# BOOK REVIEWS

*Tort Liability for Psychiatric Damage: The Law of "Nervous Shock"* by Nicholas J. Mullany and Peter R. Handford (Law Book Company Ltd, Sydney, 1993) Foreword by the Rt. Hon. Sir Thomas Bingham, MR. pages i-lv, 1-315, index 317-333. Price $95.00 (Hardback) ISBN 0 455 21175 2.

This is a timely and impressive addition to the literature of torts. The authors' objectives are, first, to provide a detailed exposition of the law of 'nervous shock' and, secondly, to identify its shortcomings and the paths to sensible reform.[1] Each objective is achieved with clarity of expression and, for the most part, distinctively persuasive argument. The chosen topic is one which well illustrates the organic nature of the common law, the unpredictable role of judicial decision-making in the common law world, the selective resort by appellate judges to public policy justifications, and the impact of legislative tinkering with the common law. The authors readily acknowledge that their treatment is inspired by the outstanding work in the law of torts of Professor John G. Fleming.[2] The structural and stylistic hallmarks of Fleming are evident throughout: very extensive (if not exhaustive) coverage of the cases (reported and unreported), comparative analysis drawing on the law in New Zealand, the US, Canada, the UK, Ireland, South Africa and Western Europe, penetrating critical analysis, a clear statement of the authors' policy preferences, and an unashamed bias in favour of opening up the law of torts to permit greater recovery.

The present law of 'nervous shock' has taken more than a century to evolve. In 1888 the Full Court of the Supreme Court of the then Colony of Victoria upheld a jury's verdict in favour of a woman who had escaped death but had miscarried after the horse-drawn buggy in which she was travelling narrowly avoided being struck by a train on a crossing in suburban Melbourne as a result of the crossing-keeper's negligence in opening the crossing gates. The female plaintiff's claim was for damages for physical injury and 'nervous shock' resulting from the fright occasioned by the near miss.[3] However, on appeal, the Judicial Committee of the Privy Council reversed the Full Court holding that 'damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a

[1] Nicholas J. Mullany and Peter R. Handford, *Tort Liability for Psychiatric Damage: The Law of "Nervous Shock"* (Law Book Company Ltd, 1993) (hereinafter 'Mullany and Handford'), Preface and Ch. 1.

[2] Turner Professor of Law, Emeritus, University of California, Berkeley; see Fleming, J. G., *The Law of Torts* (8th ed. 1992); Mullany and Handford, ix. The *realistic* approach to the law which is characteristic of Fleming's work has in the distant past scandalised some orthodox or *positivist* observers. See, for example, the savage review of the first edition of Fleming's book on torts in this journal by Dr E G Coppel, QC at (1957) 1 M.U.L.R. 272 and Fleming's response at (1957) 1 M.U.L.R. 274.

[3] *Victorian Railways Commissioners v. Coultas* (1886) 12 V.L.R. 895.

nervous or mental shock, cannot under such circumstances . . . be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper.'[4] 'Nervous shock' was too remote a category of damage. In retrospect, it is difficult to appreciate what was problematical about *Coultas*. The Full Court's decision clearly accorded with common sense and principle. Yet despite the fact that, soon after the end of the nineteenth century, courts (including some that were, strictly speaking, bound by the Privy Council's decisions) began to depart from the variant of social Darwinism evidenced by the Privy Council in *Coultas* and to allow recovery for so-called nervous shock not consequential on actual physical harm,[5] the scope for such recovery has evolved slowly. This has been due, in part, to judicial fears about a range of supposed unacceptable disadvantages of allowing wider recovery. These fears have probably reflected the traditional dualist view of the world with its body-mind dichotomy,[6] and have certainly reflected (a) at best, ignorance about,[7] and, at worst, callous disregard or stigmatising of, mental illness and disorder, (b) concern about 'trivial' or fraudulent claims, (c) that old bogey — 'opening the floodgates of litigation', (d) problems of proof including proof of causation, and (e) difficulties in assessment of money damages for intangible losses.[8]

