

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.



R. v. Truscott, 2007 ONCA 575

<http://www.ontariocourts.on.ca/decisions/2007/august/2007ONCA0575.htm>

Scientific developments lead to fresh evidence and the acquittal of Truscott almost 50 years after he was first convicted.

On June 11, 1959, the body of 12-year-old Lynne Harper was found in a wooded area close to where she lived in south-western Ontario (two days after she had been reported missing). She had been sexually assaulted and strangled with her own shirt.

On September 30, 1959, her 14-year-old classmate, Steven Truscott, was convicted of first-degree murder and sentenced to hang. His sentence was later changed to life imprisonment. His attempts to appeal this conviction failed.

In the early evening of June 09, 1959, Truscott had given Harper a ride on the crossbar of his bicycle from the vicinity of their school along a county road. The timing and duration of their encounter and what transpired when they were together have been contentious issues since 1959. Truscott has always maintained his innocence. In his defence he alleged that on the night in question, he took Lynne Harper to the intersection of the county road and the highway where he left her unharmed. When he looked back, he saw that a vehicle had stopped and he watched her enter the car. He claims that this was the last time he ever saw Harper.

A 1966 book entitled *The Trial of Steven Truscott* scrutinized the police investigations and the trial. In particular, it suggested that significant “exculpatory evidence” relating to Truscott’s innocence had been ignored at trial. The assertions in this book rekindled public debate about the case, and the federal Minister of Justice at the time referred the conviction to the Supreme Court of Canada for consideration. The Supreme Court of Canada upheld Truscott’s conviction.

After spending ten years in prison, Truscott was released on parole in 1969. He assumed a new name and maintained a low profile until 2000, at which time he publicly proclaimed his innocence and renewed the fight to clear his name, with the assistance of lawyers from the Association for the Defence of the Wrongly Convicted (AIDWYC).

In 2001, Truscott made a further request to the Minister of Justice for a review of his conviction. The Minister ordered an investigation into the matter. In 2004, the investigation report, which revealed new information, convinced the Minister that there was a reasonable basis to conclude that a miscarriage of justice had occurred.

The Minister of Justice referred the conviction to the Ontario Court of Appeal. This Court was asked to look only at the new information available and decide, in light of this new information (“fresh evidence”), whether the results of the trial and the first reference constituted a miscarriage of justice. A panel of five justices of the Court of Appeal heard testimony from seventeen witnesses.

The bulk of the new evidence related to the time of Harper’s death. The time of death was crucial to determining whether Truscott was the murderer. In Truscott’s trial, the coroner had determined, based on his examination of Harper’s stomach contents that her death occurred between 7 and 7:45pm. According to the Crown’s argument, if Harper died between 7 and 8pm, Truscott was the murderer, but if she was murdered after 8pm, he was not.

Between 1959 and the 2007 Reference, a number of scientific developments have emerged to more accurately determine the time of death. In particular, new scientific evidence regarding the reliability of stomach contents to determine time of death cast doubt on the time frame originally given by the coroner for Harper’s death.

The Court of Appeal concluded that this new evidence, when considered in the context of all of the evidence, would give a jury at least a reasonable doubt that Harper died before 8pm. If a jury had reasonable doubt about the time of death, then it would also have reasonable doubt about Truscott’s guilt.

Based on these findings, the Court of Appeal unanimously decided that the conviction of Truscott was a miscarriage of justice and should be quashed (annulled, set aside). Under the *Criminal Code*, where a conviction is quashed on appeal, the court has three options:

1. order an acquittal,
2. order a new trial, or
3. order a new trial and enter a stay of that new trial.

In this case, the Court of Appeal was not satisfied that Truscott’s factual innocence had been established or that an acquittal would be guaranteed in a new trial. Typically, this result would lead to a new trial being ordered. However, in light of the unusual circumstances surrounding the case, including the practical impossibility of a new trial 48 years later, and the fact that Truscott had already served his time in prison, the court chose instead to envision how a new trial might proceed and what evidence would be weighed in coming to a decision. In doing so, the Court determined that in a hypothetical new trial an acquittal would be the most likely result. Based on this conclusion, the Court entered an acquittal.

Following the release of the decision, former Attorney General of Ontario, Michael Bryant, offered an apology to Truscott and stated that the Crown had no plans to appeal the decision.

