



THE GR COURT DOCKET

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NERVOUS SHOCK CLAIM DISMISSED: DIVISIONAL COURT AGREES THAT JUROR IN CRIMINAL TRIAL FAILS TO MEET TEST

By **Stephen Thiele**

Under Ontario law a person who suffers a physical or psychological injury as a result of a crime of violence is entitled to make a claim for compensation under the *Compensation for Victims of Crime Act*. However where the person only suffers a psychological injury, he or she must meet the test for “nervous shock”.

In the recent case of *Wilson v. Criminal Injuries Compensation Board*¹, the Divisional Court determined that the Board had properly dismissed an application for compensation made by a juror who allegedly suffered post-traumatic stress disorder as a result of being exposed to a horrific crime during a two-month murder trial.

BACKGROUND

The facts of this case disclosed that the murder trial was commenced a few years after the crime had been committed and that during the trial explicit evidence was viewed and heard.

The jury convicted the accused of murder and he was sentenced to life imprisonment.

However afterward the juror allegedly began to experience emotional difficulties. She was diagnosed with post-traumatic stress disorder and an anxiety disorder that arose out of her experiences as a juror.²

In assessing her application for compensation as a victim of crime, the Board advised the juror that it intended to dismiss her application without a hearing on the basis that she did not meet the requisite criteria for nervous

shock and that her application therefore had no reasonable prospect of success. The juror disagreed and filed submissions to oppose the intended dismissal of her application.

Based on the material before it, including the juror’s submissions, the Board concluded that the application should be dismissed because there was a lack of relational proximity, locational proximity and temporal proximity between the juror and the murder. The juror was not related to the actual murder victim, the juror had not been at the scene of the crime when it occurred or immediately afterward, and the time between the actual commission of the crime and the juror’s disorders were years apart.

The Board also determined that the juror’s application was absurd on the grounds that a jury member was not a victim of crime.³

JUROR’S ARGUMENT

The juror argued that the Board’s decision to dismiss her application was incorrect.

She contended that the Board had misapplied the test for nervous shock by relying upon cases that were no longer good law. She submitted that based on the Supreme Court of Canada decision in *Mustapha v. Culligan of Canada Ltd.*⁴ that proximity factors were no longer considerations with respect to nervous shock claims, and that, in order to recover for nervous shock, a claimant need only prove that it was reasonably foreseeable that a person of ordinary fortitude would suffer mental injury in the circumstances and that a recognized psychological injury was suffered.

The Divisional Court disagreed.

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A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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COURT DECISION

Applying the test established by the leading case of *Anns v. London Borough of Merton*⁵, it was determined that in order for the juror to succeed she was first required to establish that there existed a duty of care in the circumstances of her case.

The existence of a duty of care could be proved by asking (1) whether there is a sufficient relationship between the parties such that it was reasonably foreseeable that carelessness on the part of the wrongdoer might cause damage to the other party; and (2) whether there were any considerations that ought to limit the scope of the duty, the class of persons to whom the duty is owed, or the damage.⁶

Under the first part of the test, a finding of proximity sufficient to create a *prima facie* duty was required. As stated by the Supreme Court of Canada in *Cooper v. Hobart*:

On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that “proximity” is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories.⁷

With respect to claims for psychiatric injury where there was no physical injury, the Board had concluded that proximity factors informed foreseeability. It noted that the juror was not a primary or direct victim of a violent act and that all of the proximity factors were absent.

The Divisional Court concluded that the Board correctly enunciated the legal test and correctly applied the law. In the case of the juror, she did not have locational proximity, temporal proximity or relational proximity, and therefore could not meet the legal test for nervous shock.

A motion for leave to appeal has been filed by juror.

The Board was represented at the Divisional Court hearing by David Fine, who recently retired from Gardiner Roberts LLP.

David was assisted in the preparation of the written argument presented to the Divisional Court by Stephen Thiele.

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1. 2015 ONSC 7876
 2. *Ibid.*, at para. 3
 3. *Ibid.*, at para. 7
 4. [2008] 2 S.C.R. 114
 5. [1978] A.C. 728 (H.L.)
 6. *Wilson*, *supra*, at para. 17
 7. [2001] S.C.J. No. 76 at para. 31

