurred – *i.e.* the anesthetic complication and the resulting cardiac arrest.

Although foreseeability of those matters (the anesthetic complication and the resulting cardiac arrest) was not within the scope of the remoteness test, the appeal court laid out a summary of the evidence "on the issue of whether it was foreseeable to a reasonable person in the position of one of the obstetrics defendants, at the time of their respective breaches of the standard of care, that [the plaintiff] would suffer a cardiac arrest arising from an anesthetic complication".[24]

The appeal court (as did the trial judge) misidentified the issue for consideration. The correct issue was whether, in all the circumstances, it was reasonably foreseeable (at the "real risk" level of likelihood) that the plaintiff might suffer some form, and at some level of severity, of brain

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[19] See footnote 12, *supra*.
[20] 2022 ONSC 2674 at para. 111, referred to on appeal at para. 91.
[21] Another example of the incorrect application of the legal causation test can be found in *Borgfjord (Litigation guardian of) v Boizard* 2016 BCCA 317 at paras. 79-88.
[22] *Frazer v Haukioja* 2010 ONCA 249 at para. 51. "It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. In the case at bar I would hold that the damage was of the type or kind which any reasonable person might foresee…The ambit of foreseeable damage is indeed broad": *Assiniboine South School Division*, at para. 17, followed in *Renaissance Leisure Group Inc. v Frazer* (2004) 242 D.L.R. (4th) 229, Ont. C.A. at para. 40 and *Bingley v Morrison Fuels* 2009 ONCA 319 at para. 21. However, although not clearly so stated, a different view appears to have been taken in the dissenting judgment in *Rankin v J.J.* 2018 SCC 19 at para. 84.
[23] *Revelstoke (City) v Gelowitz* 2023 BCCA 139 at para. 82 (original emphasis). See also *Case v Pattison* 2023 ONCA 529 at paras. 15 and 20.
[24] *Hemmings*, at para. 113.

damage in the event of negligent medical treatment, with account being taken not only of their specialized knowledge as physicians, but also their knowledge of the plaintiff's particular condition (her morbid obesity) and frailties (the "multitude of increased health risks…including cardiac arrest" that accompanied such obesity).[25]

The issue was not whether it was foreseeable that there might be an anesthetic complication leading to a cardiac arrest, but that was the basis upon which the appeal court concluded that the plaintiff had not satisfied her onus of proof on the issue of legal causation.[26] For example:

> *If Dr. O'Brien could not anticipate, or reasonably foresee, that a C-section on [the plaintiff] would result in an anesthetic complication and cardiac arrest, how could Nurse San Juan*, whose interaction with [the plaintiff] was limited to a telephone call twelve days before delivery?[27]

This is not to say that a different result would have obtained had the correct question been asked. Because the trial judge (as did the appeal court) asked the wrong question, we do not have the benefit of a finding by him on the correct issue. Not only was there a failure to ask the right question, but it may be that no evidence related to the issue in its correct form was led at trial.

As stated above, it is noteworthy that the anesthetist, the only defendant whose liability was affirmed, apparently did not raise the matter of legal causation on appeal, and no consideration was given there to the issue of remoteness in the claim made against him.

B - "REAL RISK" LEVEL OF LIKELIHOOD

Inappropriate terminology

The term "probability" is ambiguous. Strictly speaking, "probability" refers to something that is "probable". An event or outcome or happening of any sort is "probable" when the chance of that happening is greater than 50% (in lawyer-speak, when that happening is "more likely than not"). If the chance is less than 50%, the occurrence is "possible", not "probable", and therefore is a "possibility", not a "probability".

There is, however, a well-established second use/meaning of the term "probability", one which addresses likelihood generally, including those situations where the chance of occurrence is less than 50%. For example: "There is a 10% probability of rain tomorrow."[28] When used in that sense, "probability" includes possibilities.

