Defendants, Mental Illness and Negligence Law: A Critique

Nikki Bromberger

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ORIGINALITY STATEMENT

‘I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.’

Signed …….....

Date …….....

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Abstract

At common law, liability in negligence is based generally on an objective standard of reasonable care. As a consequence of this idea those who possess reduced capacities, as compared to the ordinary reasonable person, may be held to standards which they are incapable of reaching.

Yet there are exceptions to this general rule. Children are not required to behave the way reasonable adults behave. Rather, when the defendant is a child, courts take into account the capabilities which are a concomitant of the defendant's age.

A defendant's mental illness, on the other hand, is not considered by courts in Australia (or elsewhere) to be relevant when determining liability in negligence. It has been argued that in this regard the common law is incoherent and unfair.

This thesis considers whether these claims of incoherence and unfairness can be substantiated. In so doing, it considers the philosophical underpinnings of tort law in order to explore possible bases for the current law. It also examines a number of more specific accounts which attempt to justify the present law as it relates to mental illness. It is argued that none of these discussions provide a convincing basis for the different treatment in law between child defendants and defendants with a mental illness.

The discussion extends beyond the confines of tort law to criminal law for explanations for the apparent incoherence. It notes the suggestion that the criminal

law's response to defendants with a mental illness has been fuelled to some extent by a misunderstanding of mental illness and a fear of those suffering from such illnesses.

The thesis examines whether this negative attitude towards mental illness, which some scholars have referred to as 'sanism', is at work in the few Australian decisions which have considered the common law position in relation to mentally ill defendants. Possible changes to this area of law are then outlined and considered.

INTRODUCTION

Mental illness plays an important part in most areas of the law – it may make contracts and wills voidable, it may deem crimes not to have been committed, and jurisdictions throughout Australia have introduced legislation which gives appointed tribunals the power to seriously affect the freedom of action and movement of individuals suffering from a mental illness.

It has often been argued that the way in which some of these areas of law have responded to mental illness is inadequate and inappropriate, and that perhaps this is due to an ingrained prejudice towards mental illness.[1] Nevertheless, the above examples can be seen as an attempt to reconcile or provide a response to the particular concerns faced by a person with a mental illness within that area of law.

The tort of negligence, on the other hand, largely ignores a defendant's mental illness when determining liability. This response is particularly interesting because although it ignores the fact of a defendant's mental illness, it does not ignore some of the symptoms of mental illness when such symptoms manifest for different reasons. When prima facie negligent behaviour is carried out by a person who has a reduced level of awareness, control and reasoned thought due to immature age as opposed to mental illness, such symptoms are taken into account when determining liability in negligence.

[1] See eg chapter 6.

This raises several questions: Why does negligence law ignore a defendant's reduced mental capacity when it is a result of a mental illness? Why does it not do so when the symptoms which reduce mental capacity are due to the defendant being a child? Is it something in the nature of tort law – the objective standard of the reasonable person or the interest in compensation? Or is it that there are differences between children and the mentally ill which explain the varied approach to similar symptoms? And what can understanding the way in which defendants with a mental illness are treated in negligence tell us about tort law itself?

It is true that this issue has infrequently come before the courts.[2] However with the ageing population,[3] the growing number of people with dementia,[4] and the policy of deinstitutionalisation which places those with a mental illness in the wider community, all areas of law, even tort law, will likely come to deal more often with defendants displaying symptoms of mental illness.

Yet even if this were not the case, limited exposure does not make the issue of legal treatment of those with reduced capacity due to mental illness any less significant for those who are affected. It does not make it any less necessary for the legal treatment of such people to be consistent with the theoretical underpinnings of the particular area of law or with the way in which the law treats others. And it does not make it any less

[2] See chapter 7. There have only been two such cases in Australia – *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56 and *Carrier v Bonham* [2002] 1 Qd R 474.

[3] Australian Bureau of Statistics, *3201.0 - Population by Age and Sex, Australian States and Territories, June 2002 to June 2007* http://www.abs.gov.au/ausstats/abs@.nsf/mf/3201.0 at July 25 2008.

[4] Australian Institute of Health and Welfare, *Dementia in Australia: National Data Analysis and Development* (2007) 53-65.

appropriate for the legal treatment of such people to be fair and just in light of the medical realities of incapacity.

