BOOK REVIEW

TORT LIABILITY FOR PSYCHIATRIC DAMAGE: THE LAW OF "NERVOUS SHOCK", by Nicholas Mullany and Peter Handford, The Law Book Co, Sydney, 1993, lv and 333 pages (including index).

Mullany and Handford's excellent, orthodox text, which is destined to be a standard, argues the case, on the basis of a remarkable review of Commonwealth law, for a significant extension of the scope of tort liability for negligently-inflicted psychiatric damage – or so-called nervous shock. The New Zealand reader must study the work with the Accident Rehabilitation and Compensation Insurance Act 1992 in mind, but there is still much to be learned from a work of formidable scholarship.

A fine chapter considers the meaning of "recognisable psychiatric damage", which must be established to succeed in a negligence action, with a valuable discussion of post-traumatic stress disorders. There is an excellent account of the modern law of negligence in general. And in an interesting passage on the tort of intentional infliction of emotional distress[1] the authors debate the possibility (considered remote) of the evolution of this action in the Commonwealth into a comprehensive tort of outrageous conduct on American lines. This is all in addition to the central sections of the work thoroughly analysing the contemporary elements of the nervous shock action.[2]

Perhaps the most interesting issue raised for the New Zealand reader is the extent to which this unusual negligence action may survive the accident compensation bar in its new form. Section 14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992 provides:

> **14. Application of Act excludes other rights** – (1) No proceedings for damages arising directly or *indirectly out of personal injury* covered by this Act . . . that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or *any other person,* and whether under any rule of law or any enactment. [emphasis added]

Personal injury is now defined by section 4(1) to mean "the death of, or physical injury to, a person, and any mental injury suffered by that person which is the outcome of those physical injuries to that person". Mental injuries are only covered by the new legislation when they accompany physical injury or are the outcome of one of the nominated criminal acts: section 8 (3),(4). For these purposes a "mental injury" is defined in section 3 as "a clinically significant behavioural, psychological or cognitive

1 Under the rule in *Wilkinson* v *Downton* [1897] 2 QB 57.

2 With regard to the term "nervous shock" itself, Mullany and Handford make a case for the avoidance of this archaic phrase in favour of "psychiatric damage". While their argument is convincing this language shift is very difficult to achieve, given the extent to which the older term is cemented in the leading decisions.

dysfunction". The clear intention of the Act is to distinguish such conditions from physical injuries.

The result is to leave most "pure mental injuries" outside the scope of accident compensation cover. This has led Todd and Black[3] to suggest that the nervous shock action has been resurrected in New Zealand[4], but this conclusion need not follow from the exclusion of "pure mental injuries" from the scope of cover. These may not attract any form of accident compensation under the new regime, yet civil suits for such damage may still be blocked if the barrier erected by section 14(1) unequivocally excludes them. And the bar may well exclude common law actions based on the usual "nervous shock" facts.

The typical nervous shock action arises out of a situation in which one person observes another, with whom they have a special relationship, killed or maimed within their sight or hearing as the result of the defendant's negligence, causing the observer to suffer recognisable psychiatric harm. Although the observer may suffer no physical injury (and is therefore entitled to no award under the new accident compensation legislation) their psychiatric injuries may nevertheless be said to have arisen "indirectly out of personal injury" sustained by another which would be covered by the Act. They may therefore be an "other person" who cannot commence a common law action. In other words, this type of plaintiff is regarded as a secondary rather than a primary victim of the tortfeasor's negligence. For this reason the usual nervous shock action is considered an exception to the general rule that only the primary victim can recover, an issue discussed at length by Mullany and Handford in Chapter 4.

A way around this potential consequence of the accident compensation bar may be to argue that the nervous shock plaintiff is another *primary* victim who has *directly* suffered psychiatric damage, not a secondary victim at all. On this view, the plaintiff would not be seeking recovery for damages arising indirectly out of physical injuries to another, but for psychiatric damage directly inflicted on them, which is not covered by the compensation regime and which may therefore form the basis of a common law action. The "near miss" cases may assist this line of argument. Here the plaintiff has sufferred psychiatric damage as a result of an accident in which they (or another) were *nearly* physically injured. *Dooley* v *Cammell Laird & Co Ltd*[5] provides a good example. The plaintiff was a crane driver who was lifting cargo into the hold of a ship when the sling snapped as a result of the defendant's negligence. His load plummeted into the hold where he knew his fellows were working. Believing they must have been killed or injured the driver suffered nervous shock. He recovered damages although his co-workers were not hit by the falling cargo at all.

3 S Todd and J Black, "Accident compensation and the barring of actions for damages", (1993) 1 Tort L R 197.

4 See also R Tobin, "Nervous shock: the common law; accident compensation?" [1992] NZLJ 282.

5 [1951] 1 Lloyds Rep 271.