These (occasionally paranoid) judicial concerns have, for example, led to (a) the requirements that the plaintiff establish that a sudden sensory shock has been experienced[9] and that a recognizable psychiatric illness has ensued,[10] (b) restrictions on legal entitlement depending upon whether or not the plaintiff was in a zone of physical danger or was a mere bystander,[11] (c) the confining of recovery largely to spouses or close blood relatives of the primary physical victim(s) of the defendant's negligence,[12] (d) the creation of special or exceptional categories of entitlement (notably 'rescuers'[13] and fellow employees[14] of the primary physical victim(s)), (e) the creation of the concept of the physical and/or temporal 'aftermath' to the original physical mishap which produces the 'shock' reaction[15], (f) restrictions on legal entitlement according to variations in the means of communication by which the plaintiff experiences the shock to the senses,[16] and (g)

4 *Victorian Railways Commissioners v. Coultas* (1888) 13 App. Cas. 222 at 225. Section 4 of the Wrongs Act 1932 (Vic.), now to be found in s. 23 of the Wrongs Act 1958 (Vic.), removed the limitation on recoverable types of damage which the Privy Council created. The 1932 change was originally sponsored as a private member's Bill in 1931 by that tireless reformer Maurice Blackburn. It was referred to the judges of the Supreme Court of Victoria and later passed in an altered form approved by the judges: Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1932, 2676-2682.

5 See *eg. Dulieu v. White* [1901] 2 K.B. 669; Mullany and Handford, 2-7.

6 Gregory, R. L. (ed), *The Oxford Companion to the Mind* (1987) 487-489.

7 See *eg.* the strained view of foreseeability of injury through shock espoused by Latham C.J. in *Chester v. Waverley Municipal Corporation* (1939) 62 C.L.R. 1, 10.

8 See *eg. Victorian Railways Commissioners v. Coultas* (1888) 13 App. Cas. 222, 226;

9 See *eg. Campbelltown City Council v. Mackay* (1989) 15 N.S.W.L.R. 501.

10 See *eg. Swan v. Williams (Demolition) Pty Ltd* (1987) 9 N.S.W.L.R. 172.

11 See *eg. Dulieu v. White* [1901] 2 K.B. 669; *Bourhill v. Young* [1943] A.C. 92.

12 See *eg. Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310.

13 See *eg. Chadwick v. British Railways Board* [1967] 1 W.L.R. 912.

14 See *eg. Dooley v. Cammell Laird & Co Ltd* [1951] 1 Ll. Rep. 271; *Mount Isa Mines Ltd v. Pusey* (1970) 125 C.L.R. 383.

15 See *eg. Boardman v. Sanderson* [1964] 1 W.L.R. 1317; *Benson v. Lee* [1972] V.R. 879; *Jaensch v. Coffey* (1984) 155 C.L.R. 549.

16 See *eg. Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310.

occasional adjustment of the rule that the defendant takes the plaintiff (including the unusually susceptible plaintiff) as found.[17] Each of these aspects and the piecemeal legislative reforms that have been made over the years[18] are subjected to detailed, reliable and illuminating analysis by Mullany and Handford. The decision of the House of Lords in *Alcock v. Chief Constable of South Yorkshire Police*,[19] the most recent examination of the issues by the House of Lords — the case which arose from the Hillsborough Stadium tragedy in 1989 — attracts very extensive (and mostly critical) attention.

The book's sub-title appropriately renders the commonplace term *nervous shock* in inverted commas. This is because so much of the law of compensation for psychiatric injury has evolved in ways that have lagged far behind the evolution of psychiatric and psychological medicine. The authors make out an incontrovertible case for dispensing with the descriptive term 'nervous shock'. It is anachronistic and hopelessly confusing. This is clearly demonstrated in chapter 2 which contains a detailed examination of the concept of 'recognisable psychiatric damage'. The law of tort and, to a similar extent, the law of contract, have traditionally accorded different treatment to injury to the psyche and injury to the body. The former has attracted both sympathy and skepticism, but has been far less compensated than the latter. The authors have done what most lawyers either deliberately avoid or, lacking access to the resources, are unable to do; they have gone beyond the case law to the medical and psychological literature and have provided a thorough and clear account of what answers the description 'psychiatric damage'. Their impressive research has produced an invaluable source of information for practitioners, teachers, students and researchers alike.

The book's treatment of the existing law is such that, save for any large scale legislative intervention, Mullany and Handford deserves to become the standard text on what is a constantly evolving discrete area of the law of torts. The authors' position is that the existing law is still in its embryonic stages and that appellate courts should, for (a) reasons that reflect an informed understanding of contemporary psychiatric and psychological medicine and (b) for good reasons of policy, dispense with many of the existing restrictions on liability.