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[25] Trial decision, 2022 ONSC 2674 at para. 10. See also paras. 42, 47, 55, 106, 107, 111, 114 and 119 regarding the multitude of risks associated with a pregnant woman's morbid obesity.
[26] *Hemmings*, at paras. 119-27.
[27] *Hemmings*, at para. 123 (emphasis added) and see also para. 124. *Hemmings* might be usefully contrasted to *Hacopian-Armen Estate v Mahmoud* 2021 ONCA 545 at paras. 59-60.
[28] This can also occur, although less frequently, in the reverse situation. You are much less likely to hear a statement such as: "There is a 75% possibility of rain tomorrow."

Ambiguity can sow confusion. How should the term "degree of probability" as used in *Mustapha*[29] be interpreted: (a) to apply only where there is a greater-than-50% chance, or (b) to include chances that are below 50% (*so long as* a specified condition, as discussed below, is met)? As explained hereafter, it is virtually incontestable that the latter is the correct interpretation.

Were the strict meaning applied, there would be an immediate bar to a large number of otherwise worthy claims as to which foreseeability on a greater-than-50% level of likelihood could not successfully be asserted. On the other hand, the employment of a wider meaning – one that may include harm that is foreseeably less-than-50% likely to occur – would be a counterintuitive application.

Mustapha has made it clear that it is the latter interpretation which governs. By adopting the "real risk" level of likelihood test, and then defining "real risk" to mean "[a risk] which would occur to the mind of a reasonable man in the position of the defendant…and which he would not brush aside as far-fetched", the court indisputably included within the scope of recoverable claims those where the foreseeable level of likelihood of occurrence of the harm or damage is less than 50% - perhaps considerably less than 50%. In fact, the "real risk" test virtually ensures that the grey area in which remoteness is a live issue will generally involve the reasonable foreseeability of the possible, not probable, occurrence of the actual harm ultimately suffered. That is because the foreseeability of a probability (in the more-than-50% sense of that term) of the occurrence of that actual harm will almost certainly satisfy the "real risk" test, and will therefore not be an issue requiring consideration.

Mustapha, in other words, decisively rejected the application of the narrower, more literal meaning of the term "probability", and permitted claims which fall within the purview of foreseeable "possibilities" to be advanced, but did so *only on the condition that* those claims satisfy the "real risk" test of level of foreseeable likelihood. There can be little doubt that that is the correct interpretation; otherwise, the adoption of the "real risk" test would be rendered meaningless. The rejection of the requirement for a greater-than-50% chance can, in fact, be seen in the following comment (by Dickson J.A. as he then was) made long before *Mustapha* was decided:

> The test of foreseeability of damage becomes a question of what is possible rather than what is probable.[30]

In addition to being incompatible with the judicially-mandated "real risk" test, any requirement that the actual injury suffered by the plaintiff be foreseeable as a probability (in the more-than-50% sense of the term) would be unduly harsh and punitive.

It appears to have been recognized in *Hemmings* that the word "probability" is not to be applied in the narrow sense of requiring a greater-than-50% chance. Although the bald statement was

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[29] See footnote 9, *supra*. The term is found in para. 14 of the decision as well.
[30] *Assiniboine South School Division (No. 3) v Greater Winnipeg Gas Co.* [1971] 4 W.W.R. 746, Man. C.A. at para. 14, followed in *Canada (A.G.) v Stewart* (1989) 99 N.B.R. (2d) 30, C.A. at para. 20.

made that "Mere possibility that the harm would occur is not sufficient",[31] the court also expressly referred to the "real risk" test, thereby indicating that a *possibility* of the occurrence of the actual harm ultimately suffered *will* be sufficient *if* that foreseeable possibility amounts to a "real risk" as judicially defined, *i.e.* "one which would occur to the mind of a reasonable man in the position of the defendant…and which he would not brush aside as far-fetched".[32] The statement "*Mere possibility* that the harm would occur is not sufficient" (emphasis added) accords with the statement made in *Mustapha* that "*[P]ossibility alone* does not provide a meaningful standard for the application of reasonable foreseeability".[33] The test, in other words, can be satisfied by foreseeable possibilities, *but only if* those possibilities amount to "real risks". A "*mere* possibility", or "possibility *alone*", will not do the trick.

