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This paper emphasizes the importance of cultural competence for tort law by analyzing the Federal Court's decision in Haj Khalil v. Canada. Given that this symposium in honour of Rose Voyvodic's life and work is entitled "Re-Imagining Access to Justice," this paper asks "how do the principles of cultural competence allow us to think about the facts of the Haj Khalil differently. In particular, what would a cause in fact analysis look like if it were informed by the principles of cultural competence?" My analysis proceeds by "reading the silences" or focusing on the unstated assumptions and unexplored elements of Haj Khalil's story to bring into focus factors relevant to factual causation which remain largely unexplored or undervalued by the Federal Court. An examination of the facts that framed Haj Khalil's claim against immigration officials through a culturally competent lens would open the possibility of a different understanding of causation as it arises on the facts of the case. While Canadian courts have emphasized the importance of social context for fair judgment, they have not fully come to grips with the implications of social context for judicial decision-making. This is particularly the case within negligence law which remains vexed by the need to maintain an objective standard while simultaneously recognizing the importance of context and circumstance to particular claims.

Cet article souligne l'importance de la compétence culturelle pour le droit de la responsabilité civile délictuelle en analysant le jugement Haj Khalil c. Canada de la Cour Fédérale. Vu que ce symposium en honneur de la vie et de l'œuvre de Rose Voyvodic est intitulé « Re-Imagining Access to Justice », cet article pose la question « comment les principes de compétence culturelle nous permettent-ils de concevoir différemment les faits de Haj Khalil. En particulier, comment se présenterait la causalité si l'analyse des faits était éclairée par les principes de compétence culturelle? » Mon analyse s'effectue en « interprétant les silences » ou en portant l'attention sur les suppositions inexprimées et les éléments inexplorés du récit de Haj Khalil afin de mettre au point des facteurs pertinents à la causalité factuelle qui restent en grande partie inexplorés ou sous-évalués par la Cour Fédérale. Un examen des faits sur la base desquels était formulée la réclamation de Haj Khalil contre les officiers de l'immigration dans une optique faisant preuve de compétence culturelle ouvrirait la possibilité d'une compréhension différente de la causalité telle qu'elle se pré-

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sente basée sur les faits en l'espèce. Quoique les cours canadiennes aient souligné l'importance du contexte social pour des jugements équitables, elles ne sont pas complètement venues aux prises avec les implications du contexte social pour la prise de décision juridique. C'est particulièrement le cas pour le droit de la négligence qui demeure embêté par le besoin de maintenir une norme objective tout en reconnaissant l'importance du contexte et des circonstances d'une réclamation particulière.

“cultural identifications, together with life experiences and histories, influence the ways in which those who hold them see the world”¹

“people are contextual as much as law is...”²

“Cultural elements are everywhere apparent in the practice and products of tort law”³

I. INTRODUCTION

Tort law can only deliver justice if decision-makers exercise cultural competence; one cannot see the true suffering of the other by looking through a uni-cultural lens. A uni-cultural lens blurs the differences between people's lived experiences and obscures the decision-maker's capacity to understand the suffering of others, thereby silencing that suffering. This silencing in turn undermines the aims of tort law. Understanding, judging and justice require cultural competence. My own thinking about tort law's potential to produce justice is inspired by the life and work of Rose Voyvodic. By speaking with Rose and reflecting on her contributions to law and legal scholarship, I have come to realize that cultural competence, as she articulated it, offers an important dimension to developing a theory of tort law that takes justice and difference seriously.⁴ This paper emphasizes the importance of cultural competence for tort law by analyzing the Federal Court's 2007 decision in *Haj Khalil v. Canada*.⁵ The Federal Court held

1 Rose Voyvodic, “Advancing the Justice Ethic Through Cultural Competence (2005)” online: The Law Society of Upper Canada <www.lsuc.on.ca/media/fourthcolloquiumvoyvodic.pdf> [Voyvodic, “Advancing the Justice Ethic”].

2 Claire L'Heureux-Dube, “Social Context Education” online: National Judicial Institute <<http://www.nji.ca/nji/Public/category.cfm?CategoryID=12>>.

3 David M. Engel & Michael McCann, “Introduction: Tort Law as Cultural Practice” *Fault Lines* (Stanford: Stanford University Press, 2009) at 2.

4 Several scholars have advanced thinking about difference in tort law along different axes. See e.g. Mayo Moran, *Rethinking The Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003) and Desmond Manderson, *Proximity, Levinas and the Soul of Law* (Quebec City: McGill-Queen's University Press, 2006). For a fascinating discussion of the role of difference and social context in law more generally, see William L. Twining, “Introduction: Wandering Jurist,” *Law in Context: Enlarging a Discipline* (Oxford: Oxford University Press, 1997), at 1-25.

5 *Haj Khalil v. Canada* (F.C.), 2007 FC 923, (2007), [2008] 4 F.C.R. 53 [*Haj Khalil*]. The Federal Court had previously dealt with Haj Khalil's case in *Khalil v. Canada* (Minister of Citizenship and Immigration) 2001 FCT 1266 Date: November 16, 2001. The Federal Court of Appeal

that immigration officials did not owe a duty of care to Haj Khalil and could not be held accountable for the unreasonable delay in processing her application for permanent residency. It also ruled that the delay could not have caused the damages she suffered, including severe depression, anxiety, and the loss of companionship with her husband.⁶

Given that this symposium in honour of Rose's life and work is entitled "Re-Imagining Access to Justice," this paper asks "how do the principles of cultural competence allow us to think about the facts of Haj Khalil differently. In particular, what would a cause in fact analysis look like if it were informed by the principles of cultural competence?" To that end, this paper explores the factors relevant to factual causation, which remain largely unexplored or undervalued by the Federal Court, despite the value attached to them by the plaintiff, Nawal Haj Khalil, herself. I conclude that an examination of the facts that framed Haj Khalil's claim against immigration officials through a culturally competent lens would open the possibility of a different understanding of causation as it arises on the facts of the case. While the court finds that Haj Khalil's suffering was caused by a move to Ottawa and the loss of community connections in Windsor and could not consequently be attributed to her immigration status, I argue that Haj Khalil's move allowed her to maintain family unity and fulfil a role that she highly valued as mother to her children. If the court had carefully listened to Haj Khalil's narrative, it might have understood the move to Ottawa in a different light and ultimately questioned its own causation analysis.

To succeed in her negligence action, Haj Khalil must demonstrate that immigration officials owed her a duty and that their breach of that duty constituted the proximate cause of her suffering. I believe that cultural competence proves relevant to all the elements of a negligence action. However, I have chosen to focus on the factual causation analysis advanced by the Court in *Haj Khalil v. Canada* because factual causation *prima facie* appear impervious to the influence of culture. That cultural competence can generate an alternative understanding of factual causation underscores its significance for the negligence action in general.

This paper takes as muse Rose Voyvodic's professional and personal passions for access to justice, non-citizen's rights, motherhood and cultural competence and pays tribute to Rose Voyvodic's dedication to access to justice. This paper hopes to contribute to Rose's legacy while recognizing that her absence leaves a large gap in both legal scholarship and in the personal and professional lives of those who knew her and relied on her unflinching ability to "speak truth to power." This paper also seeks to illustrate a point Rose made repeatedly – cultural competence is not simply a courtesy extended to people by the legal professional. It is an obligation demanded by our professional ethics and by the social demand for a legal system that dispenses justice without fear or favour.⁷ Finally,

approved of the 2007 the Federal Court decision in both reasoning and results in *Haj Khalil v. Canada*, 2009 FCA 66 (CanLII). Leave to appeal has been sought at the Supreme Court of Canada.