The authors contend that there should be further legislative intervention in the form of a prescribed tariff of compensation for non-pecuniary loss including psychiatric damage. That tariff would adopt as its diagnostic framework either the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* or the World Health Organisation's *International Classification of Diseases*.[20] The tariff would be capped, it would be indicative rather than

[17] See *eg. Jaensch v. Coffey* (1984) 155 C.L.R. 549 *per* Brennan J. at 568; *Miller v. Royal Derwent Hospital Board of Management* [1992] Aust Torts Rep. 81-175.

[18] The legislative reforms fall into one of two categories: first, reversal of the *Coultas* rule that 'nervous shock' resulting from fright is too remote to qualify as damage — see *eg.* s. 23, Wrongs Act 1958 (Vic.); secondly, more extensive provisions which partially define the plaintiff's right to recover — see *eg.* s. 4(1), Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.); Mullany and Handford, Ch. 11.

[19] [1992] 1 A.C. 310.

[20] Mullany and Handford, 276-277. Somewhat curiously, the authors have overlooked the fact that the utility of a legislatively prescribed diagnostic structure is already accepted in Australia, most notably in regulations made under the Transport Accident Act 1986 (Vic.) and which mandate the use of the American Medical Association *Guides to the Evaluation of Permanent Impairment*. See Transport Accident (Impairment) Regulations 1988, reg. 6(1). The ill-fated National Compensation

determinative — so as to allow more scope for individual assessment — and the indicative amounts of compensation would be adjusted to reflect changes in the cost of living.[21]

In its comprehensive attack on the shortcomings of the common law of liability for psychiatric damage, this scholarly book presents a progressive approach to a distinctive component of the law of torts. It would, however, be a mistake to describe the authors' prescriptions as radical. Inasmuch as they argue for, or assume the retention of, the existing framework of fault liability, albeit considerably expanded in the scope of its coverage both by judicial creativity and legislative reform, they offer an essentially conservative prescription. It is difficult for this reviewer to appreciate from what the authors advance in the book[22] why, if extensive legislative reform is to be preferred, entitlement to damages should be linked to a showing by the plaintiff of negligence by the defendant or, indeed, why scarce community resources should be devoted to curial inquiries into fault instead of being used directly for compensation and rehabilitation. The authors' suggestions for reform, meritorious as they are in allowing greater scope for recovery, inevitably involve the allocation of more resources to the investigation of fault. It is, in this reviewer's opinion, odd that the authors have at once provided an excellent account of the medical context and yet have chosen to exclude from the social and political context an examination of important segments of the literature for and against comprehensive no-fault liability which has emerged in the last 25 years.[23] As a matter of political reality, it is inconceivable that in the foreseeable future a legislature in Australia would be prepared to effect such a specific reform to the overall law of personal injury compensation. The history of success and failure in reform of personal injury compensation law in Australia in the last three decades has been marked by legislative preference for *ad hoc* comprehensive or near-comprehensive reform according to type of accident (notably transport and workplace accidents and criminal injuries) rather than the type of injury or loss suffered. It has also been notable for a slow but inexorable move away from the inherent and costly limitations of fault liability.[24] Nevertheless, for as long as the tort of negligence has a role to play, Mullany and Handford will be an indispensable tool.

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Bill 1974 (Cth) (in cl. 8 and the Schedule) defined 'personal injury' by reference to the World Health Organisation's *International Classification of Diseases*; see *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (1974) ('the Woodhouse Report') (1974), Vol 1, para. 350.

21 Mullany and Handford, 277-282.

22 Mullany and Handford, Ch. 13; see also Mullany, N., 'A New Approach to Compensation for Non-Pecuniary Loss in Australia' (1990) 17 M.U.L.R. 714.

23 Reference is made, for example, to the U.K. *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Cmnd 7054 ('the Pearson Report') and to the Accident Compensation Act 1972 (N.Z.) and the extensive amendments made to it in 1992. There is, however, no discussion of, for example, the Woodhouse Report or the New South Wales Law Reform Commission's *Report on a Transport Accident Scheme for New South Wales* (1984).

24 There is a hint that the authors view favourably the potential for some resurgence in fault liability: see *eg.* 'Recent legislative alterations to the coverage of the [New Zealand] no-fault compensation scheme are such that common law claims for psychiatric damage may soon rise phoenix-like from the ashes.' Mullany and Handford, 8-9.

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