The following comments made in an earlier appellate decision spell out somewhat more clearly the potential for confusion engendered by the use of the ambiguous term "probability":

> I observe that in the law of negligence concluding that something is "probable" does not imply that it is likely to happen. Rather, as indicated by Linden, *Canadian Tort Law*, at p. 117: If there is only a slight chance that an accident will occur, the court may hold that running such a risk is not unreasonable, because "people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities"…In this context, the word "probability" does not mean that an accident must be more likely to happen than not; there need be only a real or substantial risk of harm. One chance of injury in 100 or even 1,000 may suffice.
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> The converse should also be true it seems to me; in other words, there may be "possibilities" that are not so remote or "fantastic" as to be unforeseeable because there is a real risk of harm that can and should be guarded against.
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> …[F]rom a reading of [the trial] judgment as a whole and the evidence…there was a real or substantial risk of harm or injury to the plaintiff. While undoubtedly it would have been better and less likely to cause misinterpretation if [the trial judge] had not used the word "possibility," the inapt use of this word does not constitute by itself, legal error.[34]

The final paragraph in that passage demonstrates the potential for confusion arising from the use of "probability"-related language. After first correctly saying that, in the context under consideration, the term "probability" is *not* to be given its strict meaning of a "more-than-50%" chance, and that a one-in-one-hundred, or even (depending on the circumstances) a one-in-one-thousand, chance of injury might qualify as a reasonably foreseeable "real or substantial risk of harm or injury", the court then said (in the final quoted paragraph) that the use of the term "possibility" was "inapt". That inconsistency – saying first that, depending on the circumstances,

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[31] *Hemmings*, at para. 67.
[32] This was confirmed in *Hemmings* (at para. 67). Although the passage there retained a reference to the term "probability", the confusion potentially caused by the continuing use of that term was diluted by adding the words "or likelihood". On the other hand, the court in *Hemmings* subsequently continued to use the term "degree of probability": see footnote 46, *post*.
[33] See footnote 9, *supra* (emphasis added).
[34] *Michaluk (Litigation Guardian of) v Rolling River School Division No. 39* 2001 MBCA 45 at paras. 21-23.

a level of likelihood less than 50%, perhaps even less than 1% (*i.e.* a possibility, perhaps even a very slim possibility), might satisfy the test, but then saying that a "possibility" is an unacceptable, or at least inappropriate, term for use in the "real risk" context – muddies the waters and results in needless confusion.

It would have been correct to say that the use of a term such as "*bare possibility*" is "inapt",[35] but it was incorrect to say that the use of "possibility" *per se* was "inapt". The correct general statement is that a "possibility" of harm is insufficient *unless* that possibility satisfies the "real risk" level of likelihood test. In fact, the court *did* effectively say that in the preceding paragraph but then, with the comments made in the final paragraph, resurrected the confusion that the use of the ambiguous term "probability" has generated on this issue.

The appropriate term when discussing *all* chances, both those that are greater and those that are lower than 50%, is "likelihood". That, rather than "probability", is the terminology which ought to have been used in *Mustapha*. "Likelihood" is unambiguous and neutral in the sense that it is indifferent to whether the chance in question is greater or less than 50%. Both "There is only a 10% likelihood of rain tomorrow" and "There is a 75% likelihood of rain tomorrow" are equally valid uses of the term. Unnecessary confusion would be avoided were the language in *Mustapha* - "the degree of *probability* [of harm] that would satisfy the reasonable foreseeability requirement" – changed to "the degree of *likelihood* [of harm]".[36]

The ambiguous term "probability" (a term which, it might be noted, was selected by judges, not a legislature) was an unhappy choice of language.