6 *Ibid.* at para. 254.

7 Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2006) 84 Can. Bar. Rev. 563 at 587 [Voyvodic, "Understanding Cultural Competence"].

this paper represents an exercise in “self-monitoring” and evaluation. Rose recognized that the quest for cultural competence is always incomplete because there is always more to learn and understand.⁸ While Canadian courts have emphasized the importance of social context for fair judgment, they have not fully come to grips with the implications of social context for judicial decision-making. This is particularly the case within negligence law which remains vexed by the need to maintain an objective standard while simultaneously recognizing the importance of context and circumstance to particular claims. My analysis of *Haj Khalil v. Canada* proceeds by “reading the silences” or focusing on the unstated assumptions and unexplored elements of Haj Khalil’s story. By reading the case differently and exploring what might have been, I hope to stimulate debate and reflection about role of culture not only for individual plaintiffs like Nawal Haj Khalil and her family but also for the law of negligence.⁹

II. NAWAL HAJ KHALIL

I first learned about Nawal Haj Khalil from Rose Voyvodic. Rose had represented Ms. Haj Khalil shortly after she had moved to Windsor, Ontario as a stateless Palestinian seeking refugee status in Canada. Tortured in Syria for writing in support of the Palestinian Liberation Organization (PLO), Haj Khalil had come to Canada in March 1993 with her two children hoping for refuge and a chance to start a new life. Nawal Haj Khalil arrived in Windsor and applied for refugee status.

Born and raised in Syria, her political activities brought her in conflict with

⁸ *Ibid.* at 577.

⁹ I have consciously taken Rose Voyvodic’s cultural competence framework as my inspiration and determined to keep her analysis front and centre of my own approach. However, I must acknowledge the important contribution of other scholars to advancing social context analysis in tort law or insisting on the need to be attentive to lived reality as part of assessing tort law’s impact and potential as an access to justice strategy. For example, Elizabeth Adjin-Tettey, “Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses” (2007) 25 Windsor Y.B. Access Just. 95 and Zoe Oxaal, “Removing That Which Was Indian From The Plaintiff: Tort Recovery For Loss of Culture and Language in Residential Schools Litigation” (2005) 68 Sask. L. Rev. 367 put their analysis of sexual abuse claims in social context; Denise Reaume and Shauna Van Praagh have asked us to pay attention to the gendered dimensions of incest cases “Family Matters: Mothers as Secondary Defendants in Child Sexual Abuse Actions” (2002) 17 S.C.L.R. (2d) 179-219 and in S. Beaulac, S.G.A. Pitel, J.L. Schulz, *The Joy of Torts* (Markham, Ontario: Butterworths, 2003) 179-219; Mayo Moran argues that the reasonable person standard has to be reconceived along egalitarian lines or risk promoting privilege in the name of abstraction. Moran, *supra* note 4. Jeff Berryman “Accommodating Ethnic and Cultural Factors in Damages for Personal Injury,” (2007) 40 U.B.C.L. Rev. 1-40. These scholars do not always use the term social context but I see their work as falling under this rubric because they emphasize that objectivity does not mandate abstraction and does not presume sameness. Health practitioners have also underscored the importance of cultural competence for care delivery and as a means of avoiding legal liability. See Avonté Campinha-Bacote, & Josepha Campinha-Bacote “Extending a Model of Cultural Competence in Health Care Delivery to the Field of Health Care Law” (2009) 13:2 Journal of Nursing Law 36. At the same time, some of the literature, as Engel and McCann point out, adopts culture as a thing to be added onto decision-making which is otherwise neutral in its cultural orientation. Culture, in short, is treated as an extralegal influence on decision-making when in fact all analysis within tort law is radically cultured. *Supra* note 3 at 3.

the regime of President Hafez Assad. In 1978, she was detained, beaten and tortured for four months for distributing pamphlets deemed insurgent by the Syrian government. She left Syria and as a stateless Palestinian, lived in various Arab countries. Assuming the pseudonym Amal Ghanem, she wrote for several papers setting out the position of the PLO and highlighted the Palestine quest for national self-determination. Despite her travels, Haj Khalil would return to Syria occasionally to visit her parents. This practice stopped in 1990 after security officials in Damascus summoned her for questioning about smuggling the names of prisoners out of Syria.¹⁰ In 1995, her employer wanted to assign her to either Syria or Iraq. She refused both assignments. With political tensions between the PLO and Syria mounting, Haj Khalil and her two children found themselves in Canada alone.

While immigration officials determined that Haj Khalil faced a well founded fear of persecution and was designated a Convention refugee, the *Immigration Act* stipulated that her permanent residency and that of her children, as dependants, could be denied for national security reasons under sections 34(1) (c) and (f) if immigration officials deemed them to be members in a “terrorist organization.”¹¹ As a reporter for the PLO, Haj Khalil was determined to fall into that category.¹² However, section 34(2) of the immigration legislation allowed the Minister to exempt individuals from the application of section 34(1) and Haj Khalil sought such a Ministerial exemption on the basis that she was not actually a threat to Canada.¹³

Haj Khalil filed an application for permanent residency on January 1995 which sat in limbo for over a decade. She subsequently brought an action in the Federal Court claiming, inter alia, that immigration officials were negligent in processing her application. Specifically, she claimed that the delay in processing her application caused her significant harm, including psychological distress.¹⁴ Dividing Haj Khalil’s application for citizenship into two stages, the Court determined that the delay was ultimately unreasonable. The first stage ran from her application until the decision by a Federal Court judge in November 2001 requiring immigration officials to reconsider its inadmissibility decision.¹⁵ Haj Khalil requested that Citizenship and Immigration Canada [CIC] render a decision within two weeks in light of the Federal Court order. CIC replied that “the file would be handled expeditiously.”¹⁶ The Federal Court characterized the time it took to review Haj Khalil’s file during this first stage as protracted but not unreasonable.

10 *Haj Khalil*, *supra* note 5 at para. 52.

11 *Immigration Act*, R.S.C., 1985, c. I-2, s. 19 (as am. by S.C. 1992, c. 49, s. 11), 53 (as am. *idem*, s. 43; 1995, c. 15, s. 12).

12 The PLO is treated as a terrorist organization for the purposes of immigration proceedings but is not a listed entity pursuant to the Criminal Code or other Canadian anti-terrorism laws. See “Currently Listed Entities” online: Public Safety Canada, <<http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp>>.

13 *Haj Khalil*, *supra* note 5 at para. 18-19.

14 *Ibid.* at para. 5-6.

15 It is worth noting that counsel for Haj Khalil in 2001 expressed concern over the long delay that the family has already endured in the processing of their application.

16 *Haj Khalil*, *supra* note 5 at para. 29.

Stage two of Haj Khalil's interaction with CIC coincided with the Federal Court reconsideration order. The Court found that immigration officials acted unreasonably during this period. For example, in March 2003, CIC decided to "park" approximately 120 Ministerial Relief cases while the department cleared its file backlog in other areas. Haj Khalil's file was included in the parked cases despite earlier assurances that her case would be treated expeditiously. Summing up immigration's decision-making, the Federal Court noted "It seems to be stating the obvious to say that the delay during stage two has been inordinate and unreasonable"¹⁷ and "it cannot be right that a Convention refugee's application for permanent residence, submitted more than 8 years prior, and returned by the Court for redetermination, would not only be put on the back burner, but would be virtually ignored."¹⁸ The judge concluded, "I find the delay was inordinate and unreasonable. In a word, it was inexcusable."¹⁹ The delay affected Haj Khalil's life and the lives of her children in manifold ways. My focus will be on the psychological impact of the delay on Haj Khalil herself.