Most discussions about the relationship between mental illness and the law concentrate on the impact the illness has on the sufferer's ability to make rational decisions. Over recent years, even though psychiatry has become more informed about the human brain, the law has shied away from this form of analysis and has instead relied upon outdated perceptions of the actual effects of mental illness. This being the case, it serves little purpose pointing out that a person who is hallucinating and in a delusional state cannot meet the standard of a reasonable person. The aim in this thesis is to find the underlying reasons for this apparent intransigence. So while the notion of responsibility is discussed in this thesis, it is not the underpinning of its theme. The complex relationship between mental illness and responsibility is thus beyond the scope of this thesis. Likewise, this thesis does not consider the boundaries and limits of notions such as normal and abnormal.

Rather, this thesis argues that the common law of negligence may be regarded as incoherent in the way it responds to different groups of defendants. It also argues that the direction that the law has taken in relation to defendants who were suffering a mental illness at the time of committing a prima facie negligent act is perhaps informed and fuelled by a fear, misunderstanding and mistrust of mental illness and towards those who suffer from such illnesses.

Chapter 1 of this thesis outlines what is meant by the term mental illness. It provides a brief history of the development of state, medical and community responses to mental illness and highlights the negative attitudes that have always, and continue to be attached to anything associated with mental illness.

Chapter 2 outlines the basic components and structure of negligence law and introduces the problem which arises when a person who is expected to behave like a reasonable person, has reduced ability to so act due to the symptoms of mental illness.

Chapter 3 considers whether the theoretical underpinnings of negligence law or tort law more generally provide insight into how negligence law *should* as opposed to does respond to the defendant with a mental illness. It considers broadly whether there is something distinctive about the nature of tortious negligence, its history, development, purposes or structure which has led it to be one of only a few legal categories which ignore the fact of a defendant's mental illness when determining liability. It concludes that these underpinnings do not provide a definitive answer to this question. Or, more correctly, that the nature of tort law, with its plurality of theoretical underpinnings, does not assist in solving this problem.

Chapter 4 is a comparative chapter, examining the way in which negligence law responds to a group of people who have symptoms similar at times to those experienced by people suffering from some kinds of mental illness. Children, who also possess a reduced level of awareness, control and ability to engage in rational thought processes, are treated quite

differently from those with a mental illness in that their reduced mental capacity is taken into account when determining their liability for otherwise negligent behaviour.

Chapter 5 considers some of the scholastic attempts to both reconcile the difference in legal treatment of mental illness and childhood and to justify the law as it relates to defendants with a mental illness. None of these attempts is able to provide a satisfactory explanation.

Chapter 6 examines the way in which an area of law which has dealt extensively with defendants suffering from a mental illness – criminal law – has responded to the issue. Criminal law is a useful comparative legal category because, like torts, it is concerned with offensive behaviour, and as it was historically joined to tort law it shares with it some of the same functions and goals. This chapter notes the several deficiencies in criminal law's attempt to deal with defendants with mental illness, and notes the suggestion that such inadequacies are perhaps due to a subconscious but pervasive negative attitude toward issues relating to mental illness.

Chapter 7 analyses in detail the courts' reasons for ignoring a defendant's mental illness when determining liability in negligence. These reasons are easily dismissed and, I argue are evidence that the law of negligence appears to be infected with the same fear and misunderstanding of mental illness which is said to be at work in the criminal law.

Although it is not the primary purpose of this thesis to provide proposals for reform, Chapter 8 considers several possible practical responses to the current common law.

CHAPTER 1- Context

1.1 Introduction

This thesis examines the way in which the law of negligence at common law responds to defendants who are suffering from a mental illness. The central argument proposed is that the present law is not explained by reference to the philosophical underpinnings of tort law[1] and it is inconsistent with the law's response to other defendants, such as children.[2] It would therefore seem that there is no rational basis for the present response to defendants with a mental illness.

This thesis argues that although some of the symptoms of mental illness may conflict with the general legal assumption that people are rational beings who can make reasonable choices about when and how to act, this fact ultimately does not explain the law relating to defendants with a mental illness.[3] Rather, it is argued here that the reaction of negligence law to mental illness, and the resultant incoherence in the law is directed by fear and misunderstanding of mental illness and of those suffering from such illnesses.

[1] See chapter 3.

[2] See chapters 4 and 5.

[3] See chapters 6 and 7.

