

***Causing Psychiatric and Emotional Harm – Reshaping the Boundaries of Legal Liability:*** Harvey Teff, [Oxford: Hart Publishing, 2009, xxii + 205pp, Hard Cover, HK\$356, UK £30], ISBN 978 1 84113 216 7

One of the enduring mysteries of Hong Kong tort law is the dearth, one might say absence, of negligence claims for pure psychiatric injury suffered by witnesses of accidents involving serious personal injury or death. Until recently, there were no reported claims for psychiatric injury damages for such secondary accident victims<sup>1</sup> in Hong Kong.<sup>2</sup> This is remarkable, in view of the proliferation of cases in other common law jurisdictions, the importance attached to this kind of injury elsewhere, as evidenced by law reform commission studies in those jurisdictions, in some instances resulting in statutory enactments, not to mention that entire books are devoted to the subject. The possible reasons for this state of affairs are a matter of speculation, but the phenomenon cannot be explained on the basis of the absence of catastrophic accidents causing large scale death and injury in Hong Kong. It is not easy to forget painful events such as the Top One Karaoke arson attack (1997), the Garley Building fire (1996), the Lan Kwai Fong New Year's Eve crowd control tragedy (1993), and most dramatic of all, the recent hostage-taking in Manila that ended horribly under police mis-management, and that was witnessed through a live television feed by countless people in Hong Kong, including relatives of those injured and killed.<sup>3</sup> All of these events involved human tragedy on a grand scale, and were witnessed by varying numbers of bystanders, in some cases, relatives or loved ones. Moreover, human tragedy on such a large scale is not a pre-requisite for the suffering

<sup>1</sup> In the present context “secondary accident victims” refers to accident victims who suffer psychiatric injury *only*, normally by reason of having witnessed the accident. That is, they suffer no physical injury, nor were they in the line of impact. Those who suffer personal injury in the accident, or, although not physically injured, were in the line of impact, are referred to in the case law as “primary victims”.

<sup>2</sup> The run was broken in *Espiritu v Lo Kit* (2000) HCPI 1266 of 1997. Seagroatt J in the Court of First Instance awarded damages for psychiatric injury to the plaintiff, who heard the collapse and crash of the balcony on which her husband had been standing. She rushed to the scene and heard the voice of her injured husband calling from below. In awarding damages against the negligent owner of the flat, in circumstances which would seem to come within the principles introduced in English case law, the court merely assumed the existence of a duty of care and unfortunately offered no analysis and made no mention of the principles relevant to a duty of care for psychiatric injury suffered by a bystander. More recently, see *Francine Louise Collins v The Star Ferry Co Ltd* (2001) HCPI 491 of 2000, and *Tse Lai Yin & Others v Incorporated Owners of Albert House & Others* [2002] HKLRD (Yrbk) 402 and 416. However, in both of these cases, as liability was admitted, there was no discussion of the duty of care principles relevant to psychiatric injury suffered by a secondary victim.

<sup>3</sup> According to media reports, the events in Manila triggered the need for numerous crisis call centres in Hong Kong to cope with the large scale grief and distress suffered by television viewers. See eg E Lee and A Wan, “Helplines in operation to let traumatised public talk it out”, *South China Morning Post*, August 25, 2010, p A3.

of psychiatric injury by a witness. Witnessing a motor vehicle accident or, for that matter, a crime in which a loved one is injured can trigger such a reaction, as has been experienced elsewhere and been the subject of litigation.<sup>4</sup>

Can the dearth of claims in Hong Kong be explained on the basis of an ingrained stoicism on the part of Hong Kong people? Or is it more likely to be explained on the basis of a collective reluctance to acknowledge mental illness? Or a fear of discrimination, if one is found out? The absence of such cases in Hong Kong is even more remarkable in a culture that purports to attach a higher degree of importance than western societies to family relationships and family loyalty.<sup>5</sup> One might have assumed on the basis of popular local lore that in Hong Kong the witnessing of an injury to a loved one would be more likely to trigger psychiatric and emotional consequences than elsewhere.

Harvey Teff analyses the subject of psychiatric injury claims in all its nuances. Although the focus is on the paradigmatic and problematic case of the witness to a catastrophic accident who suffers psychiatric injury only, the subject is tackled in its entirety, including the expanding area of work-related stress claims, and claims that do not arise from accidents as such, but (for instance) from the negligent performance of medical or educational services or the communication of upsetting news.

In this book Teff challenges the current liability parameters as set by the House of Lords, including the requirements for direct sensory perception of an accident involving loved ones resulting in sudden “shock”. In step with many of the English Law Commission’s 1998 recommendations,<sup>6</sup> Teff argues for the abolition of the policy restrictions imposed and reinforced in House of Lords decisions since the early 1990s. These restrictions require that, as a condition for a duty of care, the plaintiff must show that his injury was suffered through direct sensory perception of the accident, that he was physically and temporally proximate to the accident, that he suffered “sudden” shock, and that psychiatric injury would have been suffered by a person of normal mental fortitude. In place of these, Teff argues that the establishment of a duty of care should be based on general negligence principles, restoring a more principled approach to the determination of liability. This would

<sup>4</sup> What is of course required is that negligence or some other tort is proved against the one causing the accident (eg the negligence of the owner of the building that caught fire, or the negligence of the police in charge of New Year’s crowd control, or of the hostage rescue operation).