Haj Khalil contends that she has suffered chronic depression, stress and psychological harm (among other things) as a result of the delay in processing her permanent resident status. Relying on the testimony of her psychiatrist, Dr. John Dimmock, the Court noted that Haj Khalil "suffers from dysthymia (long-term depression) which he described as "chronic sadness." If exacerbating factors present, there could be episodes of major depressive disorder...Ms. Haj Khalil had experienced episodes of major depressive disorder and could be suicidal during those times."²⁰ She had trouble finding employment and, because she did not qualify for OSAP, she could not attend college to improve her skills and better herself. Nonetheless, she managed to support her family through part-time work in Windsor and remained busy raising her children and volunteering. Haj Khalil, for example, served as a board member of a community organization, Windsor Women Working With Immigrant Women, and also served as an interpreter for Legal Assistance of Windsor.²¹

According to her testimony at trial, she began feeling depressed sometime around 2001. But, 2003 seemed to bring more hardship. In August 2003, Haj Khalil moved to Ottawa to be with her son who had moved to that city to attend university.

Her stated reason for moving to Ottawa was to be with her son 'no matter what' until she felt that he 'is old enough to handle his own life.' She was not willing to separate from her children. (Transcript 657, 658.)²²

17 *Ibid.* at para. 116.

18 *Ibid.* at para. 121.

19 *Ibid.* at para. 124.

20 *Ibid.* at para. 215.

21 She had been taking courses on a part-time basis in the evenings at St. Clair College in Windsor.

She completed the courses (which were part of the "networking program" just before the move to Ottawa). *Ibid.*

22 *Haj Khalil, supra* note 5 at para. 228.

Her situation deteriorated after the move to Ottawa. She had re-located to Ottawa because supporting her children proved her first priority but she found that few around her understood this priority and she was loathe to explain her health and immigration problems to others. She was simply tired of it all. The transcripts cited by the Court in its reasons suggest Haj Khalil's despair.

And I don't know; I understand that I'm staying home doing very honourable job for my children, helping them as much as I can. But since it is not considered, this job, very honourable to certain people, well, I will keep myself inside my home avoiding any contact with anybody. And I did. I am home. Can't do any job. Even if I want, my health won't help me. I have a lot of problems. So it is better to go around my treatment first. When I am okay. Nobody will be happy to hire a depressed, distressed person.²³

In Ottawa, she felt that she was "unable to work anymore." Again, the Court transcripts convey her despair.

Since then, actually, I kepted (sic) to myself. I stayed home. I didn't want anyone to know what is my status in the country, how long I been in the country. I don't want to tell anybody. How I live, I don't want to tell anybody. Why I'm there, I don't want to tell anybody. I can't. I feel if I will be questioned one more time I will kill myself. So it's better to stay home²⁴

Haj Khalil confided to her attending psychiatrist in Ottawa, Dr. Dimmock, that she had contemplated suicide. But, she said that she would not follow through on her thoughts of suicide because "she believes that her children still need her."²⁵

Although the Court found that immigration officials had caused unreasonable and inordinate delay in the processing of Haj Khalil's permanent residency application,²⁶ the Court dismissed Haj Khalil's negligence claim on two main grounds. First, Justice Layton-Stevenson concluded that delay cannot form the basis of a cause of action in negligence because immigration officers do not owe a duty of care to Haj Khalil.²⁷ Second, and more importantly for our present purposes, Justice Layton-Stevenson held that even if a duty of care could be found, Haj Khalil had not established that the psychological harm from which she suffered had been caused by the protracted immigration proceedings and the resultant instability and insecurity created in her life.

²³ *Ibid.* at para. 227.

²⁴ *Ibid.* at para. 226.

²⁵ *Ibid.* at para. 62.

²⁶ *Ibid.* at para. 124.

²⁷ *Ibid.* at para. 170-208.

Causation in tort law is determined on a balance of probabilities using the “but for” test.²⁸ The existence of non-tortious causes that contribute to the harm does not negate the defendant’s liability at the causation stage of the analysis. As long as the defendant’s negligence was a cause of the plaintiff’s suffering, and not necessarily the cause, cause in fact is established.²⁹ Rejecting Haj Khalil’s argument that delay caused her suffering, the Court partially attributed Haj Khalil’s suffering to her decision to move to Ottawa from Windsor.³⁰ Justice Layton-Stephenson wrote

It is not possible for me to find, on the basis of the evidence before me that Ms. Haj Khalil’s depression arises from or was exacerbated by the delay in the processing of her application. By her own evidence, she acknowledges that her condition deteriorated dramatically since the move to Ottawa. That move was made voluntarily for the reasons stated by Ms. Haj Khalil. She has not functioned well since her arrival in Ottawa, but it has not been established that her deterioration is the result of delay in the processing of her application.³¹

In short, space rather than time caused Haj Khalil’s suffering. Her immigration status represented “a factor, but one of a multitude of less significant factors that contributed to, rather than caused, the depression”³² and “immigration was a small part of the overall process.”³³ Justice Layton-Stephenson effectively concluded that but for the move to Ottawa, Haj Khalil would not have suffered the harms of which she complained. “But for” the move to Ottawa, Haj Khalil would not have suffered the depression of which she complained; Haj Khalil, it is implied, should have stayed in Windsor.

III. BUT FORS AND CULTURAL COMPETENCE

In reaching this conclusion, Justice Layton-Stevenson relied on the testimony of Haj Khalil’s attending psychiatrist. The Court interpreted Dr. Dimmock to conclude that Haj Khalil’s depressed psychological state had little to do with her immigration status and more to do with her move to Ottawa, her deteriorating physical health, and her decision to litigate her claim. Indeed, the Court

28 *Resurfice v. Hanke* [2007] 1 S.C.R. 333, 2007 SCC 7 at par. 21: the basic test for determining causation remains the “but for” test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that “but for” the negligent act or omission of each defendant, the injury would not have occurred. *Blackwater v. Plint* [2005] 3 S.C.R. 3, 2005 SCC 58 at para. 78, “[t]he rules of causation consider generally whether ‘but for’ the defendant’s acts, the plaintiff’s damages would have been incurred on a balance of probabilities.”

29 *Atbey v. Leonati*, [1996] 3 S.C.R. 458.

30 *Haj Khalil*, *supra* note 5 at para. 232. The Court also attributed Haj Khalil’s suffering to her decision to pursue litigation against the government of Canada and her fibromyalgia.

31 *Ibid.* at para. 232-233.

32 *Ibid.* at para. 233.

33 *Ibid.* at para. 219.

appeared to accept Dr. Dimmock's assessment that the litigation resulted in a "secondary gain" for Haj Khalil.³⁴ Secondary gain is an "external motivator" or as Dr. Dimmock suggested that Haj Khalil's symptoms, which approached Post Traumatic Stress Disorder [PTSD], were really a secondary gain that she used to unconsciously justify or benefit from her limited existence. The underlying theme of Dr. Dimmock's testimony is that depression in Convention refugees is no different from depression in the general population.³⁵

Although he had been a psychiatrist for more than 30 years, Dr. Dimmock had virtually no experience in immigration matters. He was declared an expert witness in depression, PTSD and the intersection of fibromyalgia and psychiatry.³⁶ Despite this glaring hole in his qualifications, he offered an opinion about the reasons for Haj Khalil's depression and the Court accepted his assessment. The Court refused to allow additional testimony that might have provided a specific understanding of the mental health of refugees and also placed little weight on the testimony of Janet Dench, Executive Director of the Canadian Council of Refugees [CCR].

