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Tort Liability for Psychiatric Damage

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Book Review

Nicholas J. Mullany & Peter R. Handford, *Tort Liability for Psychiatric Damage*, Sydney: The Law Book Company, 1993. Pp. lv, 333.

One of tort law's great failures is its treatment of claims for psychiatric damage (or, to use a misleading but more popular term, nervous shock¹). While a great deal of progress has been made since the days when liability would lie only if a plaintiff also suffered physical injury², or at least reasonably feared for her personal safety³, the law remains largely unsatisfactory and in need of reform. Illogical and arbitrary rules abound with the result that worthy claimants are often denied compensation. Recent attempts at clarification and rationalization by the House of Lords⁴ and the High Court of Australia⁵ have been at best partially successful. When next presented with an opportunity to settle the issues involved, the Supreme Court of Canada would do well to avail itself of Mullany & Handford's *Tort Liability for Psychiatric Damage*.

That text contains an impressive and exhaustive treatment of the subject matter. Believing that no jurisdiction has a monopoly on excellence, Mullany & Handford consciously adopt the style of Professor Fleming's *The Law of Torts*⁶ and approach their topic from a comparative perspective.⁷ Thus, while its starting point for discussion is typically English or Australian law, *Tort Liability for Psychiatric Damage* includes a thorough discussion of the Canadian and American positions, and also provides illuminating references from jurisdictions as diverse as New Zealand, Germany, France, Israel and South Africa. The method is entirely apposite and will be welcome in this country. Because the need to impose limitations on the potentially expansive scope of liability for psychiatric damage has been addressed in every legal system, it is often possible to gain insights by looking abroad. Moreover, the Supreme

1. Transient shock is not compensable; liability lies, if at all, only for the physical and mental consequences of such shock.

2. *Victorian Railway Commissioners v. Coultas* (1888), 13 App. Cas. 222 (P.C.).

3. *Dulieu v. White & Sons*, [1901] 2 K.B. 699.

4. *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310.

5. *Jaensch v. Coffey* (1985), 155 C.L.R. 549.

6. The most recent edition is John G. Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book Co., 1992).

7. Nicholas J. Mullany & Peter R. Handford, *Tort Liability for Psychiatric Damage* (Sydney: Law Book Co., 1993) at ix.

Court of Canada has been refreshingly cosmopolitan in its willingness to consider the wisdom of foreign decisions.⁸

Mullany & Handford not only look beyond jurisdictional boundaries, but beyond disciplinary boundaries as well. Outside of the United States, the common law insists that mere mental distress (e.g. worry, anxiety, grief, disappointment and anger) is not compensable; to recover, a plaintiff must establish that he suffered a “recognizable psychiatric illness.” After a comprehensive examination of the medical evidence, the authors conclude that the rule may be difficult to justify.⁹ The distinction between mere mental distress on the one hand and recognizable psychiatric illness on the other is largely the product of legal, rather than medical, thought. While modern science can certainly distinguish common human responses from severe psychiatric disorders (such as acute schizophrenia), the line between “normal” and “abnormal” reaction can become blurred by mild conditions shading imperceptibly into debilitating states. Consequently, the authors propose that the scope of tort liability should be broadened to encompass a greater range of injury.

Indeed, the theme of expansive reform pervades *Tort Liability for Psychiatric Damage*. While made in reference to the rule which denies relief for losses which occur because a person realizes that she could have been in the place of an injured person¹⁰, the following passage reveals Mullany & Handford’s general approach to the law regarding recovery for psychiatric damage:

The courts must break free completely of the shackles of traditionalism and extreme over-caution as well as the persisting scepticism surrounding claims of this nature. ... Irrelevant distinctions ... must not be allowed to hinder the development of sound and consistent principle.¹¹

The book’s structure is based on the various conditions and limitations that the courts have imposed on the availability of relief. Thus, consideration is given in separate chapters to the relationship between the plaintiff and the primary victim of an accident, the plaintiff’s proximity to an accident in time and space, the means by which the plaintiff learned of an accident, the need for sudden impact on the plaintiff, the source of the plaintiff’s shock, and the class of potential plaintiffs. In each instance, the authors trace the development of the law up to its current position, and

8. See e.g. *Norsk Pacific Steamship Co. v. Canadian National Railway Co.* (1992), 91 D.L.R. (4th) 289 (S.C.C.).

9. *Supra*, note 7, at 56.

10. *Wilks v. Haines* (1991), Aust. Torts Rep. 81-078. In contrast, liability is possible if a plaintiff suffers psychiatric damage as a result of witnessing another person narrowly avoid death or injury: see e.g. *Dooley v. Cammell Laird & Co. Ltd.*, [1951] 1 Lloyd’s Rep. 271.

