Recovery for Emotional Distress in Tort

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Eric Descheemaeker, *Rationalising Recovery for Emotional Harm in Tort Law*, 134 **Law Q. Rev.** 602 (2018).

In English law, there is no general duty not to cause reasonably foreseeable mental distress, even if the distress-causing conduct is culpable. Indeed, the same is true in respect of psychiatric harm. What, however, is the recoverability of damages for mental distress that occurs as a result of a tortious wrong to the person who suffers the distress? Suppose, for instance, that A negligently damages B's property with the result that B suffers foreseeable mental distress. Here, B's claim is not that A owed a duty of care not to cause reasonably foreseeable mental distress by A's act. It is that B is entitled to damages for loss consequential upon a violation of B's right that A not negligently damage B's property. This is the question skilfully examined in Descheemaeker's article. He explores the extent to which damages are recoverable for emotional harm, defined as "any unpleasant emotional reaction" (P. 603), suffered as a consequence of rights violation. Interestingly, he concludes that the law is largely consistent with a simple principle: damages for consequential (or "parasitic") emotional harm are, in principle, recoverable, within the usual limits of causation and remoteness, for the violation of any tort law right.

Descheemaeker begins by considering why this simple principle is not generally explicitly recognised by the law. Compare damages for economic loss. It is approaching trite law that damages may be recovered for economic loss that is consequential upon the violation of a right, even if a person's economic interest does not serve to generate wide-ranging freestanding rights that others not set back that interest. Yet it seems true, as Descheemaeker says, that most (English) tort lawyers would be considerably more doubtful of the proposition that any reasonably foreseeable emotional harm that results from the violation of right is recoverable in damages.

The article gives two specific explanations for the absence of explicit recognition amongst doctrinal writers. First, Descheemaeker describes a general attitude of suspicion about whether emotional harm is truly "harm" or "loss." There is a tendency to think that "the concept of loss…[is] restricted…to concrete detriments that are pecuniary, i.e. directly valuable in money (damnum in the historical sense of economic or financial loss)." (P. 605.) He rightly notes the tension between this notion of loss and other well-accepted forms of recoverable loss, such as pain and suffering, and loss of amenity. If the law accepts that pain and suffering can constitute "loss", is it not required as matter of consistency to accept that the currency of loss extends beyond the pecuniary? It is plausible to think so. One might object that *emotional* harm is different from *pain*. Pain is not an emotion. Emotions are belief-mediated, and often judgment-mediated: one's emotions are directly responsive to one's beliefs about and evaluations of the world. This seems true, but the point still stands that the law is already deeply committed to extending the concept of loss to comparisons between non-pecuniary states of affairs. Perhaps, however, the belief and judgment-mediated quality of emotional harm has also played a role in emotional harm being viewed with greater suspicion than other forms of harm.

The second explanation is that courts have gone some way to cloaking recovery for consequential emotional harm in terminology that obscures the true nature of the harm in respect of which damages are granted. For example, courts award aggravated damages" in circumstances where the defendant had committed the tort in a high-handed way. The focus here on the defendant's conduct obscures the fact (reasonably well accepted now) that the loss in respect of which aggravated damages are awarded is the additional mental distress occasioned by the humiliating way in which the wrong was committed. Another example discussed is the Court of Appeal decision in Bryant[1] where trespass by the defendant's cattle had damaged trees on the claimant's land. The diminution in value was minimal. The claimants were nonetheless awarded the much greater cost of replacing the trees, the reasonableness of this measure being justified by reference to the claimant's non-pecuniary interest in the amenity value of their land.

Descheemaeker also claims that awards made for “abstractly-defined loss” indirectly compensate for emotional harm. An abstract definition of loss is adopted where the law switches “from the usual perspective of loss as a concrete detriment flowing from the wrong to the abstract definition of loss as the wrong itself.” (P. 608.) So, for Descheemaeker, damages for loss of privacy, loss of liberty, and loss of autonomy all involve indirect compensation for emotional harm.

This seems open to question, however. In some cases, courts make separate awards for the mere fact of the violation of the right in addition to an award of distress. Furthermore, it is clear that sometimes damages may be awarded in this category of case independently of any distress being suffered at all. If B wrongfully uses A’s property for a certain period, B is liable to pay user damages generally representing the reasonable rent for the use. This is also particularly clear in cases where B wrongfully damages A’s property and A is entitled to damages for the loss of use of the property, in addition to the cost of repair, even if the destruction has occasioned no financial loss, because A already had a replacement ready to stand in for the damaged object. Descheemaeker writes of such cases: “if a chattel is immobilised while being repaired, damages can be claimed for the period of immobilisation even when it is not profit-earning. What detriment is being compensated for here? Clearly it is not a pecuniary loss. This must mean that the relevant concrete detriment is emotional: damages for loss of use are in effect damages for mental distress.” (P. 609.)

This analysis faces two problems. First, it is not clear how Descheemaeker would reconcile this proposition with his later acceptance that *de lege lata* damages for non-pecuniary loss are not available in cases of juridical persons. (P. 625.) Second, why think that the only options are pecuniary loss or mental distress? On the face of it, a person can suffer a loss which consists neither in their being financially worse off nor being distressed. A person who is deprived of consciousness for a continued period, and is thereby unable to enjoy their life, is worse off than they would be if they were not so deprived. English law recognises this in granting damages for lost amenity to the comatose. It may be that Descheemaeker endorses a kind of hedonism about loss: on this view, one suffers a loss only if one suffers a conscious negative experience. But the law already accepts a non-hedonistic concept of loss. The clearest example is vanilla pecuniary loss: a person can suffer a financial loss while being entirely unaware of it.

Descheemaeker briefly develops an intriguing reply to this sort of objection. He writes that: “damages for emotional harm are not normally for what the specific claimant has suffered: they are standard awards for what an ordinary claimant would have suffered in similar circumstances.” (P. 624.) In the case of an unconscious person, Descheemaeker claims that the law can treat their being unconscious as an “idiosyncrasy” which is discounted from consideration in determining whether they suffered loss. This reasoning, he suggests, could even be extended to juridical persons. It is true that we see evidence of standardisation in the law in determining the loss a person has suffered. If A wrongfully damages B’s car, the fact that C, B’s friend, has repaired the car gratuitously will be ignored in determining B’s damages. C will be entitled to the diminution in value of the object, measured normally by the market rate for cost of repair. Yet there is a sense in which standardisation calls for justification. If the claimant *herself* is not any worse off, then why is she awarded compensation? In the case of A, B, C, we might say it is because B will feel obligated to compensate C in some way for C’s doing this work. But it is not clear what justification can be given for extending the standardisation of loss to the circumstances Descheemaeker describes (unconsciousness, juridical personality). There is nothing “idiosyncratic” about being a juridical person.

Although we might dispute the idea that the various phenomena adduced to establish the thesis are all reducible to the single notion of emotional harm, Descheemaeker’s analysis, overall, is highly persuasive. He succeeds in making out the case for the existence of an implicit general principle permitting recovery for emotional harm consequential upon a violation of a tortious right in English law. More generally, his article makes a number of interesting observations about the general idea of loss in tort law, in particular concerning the currency of loss, and the standardisation involved in applying the concept of loss. As yet, these issues remain relatively underexplored.

1. Bryant v. Macklin [2005] EWCA (Civ) 762, [2005] All ER (D) 261 (Jun).

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