Janet Dench testified that the CCR had identified delay in landing refugees as a major concern of psychological and settlement problems and had further noted that those whose applications were delayed for alleged security reasons were among those most affected by delay.³⁷ In short, Ms. Dench provided the court with social context evidence.³⁸ The Court might have used this as an opportunity for cultural competence. However, the Court noted that CCR had not specifically addressed the specific situation of Haj Khalil; thus, Ms. Dench's reports and testimony were deemed not relevant to the cause-in-fact analysis. The fact that the Court rejected social context evidence and preferred the evidence of Dr. Dimmock gives us an important clue about the Court's orientation. It is not thinking about cultural competence as an important feature of legal decision-making. Herein lies the problem.

While Janet Dench might not have been able to speak to Haj Khalil's psychiatric condition directly, her testimony did offer the Court the relevant social context against which to assess Haj Khalil's experiences and suggested the proper questions that had to be asked. The Court might have approached the task be-

34 *Ibid.* at para. 220: Dr. Dimmock's objective was to "change negative behaviour" by means of cognitive restructuring. The litigation (related to immigration) in which Ms. Haj Khalil was involved, in his view, undermined the therapeutic process from the outset. He testified that the litigation, and the secondary gain issues associated with it, interfered with therapy and hindered Ms. Haj Khalil's progress. He observed a correlation between her "legal situation" and "fluctuations in depression." Overall, it was his opinion that the litigation situation lead to secondary gain issues in terms of Ms. Haj Khalil's symptoms and if the litigation were over, one would see more clearly that any "PTSD symptoms are secondary gain issues."

35 *Haj Khalil*, *supra* note 5 at para. 221.

36 *Ibid.* at para. 212.

37 *Ibid.* at para. 167.

38 The Supreme Court has stressed the importance of social context for understanding facts in other scenarios. See for example *R. v. S.* (R.D.) [1997] 3 S.C.R. 484 and *R. v. Lavallee* [1990] 1 S.C.R. 852. Social context and cultural competence are closely connected. Social context refers to the social, political and economic forces which shape the way in which law interacts with people's lives. Cultural competence allows individuals to understand social context.

fore it with a different framework and asked, how would a reasonable refugee claimant have reacted to the inordinate delay in the processing of her application? While Ms. Dench might have not been able to assess the reasonableness of Haj Khalil's reactions or speak to the nexus between the plaintiff's harm and the defendant's negligence, her testimony at the very least reinforced the need for further expertise. Instead, the court approaches Haj Khalil as an a-contextual, abstract individual, stripped of the experiences and values which affected her most profoundly and which framed her decision-making. It accepts as its subject the largely a-historic figure offered by a psychiatrist with little experience of expertise in immigration issues. Dr. Dimmock considered Haj Khalil's immigration status irrelevant to her recovery because immigration "was not a psychiatric condition."³⁹ Haj Khalil's experiences of torture, dislocation and uncertainty give rise to symptoms to be cured and overcome rather than a context to be understood. While such an approach may make therapeutic sense, it does not make legal sense because it does not comport to the basic tenets of modern tort law.

Tort law takes context into consideration in several ways. While it assumes an objective standard, modern negligence doctrine does not presume a purportedly abstract and a-contextual person as its archetype.⁴⁰ Objectivity plays itself out in context. Canadian courts have, for example, adopted the modified objective standard which assesses reasonableness of conduct through the lens of a reasonable person sharing the plaintiff's and/or defendant's characteristics and circumstances.⁴¹ They have accepted the "thin skull rule" in relation to physical harm,⁴² alongside the modified thin skull rule for psychological harm;⁴³ and considered the role of social context and culture in the assessment of damages to a successful plaintiff.⁴⁴ Moreover, while the Supreme Court has stressed the importance of ensuring that evidence supports the plaintiff's theory of causation and has indicated that psychological harms may be deemed too remote to permit recovery, this does not change the basic need to understand the plaintiff in determining if a nexus exists between the plaintiff's harm and the defendant's negligence. In the circumstances giving rise to Haj Khalil's claim, such understanding cannot be had absent social context. Nothing in tort law mandates that we should altogether ignore the differences that set us apart from others and their particular narrative. On the contrary, reasonableness and foreseeability, the

39 *Haj Khalil*, *supra* note 5 para. 222.

40 See e.g. *Arndt v. Smith*, [1997] 2 S.C.R. 539 where the majority of the Supreme Court adopted the reasonable person standard and stressed that a modified objective standard is to be used in assessing causation while three members of the Court posited that the subjective standard provided the proper test for assessing causation.

41 See e.g. *Vaughan v. Menlove* (1837), 3 Bing. N.C. 467, 132 E.R. 490.

42 See e.g. *Smith v. Leech Brain & Co.*, [1962] 2 Q.B. 405, [1961] 3 All E.R. 1159.

43 See e.g. *Mustapha v. Culligan of Canada Ltd.* 2008 SCC 27, 293 D.L.R. (4th) 29.

44 See e.g. *MacCabe v. Westlock Roman Catholic Separate School District No. 110*, Alberta Court of Appeal (2001) 293 A.R. 41, 9 C.C.L.T. (3d) 259. For a critique of cases which adopt social context to reduce damage assessments on the basis of gender see Elizabeth Adjin-Tettey, "Replicating and Perpetuating Inequalities in Personal Injury Claims through Female-Specific Contingencies" (2004) 49 McGill L. J. 309-348 and Martha Chamallas, "The Architecture of Bias: Deep Structures in Tort Law" (1998) 146 U.Pa.L. Rev. 463.

twin concepts which underline negligence doctrine, depend in the first instance upon an appreciation of the plaintiff's actual narrative.⁴⁵ We can only judge whether a consequence is foreseeable or a particular reaction reasonable when we actually understand that narrative. Understanding does not mean that we seek to fit the narrative within our own square hole of experiences. Rather, it means we seek to know the other's suffering as experienced by them through their own cultured interaction with the world.⁴⁶ Understanding does not necessarily lead to vindicating the narrative through damages as various mechanisms in tort prevent it from compensating all suffering.⁴⁷ Understanding, however, constitutes the necessary first step to informed judgment.

The following sections of this paper argue that an understanding of the lived reality of Haj Khalil as suggested by the CCR testimony and Haj Khalil's own words are relevant to a determination of factual causation. Once we understand the value that Haj Khalil attached to family and her children, we can see that the conclusion that Haj Khalil's depression was occasioned by her move to Ottawa requires greater scrutiny. The Court fails to consider that moving to Ottawa allowed Haj Khalil to keep her family together and failed to fully consider the impact and significance of family for Haj Khalil. Had the court treated Haj Khalil as a contextualized individual and understood the evidence through a culturally competent lens, it could have understood Haj Khalil differently, evaluated her move to Ottawa in a different light and ultimately brought different considerations to bear on its causation analysis. In short, cultural competence offered the possibility of understanding and, to invoke a Levinasian metaphor, coming face to face with the authentic plaintiff herself.⁴⁸ Instead, we are presented with a distorted image of Haj Khalil and a selective account of her suffering which is translated and relayed in doctrinal form through a causation analysis which ultimately serves to lay all blame for Haj Khalil's suffering upon Haj Khalil herself.⁴⁹ I worry about the court's analysis not out of a concern about the final substantive result per se or simply because the court failed to remedy Haj Khalil's suffering. Clearly, tort law cannot respond to all suffering and it is not an insurance scheme. A plaintiff can only recover for those harms that can be attributed

45 The need to understand the authentic plaintiff and recognize the reasons behind her suffering is a necessary step regardless whether one adopts the modified objective test for causation or the subjective test articulated in *Arndt v. Smith*, *supra* note 40.