Discussion Issues:

- In our justice system, the rules of legal procedure and evidence (such as the hearsay rule or the rule regarding disclosure of evidence) change or evolve from time to time. Should persons convicted under old rules be entitled to have their cases reviewed due to a change in procedure? How would you decide?
- What impact did forensic science have on this case? Should a change or evolution in science always entitle a convicted person to a review of his or her case?
- Explain why the Ontario Court of Appeal was asked by the Minister to look only at the “fresh evidence”, and not to review and analyze all of the evidence of the case?
- How would you define a “miscarriage of justice”? Why did the court call Truscott’s conviction a “miscarriage of justice” rather than declaring him not guilty?
- Under the Criminal Code, when convictions are quashed on appeal, the Court has the 3 following options: order an acquittal, order a new trial, or order a new trial and enter a stay of that new trial. Should the Criminal Code allow a “declaration of innocence” as the fourth option?
- How was the re-consideration of the Truscott case and the path it took unique when compared to other cases which are heard by the Ontario Court of Appeal?
- Why is the final resolution of a case (final determination with no further chance of review or appeal) important within our justice system?
- Do you believe Mr. Truscott should be compensated for the time he spent in jail and the fact that he lived with the stigma of a murder conviction for 48 years? If so, how should the compensation be established? If not, why?

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R. v. Bryan, 2007 SCC12

<http://scc.lexum.org/en/2007/2007scc12/2007scc12.html>

A ban on publishing election results on a website prior to the closing of all polls was found to be constitutional and did not infringe s.2(b) of the Charter.

During the 2000 federal election, Mr. Bryan, a software developer, posted the election results from 32 ridings in Atlantic Canada on a website before other polling stations elsewhere in Canada were closed. He was charged with contravening s.329 of the *Canada Elections Act*, which bans the transmission of election results from one electoral district to another before the closing of all polling stations in the second district.

In his defence, Mr. Bryan claimed that s.329 of the Canada Elections Act was unconstitutional because it unjustifiably infringed on his freedom of expression guaranteed by s.2(b) of the *Canadian Charter of Rights and Freedoms*. His claim was dismissed and he was convicted of the offence.

Mr. Bryan appealed this decision, and the summary conviction appeal judge declared that s.329 was unconstitutional and overturned his conviction.

The Crown then appealed the decision. The BC Court of Appeal found that s.329 infringed on freedom of expression but that it was a justified limit on freedom of expression under s.1 of the *Charter*. Under s.1 of the *Charter* the government can constitutionally limit an individual's Charter rights and freedoms if the "limit is prescribed by law, and justified in a free and democratic society". This means that the legislative section in question must be authorized by law. Additionally, the following four criteria must be met:

- the legislation must have a pressing and substantial objective;
- the legislation must be rationally connected to its objective;
- the legislation must impair the right in a way that is as least intrusive as possible; and
- the infringement of the right must be proportional to the objective of the legislation. (The Oakes test)

The Supreme Court of Canada dismissed the appeal but was divided in its reasons.

The majority found that s.329 infringed freedom of expression but that this was justified under s.1 of the *Charter*. It looked at the objectives of s.329 of the *Canada Elections Act* - to ensure informational equality between voters so that they have the same information when

making choices at the polls, and maintain public confidence in the fairness of the electoral system - and found these to be pressing and substantial objectives. The legislation was also found to be rationally connected to these objectives, as to allow some voters access to results in other voting districts would violate the objectives of informational equality and fairness in the electoral system. The majority supported the view that maintaining public confidence in the electoral system requires some method of restraining publication of election results until most or all Canadians have voted. They found s. 329 of the Elections Act to be the most effective and least intrusive way to do this, given the fact that the ban was not a complete ban, and exists only for two to three hours, on election day. The majority stressed that while the ban may be inconvenient for the media, this is not enough to override the important goal of protection of Canada's electoral democracy.

The majority also discussed what type and how much evidence of harm needs to be demonstrated to the courts in order to justify an infringement of s2(b) of the *Charter*. It clarified that when considering questions where it is difficult to measure harm, such as establishing the harm associated with loss of public confidence in the justice system, then the use of logic and reason can be assisted by some social science evidence that shows proof of harm. In this case, considerations of Canadian voters' subjective perceptions of the fairness of the electoral system, in combination with findings of the Lortie Commission report, and the results of the 2005 poll, was enough to establish that information imbalance is a real and significant harm and that Canadians value the principle of information equality.