In such a case there is only a victim of psychiatric harm.[6] As Denning L J argued in *King* v *Phillips*:[7]

> What is the reasoning which admits a cause of action for negligence if the injured person is actually struck, but declines it if he only suffers from shock? I cannot see why the duty of a driver should differ according to the nature of the injury . . . . If he drives negligently with the result that a bystander is injured, then his breach of duty is the same, no matter whether the injury is a wound or is emotional shock. Only the damage is different. The bystander may be so close as to be put in fear for himself, or he may be just a little way off and be shocked by fear for the safety of others. In either case he has been injured by the driver's negligence.

But categorisation of the plaintiff as a primary victim will be more convincing in some situations than in others. As Mullany and Handford point out, Lord Oliver attempts to state a principle which can separate primary and secondary victims of nervous shock in his speech in *Alcock* v *Chief Constable of South Yorkshire Police*[8] (at 407):

> Broadly they divide into two categories, that is to say, those cases in which the injured plaintiff was involved, whether mediately or immediately, as a participant, and those in which the plaintiff was no more than a passive and unwilling witness of injury caused to others.

The first class of plaintiff is claiming damages for "directly inflicted injuries" and (at 407):

> he can properly be said to be the primary victim of the defendant's negligence and the fact that the injury which he sustains is inflicted through the medium of an assault on the nerves or senses does not serve to differentiate the case, except possibly in the degree of evidentiary difficulty, from a case of physical injury.

The hallmark of this first class of case is that (at 408):

> the plaintiff has, to a greater or lesser degree, been personally involved in the incident out of which the action arises, either through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened.

6 See also *Galt* v *British Railways Board* (1983) 133 NLJ 870. In *Dulieu* v *White and Sons* [1901] 2 KB 669 it was alleged the defendant negligently drove a pair-horse van into a public house nearly striking the plaintiff barmaid. She suffered a miscarriage, a physical injury, as a result of the shock, but there was no direct physical contact between her and the van. Her action was permitted to proceed. In the light of subsequent developments in the law there would no longer be any need to demonstrate physical injury in these circumstances, only recognisable psychiatric harm due to the plaintiff's "peril". As Trindade puts it: "If the plaintiff himself is put in peril and sustains nervous shock there would be liability if the nervous shock is sustained as a result of the defendant's carelessness": F Trindade, "The principles governing the recovery of damages for negligently inflicted nervous shock", (1986) 45 Camb L J 476, 481.

7 [1953] 1 QB 429, 439, quoting Lord Wright in *Bourhill* v *Young* [1943] AC 92, 109; see also *Hambrook* v *Stokes* [1925] 1 KB 141.

8 [1992] 1 AC 310.

The second class of plaintiff is the secondary victim, who has suffered psychiatric damage indirectly due to physical injuries to another, but was not directly involved in the original traumatic events: eg, the passive onlooker or the person who comes upon the immediate aftermath of an accident to a family member.

These distinctions between primary and secondary victims and direct and indirect injuries may assume considerable significance in New Zealand in the light of the particular wording of section 14. It may well be that common law actions by the first class of plaintiffs are not barred, while actions by the second class are. The primary victim of directly inflicted psychiatric damage who is not physically injured does not suffer a "personal injury" in the sense in which this term is now defined; nor does the damage arise "indirectly out of personal injury" to another.

This illustrates an extraordinary legal position, wherein a person involved in an accident who suffers psychiatric damage alone may bring a common law action, but the person who suffers physical injury as well may not. This is surely an absurd state for the law to be in. But the view that the new accident compensation rules are absurd ("grotesque", says Mr Moore[9]) is not itself absurd. It may simply be our situation.

Commenting on the possibility that nervous shock actions may still be blocked, Todd and Black write:[10] "It would not seem to be right for a damages action to be barred yet the loss not be compensatable under the Act." Harrop and McGreevy agree:[11] "it seems most inequitable that accident victims are not either covered or able to sue." On this basis Todd and Black write of the effect of the 1992 legislation:[12] "claims for damages for mental suffering, standing alone, *whatever its character,* can proceed if the common law gives a remedy in such a case" [emphasis added].

In my view, this is stated too broadly and with too much confidence. One can certainly argue that any other conclusion is "not right" and one can seek an interpretation of section 14 which avoids that conclusion, but arguments based on "rightness" cannot prevail over the plain meaning or the clear intention of the Act. And the erection by section 14 of a bar to civil proceedings by "any person" concerning damages arising "indirectly out of personal injury" seems squarely aimed at the secondary victim of nervous shock, unfair as this may seem. No doubt the point will soon be decided. In the meantime, potential litigants' legal advisers should bury themselves in Mullany and Handford's admirable work.

