

Review of Nicholas J Mullany & Peter R Handford,  
*Tort Liability for Psychiatric Damage*, Sydney: Law  
Book Company, 1993. pp i-iv, 1-383. HC \$95.00.

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The law relating to nervous shock (or “psychiatric damage” as the authors call it) abounds in uncertainties and absurdities. The very definition of the damage in issue is problematic because, as the authors point out, the types of mental state most commonly in issue in the litigated cases are simply extreme versions of normal reactions to external events and stimuli. In order to restrict the scope of liability for mental injury, the courts draw some truly bizarre distinctions. Shock victims are distinguished according to the intensity of their love and affection for the primary victim; indeed the House of Lords in England has gone so far as to divide relationships into those which raise a presumption of sufficient ties of affection and those which do not. Shock-inducing events are distinguished according to whether they are sudden and traumatic or long-term and debilitating, so that a person who witnesses a car accident may recover, but a person who cares for a horribly injured victim for years without having been at the crash scene may not. It is discouraging, to say the least, to find judges concluding from use of the term “nervous shock” that the cause of the injury needs to be a “shocking” assault on the senses (p 192). The courts distinguish between different media of perception (“unaided senses”, TV, bad news, and so on) in an admittedly arbitrary way. Also relevant is how far from the accident scene the shock victim was; and how long the period was between the primary victim’s “accident” and the secondary victim’s shock (so that the bigger the disaster and the greater the confusion and delay it generates, the less likely it is that victims of consequential shock will recover).

The courts’ attempts to stem the flow of nervous shock claims (never, it seems, very great) are unlikely to be easily understood by ordinary people, let alone to be attractive to them. Several reactions are possible. One (that of the authors of this book) is to advocate expansion of liability for psychiatric damage by removing the “artificial” limitations imposed by the courts on such liability and resting liability for injury to the mind on the same foundations as liability for injury to the body. Another (which, to my knowledge, has been seriously expressed only by Jane Stapleton in a paper delivered to a seminar organised by the Society of Public Teachers of Law in Oxford in July 1993) is to support abolition of liability for injury to the mind standing alone. A middle way (canvassed but summarily rejected by Mullany & Handford, p 102) would be to suggest abolition of liability to “secondary victims” of mental injury. It is possible, I think, to mount more or less powerful arguments in favour of each of these positions; and they are all arguably preferable to the present state of the law. But each may be thought still to involve an element of arbitrariness; and at the end of the day (as so often happens when one digs beneath legal rules to uncover the value-judgments which underpin them), personal predilection might be the only basis for choosing between them.

A major disappointment in reading Mullany & Handford’s volume is that they never really argue for their preferred position, but simply assume that expansion of

liability for psychiatric damage is the best way to deal with the mess the law has got itself into. This might lead one to think that the book is not aimed at an academic audience but at practitioners — a conclusion supported, for example, by the exhaustive citation of authority in footnotes which frequently dominate the page (eg pp 298–307); by the detailed discussion of the symptoms of the psychiatric disorders which most often form the subject of litigation (ch 2); and by the more-than-incidentally discussions of “general duty requirements” (pp xii–xiv and 73–85), defences (ch 12) and assessment of damages (ch 13, in which the authors make the curious assumption that the main, or only, relevant head of damages in an action for psychiatric damage would be non-pecuniary loss). On the other hand, there is very little discussion of how to go about establishing a causal link between mental injury and external event — an issue which must, in practice, often be of great and crucial difficulty. Again, United States law (to which there are 41 separate page references in the Index) and Californian law (11 page references in the Index) are likely to be of much greater interest to academic readers in the Australo-British legal community (which seems to be the authors’ prime target audience) than to their practitioner colleagues.

It must be admitted, however, that superior courts in Britain and Australia are now much more willing than in the past at least to pay lip service to decisions from other jurisdictions; and so the authors’ explicitly multi-jurisdictional approach may be justified from a practical point of view. But it seems to me that mere citation of decisions from other places does not take us very far. Law is a product of its social environment, and even cultures which look superficially similar may, on a closer inspection than a mere reading of case law or statutes can afford, appear to rest on very different ideas about what is valuable in human life and society. From the political and moral point of view, what matters is not what people do elsewhere but whether, given our social and cultural values, what they do is better for us than what we do ourselves. British judges certainly, and Australian judges perhaps, are not yet very good at asking searching questions about where the common law ought to be going. It is a pity, therefore, that Mullany & Handford prefer “pragmatism” and the (spurious) “logic” of the common law to arguments of “policy” (p 168) which, when properly developed and articulated, provide the only sure way forward.

The other possible audience for a book such as this is students, but Mullany & Handford’s volume is far too detailed (and expensive) to appeal to any but the most obsessional amongst that group. To me, the book reads rather like a consultation paper issued by a law reform body, but one with all the background research included. For example, the discussion of the unwillingness of the common law to compensate for economic loss resulting from the death of or injury to another person (pp 90–99) seems, in the end, to shed little light on the (shorter) discussion of “secondary victims and psychiatric damage”. The question whether the law concerning relational economic loss and the law dealing with relational mental injury can or should form a conceptual unity is neither asked nor answered by the authors.

Nevertheless, Mullany & Handford have quarried a mass of useful information and citation and we are indebted to them for their industry. This book will be an important work of reference on this topic for some years to come.

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