46 "Culture is not some 'thing' outside tort law that may or may not influence legal behaviour and deposit artifacts in the case law reporters. Rather, culture and tort law are inseparable dimensions of a single domain in which risk, injury, liability, compensation, deterrence and normative pronouncements about acceptable behaviour are crucial features." Engel and McCann, *supra* note 3 at 3.

47 Duty and remoteness play this role in particular. See Mustapha, *supra* note 43 for the Supreme Court of Canada's discussion of remoteness and psychological harm.

48 For an analysis of Levinas' significance for tort law, see Desmond Manderson, *Proximity, Levinas and the Soul of Law*, *supra* note 4.

49 Canadian courts have historically marginalized the suffering of racialized claimants by defining legal issues so as to sideline the racism at the heart of the dispute. See e.g., *The King v. Desmond* (1947), 20 Maritime Provinces Reports 297 (Nova Scotia Supreme Court) and *Christie v. York* (1939), [1940] S.C.R. 139.

to the defendant.⁵⁰ However, before one can fully assess the harm caused by the defendant's conduct, particularly where psychological and emotional harm is at issue, one has to understand the person seeking justice. Understanding the person seeking justice requires cultural competence.

IV. ROSE VOYVODIC'S CULTURAL COMPETENCE FRAMEWORK

Culture refers to the "experiential frames of meaning through which social life is understood and transacted."⁵¹ Cultural competence requires us to make visible the frames of meaning through which we and others decide, act and are acted upon. As Rose Voyvodic reminds us, cultural competence means putting the complainant at the centre of the analysis so that we do not make assumptions about the people whose lives are subject to our judgment. Rose envisioned and promoted a broad definition of cultural competence. Cultural competence

is understood to refer not only to religious, racial or ethnic customs, beliefs, values and institutions, but also the social groups created by disability, class, nationality, age, 'sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin colour or a variety of other characteristics.' Through these cultural perspectives, individuals 'may perceive events and ideas in different ways. (footnotes omitted)⁵²

Rose recommended that we always be aware of our own privilege rather than assuming that our stories are the same as those whose legal claims come before us. To that end, she endorsed "five habits" for culturally competent practitioners.

First, Rose insisted that we take note of the differences between the lawyer and client and second that we map out the case, taking into account the different cultural understandings of the lawyer and the client. Third, she demanded that we brainstorm additional reasons for puzzling client behaviour. Fourth, she suggested that we identify and solve pitfalls to lawyer-client communications to allow the lawyer to see the client's story through the client's eyes; and finally, she emphasized that we examine the previous failed interactions with the client and develop pro-active ways to ensure those interactions do not take place in the future.⁵³ Because of her commitment to students and clinical legal education, Rose's prescriptions were articulated with lawyers in mind. However, they apply equally well to all actors engaged in the litigation process from judges to expert witnesses to the parties in the dispute.

Cultural competence, at its core, requires active listening and taking the other seriously. Rose might concede that we may not fully understand the socio-

⁵⁰ *Resurface*, *supra* note 28.

⁵¹ Engel and McCann, *supra* note 3 at 3.

⁵² Voyvodic, "Understanding Cultural Competence," *supra* note 7 at 569-570.

⁵³ *Ibid.* at 586.

political reasons for Haj Khalil's value system. However, this does not prevent us from taking seriously that Haj Khalil's values may be different from our own and diligently looking for clues as to why she might legitimately react to the world differently than others might react. Such clues were available in *Haj Khalil v. Canada*. These habits of a culturally competent practitioner, actively exercised would have allowed for a different understanding of Haj Khalil.

The Court's predominant image of Haj Khalil was someone who has made poor choices in life: she moved from Windsor to Ottawa and she sought to sue the government rather than seeking out an administrative remedy while all along making excuses for herself. The next section of this paper questions such imagery by offering an alternative view of Haj Khalil by trying to understand her identity as a Palestinian refugee and a mother ("take note of the differences" and "map out the case taking into account the different cultural understandings"). It highlights how the Court advanced an image of Haj Khalil as a bizarre individual when her reactions to life events, viewed through a culturally competent lens, were in fact perfectly reasonable and foreseeable ("brainstorm additional reasons for puzzling client behaviour"). Moreover, by recalling that we are all cultural creatures, it warns against understanding Haj Khalil through a uni-cultural lens ("identify and solve [communication] pitfalls... see the client's story through the client's eyes"). While such a lens might seem natural and neutral to the decision-maker, it in fact is highly value-laden, and results in a fractured understanding of the justice-seeker, doing violence to her narrative and plaintiff's authentic self. Inspired by Rose's life example and guided by her scholarship, I propose that we imagine Haj Khalil differently by putting her story into a larger social context and paying careful attention to her own words. Specifically, I argue that the Court fails to understand Haj Khalil as a mother and further refuses to acknowledge her need to support her children and keep her family together even though Haj Khalil repeatedly made this point throughout her testimony. These aspects of Haj Khalil's identity are silenced and shoved aside in the causation analysis offered by the court.

I suggest that we listen more carefully to Haj Khalil and bring the Court silenced elements into sharper focus in our causation analysis. I set out the factors related to Haj Khalil's identity and link these to the causation analysis using the principles of cultural competence. By bringing the elements of Haj Khalil's identity to the fore, I hope to critically analyze the conclusion that the move to Ottawa and Haj Khalil's health caused her psychological suffering. Understanding Haj Khalil's suffering through a culturally competent lens, means understanding that remaining in Windsor would not have saved Haj Khalil from suffering.

V. HAJ KHALIL AS DISPLACED PALESTINIAN

It is not that the Court ignored Haj Khalil's identity as a Palestinian – far from it. Haj Khalil's membership in the PLO is at least part of the basis on which she is alleged to be inadmissible to Canada. But, her Palestinian identity and roots are recognized only selectively and only to advance the allegations made against her. Her Palestinian identity is deemed relevant to assessing her status under im-

migration legislation but not to the Court's torts inquiry. Haj Khalil's Palestinian identity is addressed as an object of inquiry – something upon which administrative officials and courts can pass judgment through security assessments – but it is not something the Court takes seriously in assessing the harm she suffered. In effect, Haj Khalil's identity becomes the property of the decision-maker who sits in judgement of her while Haj Khalil herself is stripped of ownership over her identity and the things she considers important to law's understanding of her as a person who is seeking to be made whole again are marginalized.

What would a torts analysis which took Haj Khalil's identity seriously look like? As a starting point, one would listen carefully to Haj Khalil's statements about the impact of insecurity and instability upon her psyche and outlook on the future. The Court notes such statements throughout its judgment.

Ms. Haj Khalil stated that her life was in limbo...She feels that she does not have "ownership of [her] own destiny." She asked, "what is the future? One week, two weeks, my life...50 years, 100 years? It is inhumane to leave people like that" (Transcript, p. 479-480).⁵⁴

While the Court recognized that Haj Khalil sought stability in her life, the Court does not appear to appreciate the full significance of that instability for Haj Khalil as a Palestinian refugee. We need not accept Haj Khalil's statement about causation – she bears the onus of proof on the balance of probability – but her statements should point us to the need to inquire further into those claims to ensure that they have been sufficiently considered. Cultural competence would dictate that the impact of the delay be assessed relative to the heightened and urgent need for stability and closure that comes with the refugee experience in general and the Palestinian refugee experience in particular.

