

The Top Five 2007

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



Waddah Mustapha v. Culligan Of Canada Ltd., 2006 CanLII 41807 (ON C.A.)

<http://www.ontariocourts.on.ca/decisions/2006/december/C43429.pdf>

A plaintiff's unconventional reaction to seeing a fly in a water bottle was found not to be 'reasonably foreseeable' harm and the water company was not liable.

In 2001, Waddah Mustapha lived with his wife and family in Windsor, ON where he owned and operated two successful hairdressing salons. At that time, his wife was seven-months pregnant with their second child. The Mustaphas have always maintained a spotless home and cleanliness and hygiene are extremely important to them.

In the 1980's a representative of Culligan Canada Ltd. visited Mr. Mustapha and told him about the purity of its water and how it would benefit pregnant women and children. The representative emphasized how it was superior to city water. Based on this, Mr. Mustapha began using only Culligan bottled water in his business and home.

On November 21, 2001, Ms. Mustapha washed and wiped down the outside of a new bottle of Culligan water (as she always did) to ensure that there were no germs on the bottle before it was put into the water dispenser at their home. As Mr. Mustapha was replacing the bottle he noticed something dark in the water and on closer inspection realized it was a fly. Ms. Mustapha vomited immediately and complained of cramps and abdominal pain. Her husband felt nauseous and vomited later that night.

Following this incident, Mr. Mustapha experienced major depression, anxiety, phobias and was obsessed with the image of the fly in the bottle. He experienced constant anxiety and worry that the health of his family had been compromised by years of drinking Culligan water. He had nightmares, he was unable to drink water, and he was bothered by revolting images of flies and feces. He had difficulty showering and continued to experience constant abdominal pain and discomfort. He lost clients because of the changes in his personality and skills as a hairdresser.

The issue before the trial judge was whether the harm suffered by Mr. Mustapha was "reasonably foreseeable" by Culligan in which case Mr. Mustapha would be entitled to damages. Reasonable foreseeability is a legal concept applied by the courts which looks at whether it is probable that one party's actions will cause harm to the other party and the

wrongdoing party knows (or ought to have known) that harm would result from his/her actions.

At the trial level, the judge found that Mr. Mustapha did suffer harm as a result of seeing the fly in the water. The judge described Mr. Mustapha's reactions as "objectively bizarre", but found that his particular sensibilities and the harm caused to him, were reasonably foreseeable in this situation. The judge considered the fact that Mr. Mustapha came from another country where a higher level of concern for family welfare exists than is usually found in North America. The trial judge also found that his family practiced a higher-level of cleanliness and avoidance of insects than most families. The judge also considered that they were additionally sensitive because his wife was having a high-risk pregnancy. Together, he found these facts to be enough to find that Culligan was liable. The trial judge awarded Mr. Mustapha damages in the amount of \$341,775 for loss of income and general damages associated with the incident.

The main issue at the appeal level was what standard the court should use when deciding what is "reasonably foreseeable". In discussing these issues, the Court of Appeal reviewed case law in Canada dealing with liability for "nervous shock" and "psychiatric injury." The court clarified that the test in finding liability is whether *"it is reasonably foreseeable that a person of normal fortitude and sensibility is likely to suffer some psychiatric harm as a consequence of the careless conduct of the defendant."*

When it applied this test to the case, the Court of Appeal found that the trial judge should have considered what effect the incident would have on someone of normal sensibilities. Instead the trial judge focused too excessively on the effect that the sight of the dead fly had on this particular person. The Court of Appeal found that trial judge had not incorporated an *objective component* when determining whether Culligan owed a "duty of care" to Mr. Mustapha. He should have also asked whether the psychological harm that happened was probable rather than possible. The appeal was allowed and trial judgment was set aside.

This case is currently being appealed to the Supreme Court of Canada. See: <http://scc.lexum.org/en/2008/2008scc27/2008scc27.html>

Discussion Issues:

- What factors influenced the trial judge's decision? The Court of Appeal's decision?
- Do you agree with the decision of the trial judge or the Court of Appeal? Why?
- What is meant by "reasonable foreseeability"?
- What elements does the court look at when deciding what is "reasonably foreseeable"?
- Should the test of what is "reasonably foreseeable" be an objective or subjective test? Why?
- Should the test be different in cases where psychological as opposed to physical harm is involved?
- Some would say that the Mustapha family reacted to the fly in the water in an

unusual and unexpected way. Should a manufacturer or seller be responsible for any extreme or serious harm caused by defective goods (such as those experienced by the Mustapha family), or only what is expected that most people would experience in a similar situation? Where should the courts draw the line of liability for harm suffered by others?