

Legal Test For “Psychological Injury” For Primary and Secondary Victims

- Reported Case:** *Kotai v. Queen of the North (Ship)*
- Citation:** 2009 BCSC 1405
- At Issue:** What is the test in BC for compensable “psychological injury” for primary and secondary victims?
- The Court:** British Columbia Supreme Court
- Judgment Rendered:** October 14, 2009
- Factual Summary:** On March 22, 2006, the Queen of the North sank en route from Prince Rupert to Port Hardy. Two passengers were killed in the accident. The rest of the passengers escaped with minor or no physical injuries but some witnessed the actual sinking and many alleged psychological injury resulting from the experience. A number of passengers and their dependants brought this class action against the defendants, suing under the *Marine Liability Act*, S.C. 2001, c. 6 (the “MLA”).
- Decision:** Mr. Justice Joyce provided a comprehensive review of English and Canadian case law regarding the legal test for compensable psychological injury. He rejected the position of the plaintiffs’ counsel that recent decisions had eliminated the requirement for a “recognizable psychiatric illness” in order to award damages for psychological injury. On the contrary, notwithstanding *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, he found at para. 69 that “there remains a requirement that [secondary victims] prove not just psychological disturbance or upset as a result of the defendant’s negligence but also that their psychological disturbance rises to the level of a recognizable psychiatric illness.”
- Furthermore, at para. 71 Joyce J. found that any difference between primary victims (those actually involved in accidents) and secondary victims (those who simply witness accidents) “that may exist goes to the duty/foreseeability analysis and not to the question of the damages threshold.” Therefore an accident must also cause a recognizable psychiatric illness to primary victims before their damages for psychological injury are compensable.