The purpose of this chapter is to provide a context for the central argument of this thesis – that negligence law has been affected by stigma. This chapter will consider whether there is such thing as mental illness, the history and development of the concept and what is meant when people are referred to as mentally ill. As chapters 4 and 5 of this thesis consider childhood as a relevant comparison to mental illness, this chapter will also outline some of the similarities and differences between childhood and mental illness.

1.2 'Mental' Illness?

The boundaries of mental illness are difficult to define and there continues to be debate about whether or not certain conditions are manifestations of mental illness. Before examining this however, it is necessary to determine whether the traditional term 'mental' as distinct from 'physical' is an accurate description of the illnesses under discussion.

Some commentators have suggested that there is no such thing as illnesses that are mental rather than physical in nature. They argue that the concept is mythical and simply a social construct.[4] However, these views are largely out of favour today.[5]

[4] George Alexander and Thomas Szasz, 'Mental Illness as an Excuse for Civil Wrongs' (1967-8) 43 *Notre Dame Lawyer* 24, 27; Thomas Szasz, 'The Myth of Mental Illness' (1964) 15 *American Psychologist* 635; Michael Cavadino *Mental Health Law in Context* (1989) 3; KWM Fulford, Tim Thornton and George Graham, *Oxford Textbook of Philosophy and Psychiatry* (2006) 14-21.

[5] Fulford, Thornton and Graham, above n 4, 14-21.

Others posit that the remarkable development in medical knowledge about cause, diagnosis and cure of mental illness makes it difficult to regard any illness as being purely mental.[6] That is, in light of the continued physical explanations for otherwise unexplained 'mental' phenomena, mental illness may itself be regarded as physical. For example, epilepsy was at one time considered a 'mental' illness. Advancements in medical understanding of the causes of epilepsy have changed the concept of this illness from the purely mental to the purely physical. Today epilepsy is firmly understood as a physical ailment not only by the medical profession but probably also by most lay people.[7]

Even those disorders which are generally considered to be 'mental' in nature may in fact be actually physical. For example, some people who suffer from depression have a neurochemical or hormonal imbalance which can be rectified by correcting this imbalance. In particular they possess reduced availability of neurotransmitters like Serotonin, Dopamine, Norepinephrine, GABA and Acetylcholine than do those people not suffering from depression.[8]

Likewise, it is now thought that mental disorders such as schizophrenia are disorders of brain development caused as a result of the interaction between genes and environmental factors. Studies have found that people who suffer from schizophrenia have

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[6] R.E. Kendell, 'The Distinction Between Mental and Physical Illness' (2001) 178 *British Journal of Psychiatry* 490; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)* (2000) xxx.

[7] See, eg Peter Bladin, *A Century of Prejudice and Progress* (2001).

[8] Michael Trimble, *Biological Psychiatry* (2nd ed, 1996) 233-265.

abnormalities in the temporal lobes, abnormalities in the central nervous system and that these abnormalities probably occurred early in life.[9] Moreover biological testing for schizophrenia is being developed. Researchers have found that the brain wave patterns of a person suffering from schizophrenia react differently when exposed to certain sound stimuli than the brain wave patterns of a person without the illness.[10] Diagnoses of this sort are significant as they merely test a physical reaction to external stimuli, just in the same way as taking someone's temperature shows an abnormality in body heat and an x-ray shows an abnormality in bone structure. Understanding mental illness in this way blurs the line between the 'mental' and the 'physical'.

Even one of the most authoritative manuals on mental conditions, the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)*[11] regards the distinction between mental and physical as dubious. It states that:

> Although this volume is titled the *Diagnostic and Statistical Manual of Mental Disorders* the term *mental disorder* unfortunately implies a distinction between 'mental' disorders and 'physical' disorders that is a reductionistic anachronism of mind/body dualism. A compelling literature documents that there is much 'physical' in 'mental' disorders and much 'mental' in 'physical' disorders. The

[9] Michael Gelder, Richard Mayou and John Geddes, *Psychiatry* (3rd ed, 2005) 126-127; Trimble, above n 8, 183-225.

[10] Nathan Clunas and Phillip Ward, 'Auditory Recovery Cycle Dysfunction in Schizophrenia: A Study Using Event-related Potentials' (2005) 136 *Psychiatry Research* 17.

[11] American Psychiatric Association, above n 6.