Even if the typical nervous shock action is found to be barred, it is clear from the authors' review of the authorities that some actions usually considered under the label "nervous shock" have succeeded without the occurrence of any physical injuries which would be covered by the acci-

9 "Moore labels ACC anomalies grotesque", *Otago Daily Times,* 13 November 1993.
10 Supra n 3, at 226, n 108.
11 S Harrop and G McGreevy, *Accident Compensation – the New Legislation,* New Zealand Law Society, Wellington, 1992, 37.
12 Supra n 3, at 211.

dent compensation legislation. The "near miss" cases are but one example. Others are where a person suffers psychiatric damage who *believes* another has been killed or maimed through the tortfeasor's negligence though they have not been; where psychiatric damage results from destruction of the plaintiff's property; and perhaps where threats to another have been overheard.

There is a further range of possible plaintiffs who are clearly the primary victims of the defendant's negligence, who suffer stand-alone psychiatric damage due to medical malpractice, threats to their person,[13] or the negligent communication of false information, to say nothing of actions for mental distress arising from a breach of fiduciary duties or breach of contract, including breach of employment obligations. *Tort Liability for Psychiatric Damage* is a mine of references to all these unusual areas.

Perhaps Mullany and Handford are even unduly pessimistic about the development of a general tort of outrageous conduct. Maybe the New Zealand courts should take their lead from the exclusion of "pure mental injuries" from the scope of accident compensation cover and knit together these threads of action to fashion a new and comprehensive obligation to avoid negligent, reckless or intentional acts causing severe emotional distress to foreseeable plaintiffs likely to suffer this kind of harm,[14] unless clear and articulated policy reasons ought to limit recovery.

Certainly this kind of expansion of liability appeals to Mullany and Handford, who strongly and eloquently assert their opposition to "inappropriate doctrinal restrictions on recovery" (at 308). The reasons they suggest for the current "artificial" and "illogical" limits on the reach of the nervous shock action are the failure to recognise that disruption to peace of mind is as worthy of support as physical injury to the body ("Broken minds have always been greeted with a scepticism which contrasts sharply with the scepticism generated by broken bones" – at 21) and the relatively recent maturing of psychiatry as a sophisticated branch of medicine. In addition, they point to the difficulties of proof in the absence of visible injury, continuing suspicion of fraudulent or malingering plaintiffs and the fear of multiplicity of actions arising from the same traumatic events, as has occurred in the Hillsborough football disaster litigation. They note that (at 275):

> Monetary relief will never be capable of "compensating" psychiatrically disturbed trauma victims for the disruption to their lives. To this extent any award made for this kind of mental harm will always be arbitrary and artificial.

13 Actions in the tort of trespass for assault do not even require proof of psychiatric damage. Even actions in battery have succeeded without proof of physical harm, provided there is some "touching" of the plaintiff: see S Todd et al, *The Law of Torts in New Zealand,* Law Book Co, Sydney, 1991, Chapter 3. In the light of the change in philosophy evident in the new accident compensation legislation, may such actions also now proceed where no physical injuries have occurred?

14 Compare the possible evolution of a new tort of "harassment": see *Khorasandjian* v *Bush* (1993) 143 NLJ 329; J Murphy, "The emergence of harassment as a recognised tort", (1993) 143 NLJ 926; K Stanton, "Harassment: an emerging tort?" (1993) 1 Tort L R 179.

Undeterred, they confidently predict the tide of history is behind them (at 214-215):

> As we edge towards the 21st century and the common law becomes more comfortable with damage to the mind, we will see the transformation of the structure of negligence claims to incorporate pleas for relief for psychiatric harm in more and more situations where previously legal advisers might not have considered them a feasible option.

If this is the case it will be due in no small part to Mullany and Handford's stimulating volume.

For my part, I confess that doubts about their expansionist mood grew rapidly as the argument progressed. The authors certainly convinced me of the arbitrary nature of the present rules governing recovery for this unusual form of damage. I became increasingly less convinced that expansion of liability to some new arbitrary position is the obvious solution. Nor was I impressed with one of their principal methods of proof: the listing of examples of worthy plaintiffs who are currently denied recovery (at 150-151 the list goes on for a page). Focusing on the needs of sufferers of psychiatric illness leads more logically to arguments about increased social welfare provision, not expansion of the tiny class of people who may recover for such conditions under an expanded system of fault-based tort liability. Of 1000 sufferers of psychiatric illness perhaps 1 could recover damages under current nervous shock principles. The thrust of Mullany and Handford's argument is that this number should be doubled to 2. Perhaps the authors would be advised to expend their impressive energies advocating better social security, housing and health service provision which would also benefit the other 998.

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