Other descriptions of what constitutes a "real risk"

Other formulations of what constitutes a "real risk" are found in a recent BCCA decision, where the following comment was adopted:

> [A finding that the defendant is not responsible in law for the plaintiff's injuries] could be because the type of injury suffered by the plaintiff was so surprising or unexpected, or the path leading to it so circuitous and bizarre, that it would be unfair to impose liability on the defendant even though those injuries were in fact caused by the defendant's carelessness.[37]

Later in the decision it was said that the harm that had been suffered "was a surprising and highly unlikely event".[38] The comments in *Tellini* echo a remark made in *Mustapha*: "To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable."[39]

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[35] Just as "mere possibility" was, as noted above (footnote 31), found in *Hemmings* to be inappropriate when considered in isolation.
[36] Even simpler would be "the *chance* [of harm] that would satisfy the reasonable foreseeability requirement".
[37] *Tellini v Bell Alliance* 2022 BCCA 106 at para. 49.
[38] *Tellini*, at para. 55.
[39] *Mustapha*, at para. 15.

Whether the formulation adopted in *Mustapha* ("a risk which would occur to the mind of a reasonable man in the position of the defendant…and which he would not brush aside as far-fetched"), or the one endorsed in *Tellini* ("a type of injury…so surprising or unexpected...that it would be unfair to impose liability on the defendant"), is applied, it is evident that this second element of legal causation (a "real risk" level of likelihood) presents a low bar for the plaintiff[40] to clear: "The ambit of foreseeable damage is indeed broad".[41] That is hardly surprising, given that this issue comes into play only after it has already been found that the defendant owed and breached a duty of care, and that its negligence was a factual cause of the plaintiff's harm or loss.

There are, of course, cases (including *Mustapha*) where that bar will not be cleared. One example involved a claim for the payment of legal fees in relation to litigation pertaining to insurance coverage for the primary loss. That expenditure was held to be too remote to be recoverable.[42]

C – OTHER ISSUES

The test is applied objectively, except where the defendant has special knowledge

Mustapha established that the test of foreseeability is administered objectively, meaning that it is applied in the context both of (a) a plaintiff of "ordinary fortitude" rather than "the particular plaintiff with his or her particular vulnerabilities",[43] and (b) a reasonable person in the position of the defendant.[44]

Those comments, however, are subject to the defendant having special knowledge. When considering whether the actual injury suffered by the plaintiff was reasonably foreseeable (as a "real risk") to the defendant, there are two additional factors to be included in that calculation:

> First, "[i]n 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."[45]
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> Second, "[f]oreseeability is assessed in the circumstances of the particular defendant…[W]hether the risk of harm satisfies that degree of probability[46] turns on

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[40] See below regarding the onus of proof on this issue resting with the plaintiff.
[41] See footnote 22, *supra*.
[42] *Jelco Construction Ltd. v Vasco* 2010 ONCA 444 at para. 12. Other cases where the harm was held to be remote in law are *McCormick v Plambeck* 2022 BCCA 219; *Condo Corp. No. 1023525 v Carlisle* 2022 ABQB 209; *Plante v Mackenzie* 2021 BCSC 2468; *Aube v Manitoulin Health Centre* 2024 ONSC 67; *Ma v Abdullah* 2019 ONSC 6781. Damages were held to be remote in the context of a claim for breach of contract in *Saramia Crescent General Partner Inc. v Delco Wire and Cable Limited* 2018 ONCA 519.
[43] *Mustapha*, at paras. 14-15.
[44] See footnote 9, *supra*.
[45] *Mustapha*, at para. 17.
[46] As mentioned above (see heading "Inappropriate Terminology") we believe the term that ought to have been used is "degree of likelihood").

> whether the risk is 'one which would occur to the mind of a reasonable man *in the position of the defendant*…and which he would not brush aside as far-fetched.'"[47]

Those points are particularly significant in the case of medical malpractice claims, where the doctor, nurse, health care professional, or the like will often, if not generally, have specialized knowledge of any "particular sensibilities", or absence of ordinary fortitude, to which the plaintiff might be subject. In such circumstances, the plaintiff might more readily be able to satisfy either or both of the two basic tests: foreseeability of the actual harm suffered, and whether the likelihood of that foreseeable harm amounted to a "real risk".

