Mental harm following negligent acts: a new dialogue between Quebec’s civil law and Canada’s common law?

Louise Belanger-Hardy

As is well-known, Canada is a country where two legal traditions cohabit: the civil law in the province of Quebec and the common law in the rest of the country. In the sphere of private law, although there may be no real convergence between the traditions, there is a dialogue which contributes to the enrichment of both legal systems. This paper considers the dialogue between the common law and the civil law regarding compensation for mental harm (emotional, psychological or psychiatric in nature) caused by a negligent act.

Civil law systems are often looked upon with envy by common lawyers who struggle to make sense of the convoluted rules courts have devised to limit recovery of damages. The “civiliste” tradition is perceived as being more open and less restrictive than the common law when it comes to the compensation of victims of mental harm. The suggestion is made that the common law could learn from what is perceived to be a more flexible approach.

Starting from the only common law modern Supreme Court of Canada decision dealing with mental harm in a tortious setting namely Mustapha v Culligan Ltd, this paper follows the subsequent treatment of the decision not only by common law courts but also by Quebec courts. Indeed, perhaps surprisingly, Mustapha has found its way in recent civil law judgments. This phenomenon raises interesting questions about points of divergence and convergence in the manner in which mental harm is apprehended by the two legal systems. For instance, why should civil law courts feel the need to rely on Mustapha and its obiter dicta about a minimal threshold of compensable harm? In addressing questions such as this one, the paper notes that broader issues come into play including definitional challenges around notions of harm, damage and damages. In the end, Quebec’s courts’ recent interest in the Supreme Court’s analysis in Mustapha may not necessarily indicate a trend towards a broader convergence of the law regarding mental harm claims in Canada. However, perhaps it is an indication that a meaningful dialogue between Canada’s two legal traditions can be beneficial to plaintiffs in both systems when they seek to assert their right to fair compensation.