11. *Supra*, note 7, at 222.

then suggest how it could be improved. As a result, the text should prove useful not only as a reference tool, but also as catalyst for change; it will enable the student and the lawyer to know what the law *is*, but it will also provide the advocate, the judge and the legislator with a glimpse of what the law perhaps *ought to be*.

The reader will likely find herself in agreement with many of Mullany & Handford's proposals. For example, there does not appear to be any logical reason to confine recovery to plaintiffs who are tied by blood or social relations to the primary victim of the accident. It often will be foreseeable that like spouses, parents and children, mere bystanders will suffer psychiatric illness as a result of witnessing a particularly gruesome tragedy.¹² Similarly, it is difficult to conceive of a justification for the rule that restricts recovery to individuals who suffer damage as a result of directly witnessing an accident or its immediate aftermath.¹³ A mother's psychiatric illness may be no less foreseeable and no less worthy of compensation merely because she was prevented by circumstance from quickly obtaining information pertaining to her son's negligently caused death.¹⁴ Given its rejection of the House of Lords' recent conservatism¹⁵ and its own willingness to expand the scope of tort liability in other areas¹⁶, it can be anticipated that the Supreme Court of Canada might at least entertain the possibility of adopting some of the proposals advocated in *Tort Liability for Psychiatric Damage*.

Nevertheless, it remains doubtful that all of Mullany & Handford's recommendations will be embraced soon, if ever. The law is generally a pragmatic exercise in which initial premises are seldom followed to their ultimate conclusions, and that is nowhere more true than in tort law's treatment of compensation for psychiatric damage. For policy reasons, courts have occasionally refused to extend the scope of liability despite the recognition that logic might suggest a contrary course.¹⁷ And whether justified or unjustified, concerns regarding unfair or excessive liability and scepticism regarding the validity of psychiatric injury will surely

12. *Supra*, note 7 at 128 ff.

13. *Ibid.*, at 136 ff.

14. See e.g. *Rhodes v. Canadian National Railway* (1990), 75 D.L.R. (4th) 248 (B.C.C.A.) per Taylor J.A. (Wood J.A. concurring).

15. See e.g. *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398.

16. See e.g. *Norsk Pacific Steamship Co. v. Canadian National Railway Co.*, *supra*, note 8; *Hall v. Hebert*, [1993] 2 S.C.R. 159.

17. Thus, for fear of opening the floodgates to liability, courts continue to distinguish between plaintiffs who witness an accident or its aftermath and plaintiffs who receive communication of an accident, though clearly it is no less foreseeable that the latter will suffer psychiatric damage: see e.g. *Jaensch v. Coffey*, *supra*, note 5; *Anderson v. Smith* (1990), 101 F.L.R. 34 at 49-50, per Nader J.

continue to result in the rejection of some claims, however meritorious. Thus, Canadian courts may never fully endorse the suggestion that recovery should be possible where bad news is broken accurately but badly, as when a person foreseeably suffers psychiatric damage after a police officer or nurse does not relay news of a family tragedy as gently as is reasonably possible.¹⁸ No matter—constructive criticism is always welcome. Even if they do not invariably help to effect substantive reforms, Mullany & Handford's efforts to reveal arbitrariness and inconsistency in the law should encourage judges to acknowledge more often the true basis of their decisions.

Finally, *Tort Liability for Psychiatric Damage* draws upon the compelling, often tragic, facts that have given rise to actions for psychiatric illness.¹⁹ Claims have been pursued as a result of being denied a make-up examination in a Criminal Procedure course²⁰, being attacked by a chimpanzee²¹, learning of a sister's death through "extra-sensory empathy"²², watching a relative's coffin tumble out of the back of a hearse²³, and witnessing a ceremonial circumcision go terribly wrong.²⁴ Mullany & Handford's text is consequently not only among the best written and most informative works on the market, it is also among the most readable.

Reviewed by Mitchell McInnes.*

18. *Supra*, note 7, at 190-191.

19. In particular, the facts of *Masiba v. Constantia Insurance Co. Ltd.*, 1982 (4) S.A. 333 (C) (South Africa), too complex to be recounted here, seem better suited to the bizarre imagination of a first year torts examiner than to the real world.

20. *McBeth v. Dalhousie University* (1986), 173 A.P.R. 224 (N.S.C.A.).

21. *Lindley v. Knowlton* (1918), 176 P. 440 (Cal.).

22. *Burke v. Pan-American World Airways Co.* 484 F. Supp. 850 (1980).

23. *Owens v. Liverpool Corp.*, [1939] 1 K.B. 394.

24. *Ibrahim (A Minor) v. Muhammad* (Unreported, Q.B.D., 21 May 1984).

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