That Haj Khalil experienced clinical depression and psychological distress from the unreasonable delay in decision-making by immigration officials and the attendant uncertainty is consistent with the fears, experiences and reactions of refugee claimants in general. Haj Khalil is a member of the oldest refugee population and stateless population in the world. The life of Palestinian refugees is marked by legally sanctioned instability and insecurity. The negative inter-generational mental health effects of a life of uncertainty and exile on Palestinian refugees has been well documented.⁵⁵ Understood as a Palestinian refugee who has faced turmoil and trauma caused by uncertainty rather than an abstracted individual with no experiences at all, Haj Khalil's yearning for a decision that would take her out of the state of limbo in which she currently lives is perfectly understandable. Cultural competence therefore allows us to see the impact of delay on Haj Khalil's life through a different lens than the one adopted by the Federal Court.

Cultural competence would also dictate that considerable weight be attached

⁵⁴ Haj Khalil, *supra* note 5 at para. 59.

⁵⁵ See e.g. Abdel Hamid Afana, "Palestinian Refugees: Mental Health Situation" in Judy Kuriansky, ed., *Terror in the Holy Land: inside the Anguish of the Israeli-Palestinian Conflict* (Westport, Connecticut: Praeger Publishers, 2006) 31-42.

to Haj Khalil's desire to keep the family together both physically and legally. Haj Khalil's concern about her family is repeatedly sidelined in the Court's analysis. For example, the Court roundly criticized Haj Khalil for refusing to sever her application for residency from that of her children and thereby delaying the files of her children.⁵⁶ Any harm, which flowed from this decision, according to the Court, derived purely from her private decision to not sever the applications. The Court appears to make no inquiry into why Haj Khalil attached such importance to a seemingly simple procedural matter. This decision has to be understood against the context of Palestinian displacement and quest for recognition of their history, narrative and identity as a people. The *sin qua non* of Palestinian disenfranchisement is that families are divided through the application of law.

Wherever Palestinians find themselves, they are divided from their families by laws, which have diminished both the fact and the significance of the Palestinian family, particularly the extended family which plays a central role in Palestinian social ordering. In short, Palestinian families around the world have been divided by forces which are beyond their control and have struggled to keep themselves together despite those forces. For example, an international border designated by the Camp David peace treaty bisected the town of Rafah between Egypt and the Gaza Strip. A military fence topped with barbed wire – now an international border – separates homes of extended family members. These homes still sit metres from each other but family members cannot visit each other.⁵⁷ Decades of lobbying eventually saw approximately 5 000 people repatriated to the Gaza Strip to join their families in 2000.⁵⁸

Family, moreover, holds a central place in Palestinian culture and politics. The Palestinian exile experience compounds the need for familial connection as a way of preserving individual and collective identities and the family holds an important place in memory/identity preservation. Various researchers have documented this reality. Mahmoud Issa, for example, identified the importance of connection to one's family and culture in interviewing 700 residents of a Palestinian village destroyed in 1948. Issa explained

...strong awareness of one's heritage, when interlinked with a state of permanent exile, helps to strengthen the individual's psychological and mental balance, as well as his (sic) ability to cope with the refugee experience and huge loss suffered that

56 *Haj Khalil*, *supra* note 5 at para. 247-248: "...when it was suggested to Ms. Haj Khalil that she could sever the children's applications from her application, she refused. It was only through the intervention of her present counsel that she ultimately agreed to allow the children to apply separately. The children's lack of physical contact with their father is not substantially connected to the delay in the processing of their applications for permanent residence. Their applications were granted after severance from their mother's application." It is difficult to ignore that Haj Khalil must have little trust in the immigration system which had, years earlier in 2001, promised her a quick turn around of her file.

57 See Human Rights Watch, Razing Rafah online: Human Rights Watch <<http://www.hrw.org/reports/2004/rafah1004/index.htm>>.

58 The area is known as "Canada Camp" because of the Canadian contingent stationed there at the time of partition. UNRWA, Rafah Camp, online: United Nations <<http://www.un.org/unrwa/refugees/gaza/rafah.html>>.

nothing can compensate for. It is also a struggle to preserve the history of the self against the ravages of time and forgetfulness.⁵⁹

Understood through a cultural lens, Haj Khalil's instance on keeping her family together takes on a different hue. Born in 1950, two years after the dislocation of approximately half the Palestinian population from historic Palestine and prevented from seeing her own parents as a result of her political activism, Haj Khalil, not surprisingly, struggled to keep her family together in Canada "no matter what." Rather than taking her emphasis on keeping her family together seriously, however, the Court determined that her decision to move to Ottawa to be with her son proved unnecessary and irresponsible.

VI. HAJ KHALIL AS A PALESTINIAN MOTHER

When I read about Haj Khalil, I imagine a proud, strong and extremely brave woman. She endured torture and political instability for the sake of her convictions. She accepted the risk of re-facing the wrath of the Syrian authorities by smuggling the names of prisoners for the sake of their humanity and to expose the indignities and human rights abuses in that country. She arrived in a new country, Canada, without English language skills but managed to complete her high school equivalency while volunteering to better her community and raising two well adjusted, successful children who have thrived despite the barriers facing them. She did this without the luxury of permanent legal status in Canada. But, this is not the dominant image presented by the Court. On the contrary, one would have to read carefully between the lines to see this Haj Khalil.

The predominant image of Haj Khalil presented to us in the Federal Court's judgment is someone who imposes a burden, someone with little left to contribute, even to her children. She is, in short, not really useful to her children, and, in the court's view she comes across as someone who lacks mothering skills. In a particularly painful passage, the Court considers it necessary to isolate a single paragraph from thousands of transcript pages to highlight the words of Haj Khalil's own daughter, Acil. The Court noted,

Acil's evidence was that lately her mum had been "crazy"; she was "irrational and irritated and just all the time stressed out" (Transcript, p. 1762). She described her mum as pathetic and claimed that, in the past, she had been "like a mum", was active and happy (Transcript, p. 1764). Acil does not like to leave the house for a night out because she is aware that her mum is stressed out. She thinks that if she were to move out (for university) that her mum will kill herself (Transcript, p. 1765).⁶⁰

59 Mahmoud Issa, "Resisting Oblivion: Historiography of the Destroyed Palestinian Village of Lubyā" (2003) 21:2 *Refuge* 17.

60 *Haj Khalil*, *supra* note 5 at para. 231.

One can imagine that Acil is lamenting the change in her mother, given all that she has endured. But, this excerpt from Acil's testimony is presented not for the sake of demonstrating how the passage of time has taken its toll on Haj Khalil. The passage is woven into the Court's reasons specifically and explicitly to reinforce the conclusion that Haj Khalil caused her own suffering and the suffering of her family by deciding to move to Ottawa. Acil's testimony thus is treated like an indictment of Haj Khalil character and behaviour. Haj Khalil's greatest value as articulated in her own words – the honour she possessed by directly caring of her children “no matter what” – is thus taken away from her in one fell swoop. Her status as a worthy and honourable mother is diluted and denied. She is instead “crazy” “irrational” “irritated” and “pathetic.” The Court thus symbolically divides Haj Khalil's family through its analysis.⁶¹

In diluting the importance of motherhood to Haj Khalil and her children, the Court not only discounted the place of Palestinian narrative in shaping the importance of family connections but also discounted the particular role that Palestinian mothers play in that narrative. Palestinian mothers across contexts have struggled to keep their families together against all odds. Their role in holding family together has high personal and collective value. For example, a study of the demolition of Palestinian homes by the Israeli military stressed that home demolition did not simply destroy the home as shelter but also struck at the heart of Palestinian women's identity.