> problem raised by the term 'mental' disorders has been much clearer than its solution, and, unfortunately, the term persists in the title of DSM-IV because we have not found an appropriate substitute.[12]

Inherent in the relevant case law and probably the view held by the general public is that there is such a thing as 'mental' illness or 'mental' disorders, and that mental illness is qualitatively different to physical illness.[13] Therefore the following discussion will be based on this assumption.

The extent of the incidence of mental illness in Australia has never been definitively established.[14] It is estimated that almost one in five Australians suffer a mental illness in their lifetime and that at any one time, one in five Australians will be suffering from a mental illness.[15] This means that approximately 2.8 million Australian adults have a mental illness in the space of any one year. Often they experience more than one illness at a time.[16] It is also estimated that at any given point 0.4-0.7% of the population will be affected by psychosis,[17] 3% of Australians will experience a psychotic illness in their

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[12] American Psychiatric Association, *DSM-IV-TR* above n 6, xxx.

[13] See for example chapters 6 and 7 on the difference in legal treatment of those with mental and physical illness. Similar comments are made in Michael Perlin, 'On "Sanism"' (1992-3) 46 *Southern Methodist University Law Review* 375 fn 12.

[14] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* 1993 (Burdekin Report) 13.

[15] This includes psychoses and neuroses – see below pp 22-23; Ibid, 13.

[16] Department of Health and Aging, *National Mental Health Report 2007 Summary of Twelve Years of Reform in Australia's Mental Health Services under the National Mental Health Strategy 1993-2005* (NMHR 2007) http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-report07 at 1 July 2008, 15.

[17] Illnesses which involve psychoses include schizophrenia, bipolar disorder and drug induced psychosis see below pp 22-23.

lifetime and that in any one month approximately 58,000 Australian adults have contact with mental health services because of a psychotic illness.[18] In 2006 there were 14447 patients involuntarily taken to psychiatric hospitals or psychiatric units of public hospitals.[19] There is also international recognition that mental illness represents 11% of disease burden worldwide and it is rated third after heart disease and cancer as the largest cause of illness-related burden in Australia.[20]

1.3 Definition of Mental Illness

Having considered whether there is such thing as illnesses which are 'mental' it is now necessary to consider what the term 'mental illness' in fact refers to. The medical and legal understandings of this expression are sometimes quite different, but their genesis is the same. Until the 19th century mental illness was known in the medical, legal and wider community as either insanity or madness.[21]

1.3.1 Medical Definition

The words 'mental illness', 'mental disease' and 'mental disorder' are often used interchangeably in everyday parlance. However they have a significantly different meaning from a psychiatric perspective. Mental illness is said to relate to a sufferer's

[18] NMHR 2007 above n 16, 15.

[19] Greg James, *Mental Health Review Tribunal Annual Report 2006* Mental Health Review Tribunal http://www.mhrt.nsw.gov.au/mhrt/pdf/annualreport2006.pdf at 3 July 2008, 36.

[20] NMHR 2007, above n 16, 16.

[21] Kendell, above n 6, 490.

experiences of distress. Mental disease denotes the presence of physical pathology (such as Alzheimer's disease). And mental disorder is the term generally used by psychiatrists to refer to all abnormalities of behaviour or psychological experience.[22]

Thus the *DSM-IV-TR* refers to a mental disorder as:

> a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (eg a painful symptom) or disability (ie, impairment in one of more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioural, psychological or biological dysfunction in the individual. Neither deviant behaviour (eg political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.[23]

[22] Gelder, Mayou and Geddes, above n 9, 12-13.

[23] American Psychiatrist Association, *DSM-IV-TR* above n 6, xxxi.

In other words, a mental disorder may be said to be present when a person is experiencing 'delusions, hallucinations, severe alterations of mood, or other major disturbances of psychological functions'.[24]

Mental disorders are conceived as something different from mental retardation or learning disability where the sufferer has simply not advanced from a mental perspective beyond that of a child of a particular age.[25] They also differ to personality disorders because the abnormal behaviour in those suffering from mental disorders tends to have a recognisable onset after a period of normal functioning and behaviour. The abnormal behaviour in someone with a personality disorder tends to have been present continuously from early adult life.[26]

Mental disorders are often divided into two classifications – psychoses and neuroses. Although modern psychiatric opinion is that this division is neither entirely accurate nor helpful, it is often relevant for legal purposes. The term psychosis refers to disorders in which the sufferer may experience hallucinations and delusions and therefore have an inaccurate understanding of the realities of the world around them. People suffering from a psychosis may also have impaired insight, so that they may have a limited awareness that they are experiencing symptoms which are abnormal or that they may require

[24] Michael Gelder, Dennis Gath, Richard Mayou and P Cowen, *Oxford Textbook of Psychiatry* (3rd ed. 1996) 57. It has also been described as a 'pervasive inability to engage reality'. See, Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (1993) 35.