Onus of proof

The onus of proof rests with the plaintiff in regard to both types of causation, factual and legal. That is trite law insofar as factual causation is concerned.[48] It is tempting to make the argument that the onus on the issue of legal causation should rest with the defendant, because it is effectively the defendant who raises the issue of remoteness of damage as a defence.[49] However, the general principle that the plaintiff bears the onus of proof as to all of the necessary elements of the claim, including the issue of recoverability of the damages claimed, is applicable even if, as here, the onus involves a negative assertion:[50]

> *Once a plaintiff established* the foreseeability that a mental injury would occur in a person of ordinary fortitude…the defendant must take the plaintiff as it finds him for purposes of damages…[That] is a threshold test for establishing compensability of damage at law.[51]

> [I]n order to show that the damage suffered is not too remote to be viewed as legally caused by [the defendant's] negligence, *[the plaintiff] 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.[52]

The difference between "the type of" and "the actual" injury may not be meaningful

In many, perhaps most, instances, this may be a distinction without a difference. Suppose, for example, that a plaintiff's losses include, in addition to loss of ordinary income, loss of a bonus because of the inability to work. The defendant, presumably not having any personal knowledge regarding the plaintiff, would not have known that the plaintiff would sustain that particular loss. Would it be unrecoverable as not being reasonably foreseeable and therefore too remote?

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[47] *Hemmings*, at para. 68 (original emphasis).
[48] *Clements (Litigation guardian of) v Clements* 2012 SCC 32 at paras. 6 and 46.
[49] It is the defendant who argues that the harm "is too remote to warrant recovery", or is "too unrelated to the wrongful conduct to hold the defendant fairly liable": see footnotes 6 and 7, *supra*.
[50] The plaintiff's onus is to show that the harm "is *not* too remote to warrant recovery", or is *not* "too unrelated to the wrongful conduct to hold the defendant fairly liable".
[51] *Mustapha*, at para.16 (emphasis added).
[52] *Mustapha*, at para. 18 (emphasis added).

Given the lack of further information, the answer here is uncertain. The important point, however, is that knowledge of actual loss is not required; the test is not whether the actual injury suffered by the plaintiff was reasonably foreseeable as a certain, a probable, or even a likely consequence of the wrongdoing. The test instead is whether there was a foreseeable "real risk" that that particular injury (the loss of a bonus) might be a consequence of the wrongdoing. More particularly, the application of the test calls for the determination of whether the actual injury sustained (again, the loss of a bonus) would, in the circumstances, "occur to the mind of a reasonable man in the position of the defendant, and whether he would brush aside the risk of it occurring as far-fetched"; or, as alternatively articulated in *Tellini*, whether the loss of a bonus was "a type of injury…so surprising or unexpected...that it would be unfair to impose liability on the defendant".

The general statement that "injury will be sufficiently related to the wrongful conduct if it is a reasonably foreseeable consequence of that conduct"[53] is incomplete, in that it makes no reference to the qualifying foreseeable level of likelihood of the occurrence of that injury, and therefore is misleading. The defendant's lack of reasonable foresight that the actual harm that was ultimately suffered by the plaintiff would, or was likely to, occur is not the governing test on the issue of whether that harm is remote in law. The test is considerably less stringent than that. It is necessary only that the injury in question was reasonably foreseeable in the form of a "real risk" as a consequence of the defendant's conduct.

There will, of course, be situations where the distinction *is* meaningful. Suppose the plaintiff was carrying a batch of rare and valuable stamps at the time of the wrongdoing and injury. Loss of or damage to those stamps would not be recoverable because, although the damage would be of a general type (property damage) that was readily foreseeable, it is unlikely that the actual harm – the loss of or damage to a set of rare stamps[54] – would be viewed to be foreseeable as a "real risk", despite the fact that that test presents a much lower standard than that of probability.