...the home is where women most acutely invest their time, build their safety nets, advance their talents and hobbies, carry on their work of looking after the family, and carrying on with their life responsibilities. Once the home is destroyed, women are left with the metaphoric and symbolic burdens—which are no less real than the material loss of a safe place to live—of not having a sense of safety and place of belonging, a source of memories.⁶²

Surely a move from Windsor to Ottawa would not carry such profound consequences for many people. Yet, Haj Khalil attached great significance to the move. Understood against its cultural and political context, Haj Khalil's decision to move to Ottawa allows her to continue being a mother in the way she knows best – through a Palestinian cultural prism which says that mothers take care of their families regardless of the perceived cost. Indeed, the cost of not taking care of one's family – especially in the face of power structures which appear intent on scattering its members – will always be higher than the perceived cost of taking care “no matter what.” We, I think, need to know more about Haj Khalil than

61 For a discussion of how race impacts upon assessments of motherhood, see Marlee Kline, “Race, Racism, and Feminist Legal Theory” (1989) 12 *Harv. Women's L.J.* 115.

62 Nadera Shalhoub-Kevorkian, “House Demolition: A Palestinian Feminist Perspective” (Sunday 30 December 2007), online: Resisting Women <<http://www.resistingwomen.net/spip.php?article272>>.

the Court's judgment allows.

It might be that Haj Khalil's decision to move herself and her daughter to Ottawa to be with her son might have represented both a defensive and a good offence strategy. The move to Ottawa meant that she would keep her family together – a defensive tactic that would prevent its further disintegration. It also meant that she would go on the offence and take positive measures to preserve her own status and identity as a mother. As Haj Khalil put it “I understand that I'm staying home doing very honourable job for my children, helping them as much as I can.” This in turn gave her a reason to continue living. Indeed, she made this point quite explicitly to her psychologist and to the Court.⁶³

I do not want to suggest that motherhood exhausted Haj Khalil's identity. Far from it. She was clearly an articulate and dedicated writer and a passionate advocate. She was also a determined woman who emigrated to a new culture with a will to succeed and the desire to teach her children.⁶⁴ Yet, she was stripped of facets of her identity by her lack of status. English was her second language and she could not improve herself through career or study the way she had hoped. No wonder that motherhood took on such an important space in Haj Khalil's life. Yet, Haj Khalil's emphasis on family and caring for her children as an integral part of her identity is dismissed by the Court in the process of privatizing Haj Khalil's harm and decontextualizing her decision-making, rendering the Ottawa move a product of irrational choice rather than a question of personal, familial and cultural preservation. In discounting Haj Khalil's insistence on the value of supporting her children and keeping her family together, the Court noted that she had left volunteer opportunities, a part-time job, and opportunities for future employment behind. The Court effectively ruled that Haj Khalil made the wrong decision by attaching more weight to her (particular, culturally defined) role as mother than to her place within the Windsor community. In so doing, it appears to have substituted its own culture and values for that of Haj Khalil's clearly articulated identity.

VII. HAJ KHALIL AS NON-CITIZEN

Rose Voyvodic invited us to bear in mind that we are all cultural creatures. She recognized that the cultures of both the rights claimant and the decision-maker must be made visible and relevant to the decision-making process. The decision-makers' culture, broadly understood as the set of experiences and assumptions that inform one's thought processes, must be revealed to test whether cultural stereotypes and biases have infiltrated the decision-making. The failure to test one's assumptions opens up the possibility of bias because popularly held stereotypes can invade decision-making in ways which are invisible to the decision-maker who does not examine his or her own context. Non-citizens face deeply entrenched stereotypes.

⁶³ Haj Khalil, *supra* note 5 at para. 227.

⁶⁴ Haj Khalil's desire to learn and succeed in Canada was most evident to me in her desire to partake in volunteering, a practice that is not well established in the Middle East, and to encourage her children to do the same. *Supra* note 5 at para. 597

One of the most widespread stereotypes about immigrants is that they seek to take advantage of Canada's social welfare system. The Ontario Court of Justice recently recognized that widespread stereotyping of immigrants as people who welcome an excuse not to contribute to the system can underline legal arguments in subtle ways that may often be unconscious or unclear to the person perpetuating the stereotype. Commenting on a defence lawyer's address to a jury in a personal injury claim brought by a non-citizen, the Court took exception to the lawyer's appeal to anti-immigrant bias.

What the offensive portions of the jury charge appealed to was an anti-immigrant sentiment that is unfortunately known to exist in some segments of our society, a sentiment that depicts immigrants as no more than a drain on Canada's social service network. By drawing a distinction between the kind of immigrants who built this country and the kind of immigrants who take advantage of a car accident to "write their ticket," defence counsel was playing on a negative stereotype of the immigrant as a leech on our system and seeking to have the jury place the plaintiff within that stereotype. That is the very essence of an inflammatory and improper jury address.⁶⁵

The spectre of stereotyping raised itself in *Haj Khalil*. She too is depicted as an immigrant who seeks to take advantage of the Canadian system. Through psychiatric testimony, she is presented as someone who is taking advantage of litigation, which the Court notes is state-funded,⁶⁶ to justify her inability to function and seek work. While Dr. Dimmock is careful to indicate that the secondary gain was unconscious, his testimony at best served to undercut the seriousness of Haj Khalil's full range of psychological symptoms, and at its worst, suggested that her symptoms served an ulterior purpose – justification of her unemployment. The Court concludes:

Whether I reject Dr. Dimmock's opinion that Ms. Haj Khalil's "pain" was the primary cause of her depression or not, the evidence does not establish that her depression was caused or exacerbated by the delay in the processing of the claim.

The Court's use of quotations around the word "pain" is puzzling because the quotations suggest that the pain is not real or valid. To the extent that Dr. Dimmock's testimony suggests that Haj Khalil's psychological harm is largely self-in-

⁶⁵ *Abdallah v. Snopek*, 2008 CanLII 6983, 32 [cited to ON S.C.D.C.]. The Court went on to observe: Mr. Abdallah's immigrant status was wholly irrelevant to any issue the jury had to decide. Dwelling on this point as extensively as defence counsel did can only be seen as attempting to sway the jury to decide the case based on improper considerations. Perhaps coincidentally, the non-citizen in this case is also of Palestinian roots.

⁶⁶ The fact that Haj Khalil relies on legal aid was cited as a policy reason, in light of the costs of a trial as compared to administrative proceedings, for refusing to recognize a duty of care owed by immigration officials. *Supra* note 5 at para. 205.

duced, it risks playing into an image of immigrants as people who malingering and take advantage of the Canadian system. Culturally competent decision-makers, at this point, would pause and at least question whether bias or stereotyping had infiltrated the image of Haj Khalil presented through this expert testimony. Haj Khalil's lawyer, Barb Jackman did exactly that. However, the Court does not appear accept the possibility that stereotyping may be at play in creating an impression that Haj Khalil does not want to work. Indeed, later in the decision, the Court points to the testimony of another Palestinian writer who managed to find work in Ottawa and questions why, if he could do it, Haj Khalil cannot, thereby implying that malingering might be a play or, at the very least, again privatizing Haj Khalil's suffering.