The dissenting judges found that the s.329 *Elections Act*, publication ban was an excessive response to an insufficiently proven harm and the violation of 2(b) of the *Charter* could not be justified under s.1. They found that the legislative section was not proportional to the level of harm that was shown. In their minds, the social science evidence presented did not convincingly establish the consequences of imposing a ban, or failing to impose a ban on voter confidence in the electoral process or voter behaviour. The dissenting judges found that the infringement of section 2(b) and harm to the core democratic rights of the media to publish timely election results was demonstrated, but the benefits of the publication ban were not.

Discussion Issues:

- Should courts consider social science evidence when addressing complex *Charter* issues? Why or why not?
- Is it fair that election results cannot be transmitted from one electoral district to another until the polls close everywhere?
- What impact do you think information about other polls has on voter decision-making?
- Is the s. 329 of the *Elections Act* ban a fair limit on freedom of expression?
- Are there other ways the government could deal with this issue rather than publication bans during voting periods?
- How will new technology challenge the effectiveness of s.329 of the *Elections Act*?
- Why is it important that Canadian's perceive the election process to be fair? What impact does this have on maintaining a democracy?

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R. v. Teskey, 2007 SCC 25

<http://scc.lexum.org/en/2007/2007scc25/2007scc25.html>

A long delay between a verdict and the judge's reasons for the verdict raised issues about whether the judge engaged in proper legal reasoning and resulted in a new trial.

Mr. Teskey was charged with aggravated assault, break and enter, and theft related to an incident that took place in an apartment building. His trial lasted five days and the evidence presented was complex, largely circumstantial and contained contradictions. The strongest evidence against Mr. Teskey came from an eyewitness. The trial judge found however that the witness' evidence was less reliable due to certain flaws in the photo line-up.

Four months after the trial ended, the trial judge convicted Mr. Teskey on all charges, but did not provide reasons for his verdict. Eleven months later, the judge delivered his written reasons.

The central issue before the courts was whether the trial judge arrived at a verdict before engaging in the necessary legal reasoning and analysis, and whether the delay in giving reasons for the decision was evidence of this.

It is important to know that all judge's decisions are held up to certain legal standards. Upon reaching a verdict, a trial judge is required to give reasons to justify and explain how he or she reached the verdict. The rationale behind this is that an individual convicted of a crime is entitled to know why he or she was convicted and be able to prepare for a possible appeal. Reasons are also necessary for the public to see for themselves whether justice has been done. Reasons that do not adequately explain how a verdict was reached will be "insufficient" and may result in a new trial.

Judge's actions also benefit from a "presumption of integrity". This means judges are presumed to overcome personal bias and partiality and to carry out the oath of their office to the best of their ability. The "presumption of integrity" is only displaced by strong evidence that would lead a reasonable person to believe the reasons delivered were an after-the-fact justification of the verdict instead of the true reasoning that led to the verdict.

In this case, the Alberta Court of Appeal found that the *oral reasons* given 4 months after the trial ended were insufficient. The trial judge only recited the verdicts and did not provide any

grounds supporting them. However, the Court of Appeal decided to re-consider the *written reasons* of the trial judge delivered 11 months later. A majority found his reasons to be appropriate and, on this basis, upheld the convictions.

The Supreme Court of Canada considered whether the Court of Appeal should have looked at the content of the trial judge's written reasons given 11 months later, when deciding if the trial judge acted improperly in coming to his verdict. It also discussed the issues at play when evaluating how a judge comes to a verdict and whether he or she has made a decision improperly.

A majority of the Court emphasized that reasons delivered long after a verdict may cause a reasonable person to suspect that the trial judge engaged in "result-driven reasoning". This means that instead of the reasons reflecting the judge's actual legal and factual analysis leading to a decision, the judge came to her decision and then tailored the reasons to fit his or her already predetermined verdict. The Supreme Court of Canada clarified that a delay between the verdict and reasons for the verdict does not necessarily mean that a judge has shown bias or acted improperly.