Mustapha is an example of a case where the actual injury – mental harm – did not pass the "real risk" test. That was because, in the circumstances of that case, mental harm was not considered to be foreseeable as a "real risk" for a person of ordinary fortitude. That was so despite the fact that a different type of harm *would* have passed that test: for example, physical illness from having consumed contaminated water undoubtedly would have been seen to be foreseeable as a "real risk" had that been the actual harm suffered by the plaintiff.

Mustapha was explained in a later decision as follows:

> [In *Mustapha*], the claimant's damage was not caused in law by (that is, it was too remote from) the defendant's breach. *Mustapha* thus serves as a salutary reminder that, even where a duty of care, a breach, damage and factual causation are

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[53] *Deloitte & Touche v Livent Inc. (Receiver of)* 2017 SCC 63 at para. 77.

[54] The argument might be made that "the actual harm" was not the loss of or damage to a set of rare stamps, but rather, the loss of or damage to highly valuable objects as a general category, in the same way that the first-level general category of brain injury, rather than (say) frontal lobe brain injury, would have been part of the test in *Hemmings*, and the first-level general classification of mental injury, rather than a specific form of mental injury, was part of the test in *Mustapha*. Absent other information, however, the likely result would still be a finding of remoteness.

> established, there remains the pertinent threshold question of legal causation, or remoteness – that is, whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct…And, just as recovery for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant's negligence, so too will claimants be denied recovery (as the claimant in *Mustapha* was denied recovery) where mental injury could not have been foreseen to result from the defendant's negligence.[55]

Must there be foreseeability of a "serious" injury?

Another bit of loose language in *Mustapha* might be seen to suggest that the foreseeable injury must be one that is "serious":

> It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by [the defendant's] negligence, [the plaintiff] must show that it was legally 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.[56]

However, the inclusion of the word "serious" in that passage was probably no more than a reflection of the fact that the injury suffered by the plaintiff in that case had in fact been serious. It might be noted that the balance of that cited paragraph makes no reference to the need for foreseeability of a "serious" injury. There is a distinction to be made between injuries which would not be described as "serious", but for which damages would nevertheless be recoverable, and those for which damages would not be recoverable because of the adage *De minimis non curat lex*. To require foreseeability of a "serious" injury would unjustifiably cut out a segment of otherwise meritorious claims.[57]

While it is not necessary that the foreseeable injury be "serious", in those situations where the foreseeable harm *is* serious, that can be a relevant factor on the question whether there was a foreseeable "real risk". For example, the foreseeability of a 1% risk/likelihood that an office tower might collapse is far more likely to constitute a foreseeable "real risk" than the foreseeability of a 1% risk/likelihood that an old garden shed might collapse.[58]

D - CONCLUSION

The following question ought to have been asked in the case of each defendant in *Hemmings*:

> In all the circumstances, including the plaintiff's known frailties and the conduct (negligent or otherwise) of others who were also involved in her treatment, was brain

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[55] *Saadati v Moorhead* 2017 SCC 28 at para. 20.
[56] *Mustapha*, at para. 18 (emphasis added).
[57] In *Grant Estate v Mathers* (1991) 100 N.S.R. (2d) 363, S.C.T.D. an action was dismissed because the foreseeable injury from a slight dog bite was minor physical harm and a local infection, whereas the actual result was death. The decision appears to have been based on the false premise that foreseeability of the extent of the injury was a necessary part of the remoteness test. Stated differently, the court failed to apply the "eggshell skull" principle.
[58] See *Funk v Clapp* (1986) 35 B.C.L.R. (2d) 222, C.A. at para. 62.

> damage of some (any) type, magnitude/severity being immaterial, a risk which would occur to the mind of a reasonable man in the position of the defendant and which he would not brush aside as far-fetched?

Put more succinctly (and the next few words capture the essence of this entire paper):

> Was some form of brain damage, regardless of extent, an outcome that, in all the circumstances, would have been foreseeable as a "real risk" to a reasonable person in the position of the defendant?[59]

[59] Even more briefly (probably too much so): Was it reasonably foreseeable that there was a "real risk" of brain damage?