Given the clear denunciation of stereotyping by all levels of Canadian courts and the pervasiveness of anti-immigrant bias and stereotyping, a clear explanation of why stereotyping was not at play would have deepened the court's analysis. In particular, the Court might have had regard for intersectionality analysis which dictates that elements of identity such as gender demand that individuals be treated and understood in their own unique category and that they not be assimilated into categories such as nationality or immigration status.⁶⁷ Intersectionality mandates a careful assessment of comparator groups to ensure that presumed sameness does not perpetuate misunderstanding of the justice-seeker. What were the circumstances of the other writer to whom Haj Khalil was being compared? Was he a single parent? Did he have child-rearing responsibilities? What was his particular immigration status? We need to ask these questions to determine if gender proves a relevant factor in Haj Khalil's story of struggle and disenfranchisement. Instead of acknowledging the differences to determine if they are relevant, the Court assumes sameness between Haj Khalil and another immigrant Palestinian writer. Again, the silenced elements of the story – Haj Khalil's responsibilities as a mother – prove relevant to assessing the efficacy of the Court's approach to Haj Khalil's suffering. By emphasizing Haj Khalil's cultural and professional similarities to a comparator subject who does not share her fate and silencing her gender differences, the Court questions Haj Khalil's account of her suffering.⁶⁸ Presumptions of sameness thus permit the spectre of

67 The literature about intersectionality is immense and growing. See e.g. Avtar Brah and Ann Phoenix, "Ain't I a Woman? Revisiting Intersectionality" (2004) 5 (3) *Journal of International Women's Studies* 75, online: [Bridgewater State College <http://www.bridgew.edu/Soas/jiws/May04/Phoenix_Brah.pdf>](http://www.bridgew.edu/Soas/jiws/May04/Phoenix_Brah.pdf) at 77. As they put it, "what we call 'identities' are not objects but processes constituted in and through power relations."

68 The gender and other social differences are again silenced when the Court questions why Haj Khalil could not borrow money from her male family members to attend school when her son managed to pursue that route: "Regarding the inability to attend St. Clair College because of the unavailability of OSAP funding (a matter that has since been rectified), Ms. Haj Khalil's son, Anmar, was confronted with the same problem, yet he was able to attend university. He borrowed the money from Ms. Haj Khalil's brother. Even after OSAP became available to him, Anmar stated a preference for being indebted to family over being indebted to the government...Ms. Haj Khalil did not provide evidence of her efforts (if any) to find alternative funding for her proposed year of study. Once she learned that OSAP was not available, that apparently ended the matter." The court did not consider whether cultural norms would have made it difficult for Haj Khalil, a middle-aged woman, to borrow funds from family members to attend school.

stereotyping to rear its head.

One might object at this point that cultural competence demands too much of courts and other decision-makers. Do they really need to know about Palestinian history and social structures to assess something as simple as a move from Windsor to Ottawa? To what extent do we need to examine ourselves and our assumptions as decision-makers? Must every correlation with stereotype prove suspect? Perhaps cultural competent decision-making proves unrealistic if not impossible, even in a country which values multiculturalism and inclusion? At this point, however, we might be reminded of Rose Voyvodic's insistence that cultural competence is not simply a nicety that one should extend to rights claimants. We are all cultural creatures so any process of being and understanding is invariably cultured. Judgment must begin with an appreciation of our own culturally contingent frames of reference. Hence, cultural competence is integral to justice. Rose argued that the legal profession has a special responsibility, by virtue of the privileges afforded the legal profession, to "protect the dignity of individuals and recognize diversity."⁶⁹ Cultural competence goes to the core of dignity.

Haj Khalil provided the clues needed for a culturally competent assessment of her narrative and of causation analysis. She emphasized her identity as a Palestinian refugee claimant and the importance of motherhood to her identity. While the Court may not have been able to connect all the dots – it may not, for example, have had sufficient information before it to connect Palestinian narrative with motherhood – it did have sufficient information before it to question the story that it ultimately told about Haj Khalil and her suffering. When Haj Khalil says that she needs to move to Ottawa to take care of her children "no matter what" we need to appreciate that she attaches great weight to those ends. While some might pack their student children off in a van and wave them goodbye from the drive-way, we need to understand and take seriously that this option did not present itself to Haj Khalil. While some might wait for phone calls and keep in touch by e-mail with their children, we must acknowledge and not judge for the purposes of tort law's factual causation analysis that Haj Khalil saw her role and relationships differently. We must not assume that just because we know of other children who left home without much fuss and with fond adieu that the experience would have been the same for Haj Khalil. In short, we might be more cautious and humble in our assessment of others.

Moreover, one might object that cultural competence offers its own form of stereotyping. For example, I have suggested that Haj Khalil's roles as a Palestinian mother renders the Court's assessment of causation all the more suspect. Haj Khalil does not herself put her claims into such a framework. How do I know that she sees her claim in this light? Am I perhaps imposing a stereotype of mothering upon Haj Khalil? I acknowledge the risk of essentializing Haj Khalil and the possibility that her claim of wanting to be a good mother may not be linked to the larger pattern of maternal protection we find in other stories. Yet, my point is not that the court needed to make this connection but that Haj Khalil herself clearly and unequivocally repeated the importance of mothering

69 Voyvodic, "Understanding Cultural Competence," *supra* note 7 at 575.

as part of her identity but was ignored by the Court. I suggest that this is part of a familiar pattern to reinforce the efficacy of delving deeper into Haj Khalil's story and, as Rose Voyvodic suggests, trying to understand puzzling behaviour through a cultural competence lens. My point is simply that the court needed to ask more questions about Haj Khalil and itself to ensure that the plaintiff was understood.

VIII. CONCLUSION

Cultural competence contemplates that one's experiences in the world shape how one responds to the events that give rise to legal disputes. The notion that the client or claimant should be put at the centre of legal disputes proves particularly poignant with respect to tort law. The subject of modern tort law is not some disembodied entity who wears a mask of abstraction but a contextualized human being who is understood to bring different experiences and frailties to the table. Since tort law ultimately aims to address the plaintiff's pain and suffering to the extent that they are caused by the lack of care owed by another person or institution, then tort law needs to understand the authentic plaintiff, unmediated by the cultural barriers that might be imposed by decision-makers who fail to understand the plaintiff's suffering in and of itself. Despite tort law's need to understand the plaintiff in context, *Haj Khalil* contains assumptions and misunderstanding about Haj Khalil that flow from a lack of context. This is evident in the Court's inability to understand Haj Khalil in light of her identity as a displaced Palestinian in general and a Palestinian mother in particular. It is also evident in the Court's apparent willingness to adopt expert testimony, which may be tainted with stereotypes about non-citizens.

Once we are able to see Haj Khalil in context, we can more clearly understand why the Federal Court's assessment of the causes of her psychological suffering needs further consideration. Most significantly, the Court's claim that a move to Ottawa caused Haj Khalil's pain needs re-examination.⁷⁰

Haj Khalil v. Canada illustrates why, as Rose Voyvodic saw so clearly, cultural competence is inextricably linked with access to justice. Rose Voyvodic's cultural competence scholarship flows from her larger concern for equal access to justice and her overriding passion to work towards giving those who do not hold socio-economic power access to legal empowerment. For this reason, she always took rights claims seriously while recognizing that the system mandated with resolving these claims remains ill-equipped to hear and understand all claims equally. Perhaps Rose's most lasting legacy lies in her reminder that listening carefully to person at the centre of the legal dispute does not undermine our objectivity but rather leads to better informed decision-making. She reminded us that lawyers do not always understand the dynamic and impact of law on people's lives and insisted that we take seriously our obligation to listen deeply and understand culturally.

⁷⁰ Having determined that Haj Khalil should never have sought to litigate her claim in torts in the first place, the Federal Court assessed \$305,000 in costs against her. *Haj Khalil*, *supra* note 5.