The majority concluded that in this case a reasonable person would have suspected that reasons for a verdict, delivered more than 11 months later, did not reflect the real basis for Mr. Teskey's convictions. In addition to the delay, there were other important factors in this case that together called the judge's reasoning into question including: the judge's difficulty in reaching a verdict in the months following the trial; the nature of the evidence that called for a detailed analysis before any verdict could be reached; and the failure of the judge to respond to repeated requests from counsel to give reasons. The majority of the Supreme Court found that, in this case, the Court of Appeal should not have re-considered the trial judge's written reasons. It also disagreed with the Alberta Court of Appeal's decision, and a new trial was ordered.

Several Supreme Court Justices dissented. They found that the delivering of reasons after a verdict does not necessarily mean that the verdict was not carefully thought through. According to the dissent, unless the content of the reasons reflects some absence of judicial integrity, reasons should be accepted as being honest reflections of a decision. Excessive delay should not result in a refusal to even consider the reasons. In this particular case, the dissenting judges found that the reasons responded to the facts and issues at trial and should have been reviewed on their merits by the Court of Appeal.

Discussion Issues:

- Why is it important for trial judges to give reasons? Can you think of a time when you felt unfairly treated because you weren't given a reason for a decision that affected you?
- In this case, the Supreme Court was concerned that the trial judge tailored his reasons to fit his pre-determined verdict. What are some arguments why judges shouldn't engage in "result-driven" reasoning?

- In deciding whether a delay between a verdict and reasons has led to “result-driven” reasoning, what did the court consider? Should it consider anything else?
- Would or should the outcome have been different if the judge gave his reasons 6 months after announcing his decision? What about three months?
- The Crown’s case was not particularly strong in *R. v. Teskey*. Do you think this led to questions about the trial judge’s reasoning in this case? What if the Crown had a stronger case?
- Should a trial judge be required to give more detailed reasons where the accused is charged with a more serious offence? Should more detailed reasons be required if the case is more complex or if the trial takes longer? Why?
- Why is it important that justice not only be done but also that it *appear* to be done?
- Why is the independence of the judiciary from other spheres of government and society important?
- Why does the existence of judicial independence make it more important that trial judges give full reasons?

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R. v. Clayton, 2007 SCC 32

<http://scc.lexum.org/en/2007/2007scc32/2007scc32.html>

A police detention and search of two men at the site of a roadblock in response to a 911 call about handguns was found not to infringe s. 8 and s. 9 of the Charter.

Early one morning, a 911 call was received from a man who reported that he'd seen four men with handguns standing near four cars in the parking lot of a strip club. The four men were described as being among a group of ten "black guys" in the parking area. In response to the call, officers arrived immediately at the scene and set up "roadblocks" at both of the club's two exits. A car that did not match any of the descriptions provided by the 911 caller drove towards the exit. After stopping the car, the officers observed that the two occupants were black males. One officer approached the driver, informed him about the gun complaint, and asked him to step out of the car. The driver protested before getting out of the car, and the officer became concerned for his safety. The passenger was also asked to step out of the car and he unsuccessfully attempted to flee. One officer noticed that the passenger was wearing gloves even though it was not "glove weather". Once the two officers regained control of the scene, they searched the driver and passenger and found they were each carrying loaded, prohibited handguns.

At the trial level, the judge found that the initial roadblock and stop of the accused's car was lawful, but that the detention of both men and subsequent search for handguns violated their ss. 8 and 9 rights under the *Canadian Charter of Rights and Freedoms*. Section 9 is the right to be free from arbitrary detention or imprisonment. Section 8 is the right to be secure against unreasonable search and seizure. When a judge finds that evidence has been obtained in violation of a *Charter* right such as ss. 8 or 9, the judge can exclude the evidence based on section 24(2) of the *Charter*. Under s. 24(2), evidence that was obtained in a manner that denied or violated a *Charter* right will be excluded if admitting the evidence would bring the administration of justice into disrepute. In other words, if admitting of the evidence would affect the fairness of the trial, the evidence will generally be excluded.

In this case, the trial judge admitted the guns into evidence under s. 24(2) of the *Charter* and both men were convicted. However, at the Ontario Court of Appeal the evidence of the handguns was excluded and the two men were acquitted on all charges.

Issues before the Supreme Court of Canada included whether the officers legitimately exercised their common law powers when detaining and searching the two men and whether

the common law power violated the *Charter* and, if so, whether it would have been saved under s.1 of the *Charter*.