<sup>5</sup> For more on community attitudes to mental illness in Hong Kong, see Chou, Mak, Chung and Ho, “Attitudes Towards Mental Patients in Hong Kong”, (1996) *International Journal of Social Psychiatry* at p 213.

<sup>6</sup> *Liability for Psychiatric Illness*, Consultation Paper No 249 (London: HMSO, 1998).

of course entail abolition of the distinction between primary and secondary victims. In the aggregate these changes would mean less complex litigation and arguably, speedier settlements.

Teff argues that the current legal requirement for actionable injury (recognisable psychiatric illness) is outdated and inappropriate, specifically, because there can be severe emotional harm that does not fall within a recognisable psychiatric injury classification. Thus, under the current configuration, many legitimate claims are excluded. Teff argues that the law's bias in favour of physical harm, and its marginalising and dismissing of psychiatric harm, is unjustified. This is a compelling argument, and should not be missed. Tort law's fascination with physical harm, allowing compensation for even the slightest of physical injuries, while ignoring most forms of emotional and psychiatric injury, has never been explained in the case law, and is justifiably questioned in this book. It is hard to disagree with Teff's argument that psychiatric and emotional injury often cause more suffering than physical injury, which at least can be understood, more readily treated, and for which analgesics are generally available.

Teff makes the case that injury in the form of psychiatric or emotional harm should be legally recognised without any qualifiers, in the same way that physical harm has no qualifiers. However, acknowledging that "in the English context, it is idle to suppose that the liability threshold will be extended without a significant, countervailing precautionary measure",<sup>7</sup> and as a pragmatic response to the floodgates fear that has always featured in this area of negligence law, he suggests the introduction of a liability threshold for *all* personal injury claims. Under Teff's approach, minor transient harm, whether physical, psychiatric or emotional, would be excluded. Tapered awards would be available for moderately severe harm and more substantial awards for the more serious.<sup>8</sup> For psychiatric and emotional injury the standard would be "moderately severe mental or emotional harm".<sup>9</sup> In this way, "technical psychiatric definitions, though valuable as indicators, can be subordinated to a more broadly conceived notion of harm measured by intensity, duration and functional incapacity".<sup>10</sup> In monetary terms the monetary threshold for actionability could perhaps be determined by the Judicial Studies Board, already experienced in tariff-setting for other types of injury.<sup>11</sup>

<sup>7</sup> At p 175.

<sup>8</sup> At pp 183–84.

<sup>9</sup> See p 178.

<sup>10</sup> At p 175.

<sup>11</sup> At p 178.

Teff proposes that these reforms are best achieved through legislation, taking his prompt from Lord Hoffmann's candid remark in *White v Chief Constable of South Yorkshire Police*<sup>12</sup> that "the search for principle on psychiatric harm 'was called off in *Alcock*'".<sup>13</sup> All of Teff's proposals are neatly and conveniently summarised toward the end of book.<sup>14</sup> However, in the penultimate section of the last chapter, Teff acknowledges the Department for Constitutional Affairs' 2007 rejection<sup>15</sup> of the Law Commission's 1998 reform proposals, suggesting that Parliament's door may also be closed to reforms, and that the only viable avenue to reform is through development of the common law.

*Causing Psychiatric and Emotional Harm* is a technical work and a challenging read, but one that is amply rewarded. The book not only provides a historical tour of this controversial subject, and an analysis of the current leading cases across the English and Australian jurisprudence, it also puts paid to a number of the basic assumptions about mental illness and its causes that have dogged the courts and that have impeded the development of this area of the law, one that has for a long time been in particular need of a breakthrough. Hence, with this book, the reader is provided with an excellent primer, the practitioner with ammunition for legal argument, and the jurist with much to reflect on.

Whatever be the explanation for the virtual absence of claims in Hong Kong, it is a situation not likely to continue for long in a legal environment where, as elsewhere, the right to compensation is being increasingly asserted. The Hong Kong courts will inevitably have to adjudicate such claims, and in doing so consider the leading case authorities, in order to develop their own parameters for the recognition of claims and the awarding of damages. When that time comes, a book such as the one under review will be a useful guide.

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<sup>12</sup> [1999] 2 AC 455.

<sup>13</sup> See p 185. Lord Hoffmann was referring, with perhaps a mild hint of sarcasm, to the House of Lords decision in *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, still the leading decision in the field of psychiatric injury claims.

<sup>14</sup> At pp 185–186.

<sup>15</sup> *The Law on Damages*, Consultation Paper (CP9) (London: Department for Constitutional Affairs, 2007).

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