

Commentary

Oscar S. Gray

The Reporters' recommendations for updating the provisions of the second Restatement that refer to "emotional distress" or "emotional disturbance" are generally progressive within the mainstream of American jurisprudence. No doubt most of us would consider that to be an admirable outcome for a Restatement revision, ordinarily. Yet I cannot help thinking that, when the time comes to prepare Restatement fourth, our successors will look back on our efforts on the third Restatement as a lost opportunity to have done better, --an opportunity to have improved our analysis through clarification of our terminology and the reduction of unnecessary doctrinal confusion.

Specifically, the relentless emphasis in this draft Restatement on a supposed distinction between "physical" and "emotional"--to the point that the very name of this Restatement project was changed in mid-stream to "Liability for Physical and Emotional Harm"--points the discussion in the wrong direction, in light of what we seem to be learning from the modern neuro-sciences. I do not suggest that the neuro-sciences have come to the point of enabling diagnoses, much less forensic demonstrations, to be made from brain scans. But it does seem that the more we learn from them, the more confirmation there appears to be of a physiological basis for the phenomena the Reporters would lump as "emotional", and the more

artificial the distinction that the Reporters adopt as fundamental appears to be. At a minimum, this “emotional”-“physical” distinction casts a pall of apparent anti-science over our work, and makes us appear obsolete from the outset. Worse, it obscures what could have been a clearer understanding of how the common law has been developing.

Rather than a distinction between “physical” and “emotional”, I would suggest, we should be exploring a distinction between which might be called “mere feelings”, on the hand, and “injury” on the other. Only the former--which probably correspond with what is sometimes called “affects”--are plausibly described by the term “emotional distress”. These are the unpleasant states of mind that we have been accustomed to considering non-compensable at common law except parasitically, e.g., sorrow or indignation.

While they may be intense, they usually fade with time, without special treatment. They conspicuously inhabit the conscious mind. Indeed, it is the conscious awareness of them that itself constitutes the “feelings” in question. And, most important, they are not considered pathological. They are instead the normal reactions of healthy people to various other injuries, physical or dignitary.

Quite different are the medically recognized disorders, which relate to *disabilities*--e.g., in social, vocational, or sexual functioning. They are the result of

unconscious processes of the mind. They are not recognized as disorders unless they are disabling. While they may be accompanied by emotional feelings, it is the disability that constitutes the disorder. The connections between the feelings and the disabilities and their precipitating factors may be far from accessible to the victims' consciousness. And these conditions, typically, do not heal themselves without expert attention.

Accordingly, to use the term "emotional disturbance" to cover both types of mental phenomena is both misleading and trivializing.

Particularly unfortunate is the suggestion that "'Emotional disturbance' is distinct from bodily harm and means harm to a person's emotional tranquility." (Sec.4, Comment *a*). The harm in the case of disabling mental disorders is, I think, not so much to an interest in "tranquility", as to an interest in health.

The formulation that I suggest may seem unacceptable on grounds of novelty. I know that my terminology will be relatively unfamiliar to most American lawyers. It is not, however, novel to the common law world. In the mother of all common law jurisdictions, England, the tone of discussion of the issues in question is much closer, as I read the opinions, to my proposals, than is that of the proposed third Restatement. I do not put myself forward as competent to state what English law is--a task well accomplished in Mr. Matthews' paper.

But I can report on what strikes an American lawyer on reading House of Lords speeches. And I strongly recommend to any American lawyers and judges who may be interested in further consideration of the subject of my proposals, that they read these House of Lords opinions. If you do, you will find a body of outcomes not markedly dissimilar on the whole to those that would be expected in American courts. But you will find them expressed in a tone, in a context of discourse, that seems to me refreshing and sophisticated in a way that I think the proposed Restatement fails to match, precisely because of its obsession with outmoded distinctions between “physical” and “emotional” and with concepts of “disturbance” and loss of “tranquility”. Instead, a recognition that disabling mental disorders, recognized as psychiatric illness, are an aspect of personal injury, as much “bodily” as are bloody somatic trauma, seems to fit comfortably in British jurisprudence (the House of Lords has treated Scots law as similar to English law on these points).

I do not ask that you take my word for this. I urge, instead, that you read the leading recent English cases for yourselves. I think you will find them interesting and rewarding. As Mr. Matthews concludes, “In various (though not all) respects English law is more favorable to claimants than the Restatement proposals, and it is suggested that some of these situations might be accommodated without too adverse an effect on the floodgates or ‘bright-line’ issues.” More significant than

differences in specific outcomes, however, is the difference in tone that becomes possible with a de-emphasis on distinctions between “physical” and “emotional”; with a recognition of all illnesses as aspects of bodily harm; and with the substitution of medical diagnoses of psychiatric disorders to define free-standing compensable conditions, in place of the vagaries of jury understandings about the meaning of the word “severe”.

These are matters about which we have something to learn from our senior brethren. I believe Mr. Matthews is excessively tactful in suggesting that the differences may be attributable to systemic differences that have arisen in the two countries, such as differences in the use of juries, or in provisions for handling litigation expenses. I don't think these systematic differences account for the differences in terminology and tone to which I refer. I believe, rather, that the English judges have simply done a better job than we have in thinking through some of the issues. Perhaps, by the time of the fourth Restatement, we will have caught up.