Police are granted certain duties and powers that exist independently of statute and are therefore called “common law” duties and powers. Police duties, at common law, include the preservation of the peace, the prevention of crime, and the protection of life and property. Police powers are used to carry out these duties where necessary. These powers are not without limits. A balance must be struck between the competing interests of the police duty and the liberty interests of individuals. More specifically, the police’s interference with liberty must be necessary given the risk and must not interfere with the liberty interest more than is necessary to address the risk.

In this case when considering the police exercise of common law power, a majority of the Supreme Court of Canada disagreed with both the Court of Appeal’s and trial judge’s decisions. It found that the officers had lawfully exercised their common law powers when they detained and searched the accused and found no violation of ss. 8 or 9 of the *Charter*. In determining whether the police officers had properly exercised their powers in relation to a detention, the Court considered the nature of the situation including the seriousness of the offence, the information known to the police about the suspect or the crime, and whether detention was reasonably tailored to the risk in the circumstances. Searches which are incident to an investigative detention can be justified if the officer believes, on reasonable grounds, that her safety, or that of others, is at risk.

The majority of the Supreme Court of Canada concluded that, in this case, the initial roadblock detention was reasonably necessary to respond to the seriousness of the threat to safety and was responsive to the circumstances known to the police. If the police only had the authority to stop vehicles which matched the description given by the 911 caller, this would impose an unrealistic burden on police, inconsistent with their duty to respond in a timely manner to the threat to safety. The continued detention of the two men by their car was also found to be justified. It was reasonable for the police officers to believe that the accused were implicated in the offence under investigation. Both accused came from the scene of the reported crime, had left the scene within minutes of the call, and matched the 911 caller’s description. Finally, the officers’ safety concerns justified the searches of both men.

Justice Binnie wrote a minority opinion in which he agreed with the majority’s end result but disagreed with their reasoning and analysis. The minority found that the police’s strategy to stop all cars without any criteria for selecting the drivers to be stopped was a valid exercise of their common law powers but was contrary to s.9 of the *Charter*. Justice Binnie then considered whether a detention by a roadblock in response to a 911 call was a reasonable limit on rights under s. 1 of the *Charter*.

Section 1 of the *Charter* provides that rights are not absolute and can be constrained by reasonable and justifiable limits as long as those limits are prescribed by law. In *R. v Oakes* the

Supreme Court formulated a test to determine whether an infringement is justified under s.1 of the *Charter*. This test requires that the objective behind the state action be sufficiently important to warrant overriding a *Charter* right. The means used by the state must be reasonable and demonstrably justified in the circumstances.

Justice Binnie applied the *R. v. Oakes* analysis and found that the police's actions were a reasonable limit on rights under s. 1. First, protection of society from illegal handguns in public places is clearly a pressing and substantial public purpose. The roadblock was a rational response to the 911 call and minimally impaired the accused's rights to be free from arbitrary detention. The police should not be required to rely on an unknown 911 caller's ability to recognize vehicles. It also would not have been practical for police to assume that the people reported by the 911 caller would necessarily leave in the vehicles described by the caller. Finally, the beneficial effects of the roadblock exceeded its negative effects.

Justice Binnie also found that the searches did not violate s. 8 of the *Charter*. By the time the passenger was asked to step out of the car, the police had sufficient individualized suspicion to detain and search him. Although the driver was perhaps less suspicious, it would have been unrealistic to treat them as unconnected.

Discussion Issues:

- Why shouldn't police be allowed to stop and search *anyone* that could possibly be guilty of some wrongdoing?
- Should police be allowed to ask questions and detain someone even if they don't have reasonable and probable grounds to arrest or charge that person? What potential issues arise if police were not able to detain individuals for investigative purposes or ask questions?
- How do we balance an individual's rights under the *Charter* in a way that allows the police to do their job and guess right under pressure? What guidelines should exist for police?
- Would or should the result have been different if this had happened at the Air Canada Centre?
- Would or should the result have been different if the 911 caller had been very specific and had identified only one car?
- Would or should the result have been different if the caller had seen marijuana instead of guns?
- Would or should the result have been different if the caller did not give the 911 operator any specific details about the men or their vehicles?
- Justice Binnie stated that Parliament should consider and enact measures setting out the particular circumstances in which investigative detention should be permitted. Do you agree? If so, what do you think would be appropriate? (see paragraph 75 of the case for similar legislation enacted in other countries)
- Why is evidence that is obtained in violation of s. 8 or s. 9 rights sometimes excluded? Should this happen?

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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?