
COMMENTARY

*Oscar S. Gray**

The Reporters' recommendations for updating the provisions of the *Restatement (Second) of Torts* that refer to "emotional distress" or "emotional disturbance" are generally progressive within the mainstream of American jurisprudence. No doubt most of us would ordinarily consider that to be an admirable outcome for a *Restatement* revision. Yet I cannot help thinking that, when the time comes to prepare a *Restatement (Fourth) of Torts*, our successors will look back on our efforts on the *Restatement (Third) of Torts* as a lost opportunity to have done better.

Specifically, the relentless emphasis in this draft *Restatement (Third)* on a supposed distinction between "physical" and "emotional" (to the point that the very name of this *Restatement* project was changed in midstream to "Liability for Physical and Emotional Harm"¹) points the discussion in the wrong direction, in light of what we seem to be learning from the modern neurosciences. I do not suggest that the neurosciences 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 antiscience over our work and makes us appear obsolete from the outset.

Rather than a distinction between "physical" and "emotional," I would suggest that we should be exploring a distinction between what might be called "mere feelings" on the one 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 noncompensable in negligence except parasitically, e.g., sorrow or indignation.

While they may be intense, these feelings usually fade with

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1. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM, at i, xxi (Tentative Draft No. 5, 2007).

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 underlying injuries, bodily or dignitary.

Quite different are the medically recognized disorders, which relate to *disabilities*, e.g., in occupational or social functioning. They are the result of unconscious processes of the mind. They are not recognized as disorders unless they are disabling—that is, unless they impair functioning to a degree deemed clinically significant. While they may be accompanied by emotional feelings, it is the disability that constitutes the disorder. The connections between the disabilities and their precipitating factors and any accompanying feelings may be far from accessible to the victim’s consciousness. And these conditions typically do not heal themselves without expert attention. They are injuries to a bodily organ—the brain—in the same way as are conventional somatic diseases, and they should be capable of sustaining a tort action in the same way as other injuries to bodily organs.

Accordingly, to use the term “emotional disturbance” or “emotional distress” to cover both types of mental phenomena is both misleading and trivializing. Particularly unfortunate is the suggestion that “[e]motional disturbance’ is distinct from bodily harm and means harm to a person’s emotional tranquility.”² 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 jurisdiction of the common law, 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 *Restatement (Third)*. I do not put myself forward as competent to state what English law is, a task apparently well accomplished in Mr. Matthews’ article.³ 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.⁴ If they do,

2. *Id.* § 4 cmt. a.

3. See generally M.H. Matthews, *Negligent Infliction of Emotional Distress: A View of the Proposed Restatement (Third) Provisions from England*, 44 WAKE FOREST L. REV. 1177 (2009).

4. See, e.g., *Simmons v. British Steel Plc*, [2004] UKHL 20, [2004] S.C. (H.L.) 94, 111, 115 (appeal taken from Scot.); *Page v. Smith*, [1996] A.C. 155, 182, 188 (H.L.) (appeal taken from Eng.).

they will find a body of outcomes not markedly dissimilar on the whole from those that would be expected in American courts. But they 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 (Third)* often fails to match, precisely because of its obsession with outmoded distinctions between “physical” and “emotional,”⁵ and with concepts of “disturbance” and loss of “tranquility.”⁶ Instead, a recognition that disabling mental disorders, recognized as psychiatric illnesses, are an aspect of personal injury as much “bodily” as is 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).

As Mr. Matthews concludes, “In various (though not all) respects English law is more favorable to claimants than the *Restatement (Third)*’s 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.”⁷ 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 freestanding compensable conditions, in place of the vagaries of judicial or jury understandings about the meaning of the word “severe” in the term “severe emotional disturbance.”⁸

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 do not think these systemic 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 *Restatement (Fourth)* we will have caught up.

5. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. a (Tentative Draft No. 5, 2007).

6. *Id.* § 4 cmts. a–b.

7. M.H. Matthews, *supra* note 3, at 1191.

8. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. i (Tentative Draft No. 5, 2007).