[25] Gelder, Mayou and Geddes, above n 9, 13, 303-317.

[26] Ibid, 13. The distinctions between mental disorders on the one hand, and those with personality or learning disorders are also sometimes made in the legal context. Some of the state mental health legislation specifically exclude anti-social personality and learning disabilities from their definition of mental illness. *Mental Health Act 1996* (Tas) s4(2); *Mental Health Act 1996* (WA) s4(2); *Health Act 1986* (Vic) s8(2); *Mental Health Act 2000* (QLD) s12(2); *Mental Health and Related Services Act* (NT) s6(3).

treatment. Examples of psychotic disorders or psychoses are schizophrenia, manic-depressive disorder (bipolar disorder) and dementia.[27]

Neurosis, on the other hand refers to mental disorders in which the sufferer does not experience hallucinations, delusions or a loss of insight.[28] Examples include anxiety and depression.

Beyond these general notions of mental illness, the precise meaning of, or the exact boundaries of such expressions are unclear because they are of little significance to the medical community at least from a clinical perspective.[29] This is because its primary concern is to treat unwanted symptoms experienced by individuals, and terminology largely does not assist in this process except to the extent that it assists in the provision of treatment.[30] Instead, medical practitioners focus on particular symptoms which have manifested in an individual, in order to try to alleviate such symptoms. For example, the manifestations of an illness such as schizophrenia are best explained for medical purposes by the *DSM-IV-TR*. It explains the symptoms as including:

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[27] Gelder, Mayou and Geddes, above n 9, 11-12, 121.

[28] Gelder, Mayou and Geddes, above n 9, 12.

[29] American Psychiatric Association, *DSM-IV-TR* above n 6, xxx states that 'although this manual provides a classifaction of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder'. The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations.'

[30] Gelder, Mayou and Geddes, above n 9 12; Michael Errington, '"Mental Illness" in Australian Legislation', (1987) 61 *The Australian Law Journal* 182; German Berrios, *The History of Mental Symptoms* (1996) 10.

- Distortions in thought content (or delusions). These are erroneous beliefs which usually involve a misinterpretation of perceptions or experiences such as being tormented, followed, tricked, spied on or ridiculed;[31]

- Distortions in perception (or hallucinations). These are usually experienced as hearing voices distinct from the person's own thoughts;[32]

- Distortions in language and thought process (or disorganised speech). This generally involves the person straying from one topic to another and providing responses which are unrelated to the question. This will be so severe that it leads to a substantial impairment of effective communication;[33]

- Distortions in self-monitoring of behaviour (or grossly disorganised or catatonic behaviour). This incorporates a range of activities including childlike silliness, unpredictable and untriggered agitation and general difficulties with any form of goal-directed behaviour as simple as menial daily activities. This may also include a decrease in reactivity to the environment, such as complete unawareness, maintaining a rigid posture or purposeless and unstimulated excessive motor activity;[34]

[31] American Psychiatric Association, *DSM-IV-TR* above n 6, 299, 300.

[32] Ibid, 300.

[33] Ibid.

[34] Ibid.

- Restrictions in the range and intensity of emotional expression (or affective flattening). That is, the person's face appears immobile and unresponsive. There will generally be poor eye contact and reduced body language;[35]

- Restrictions in the fluency and productivity of thought and speech (or alogia). This means that the person provides only brief, laconic, empty replies to questions and appears to have a diminution of thoughts which is reflected in decreased fluency and productivity of speech;[36] and

- Restrictions in the initiation of goal directed behaviour (or avolition). That is, the person may sit still for long periods of time and show little interest in participating in work or social activities.[37]

Thus, while a 'heading' is helpful, it certainly does not explain the particular symptoms of an individual sufferer. It must be noted that this description does not cover all the elements that are significant from a legal perspective. *DSM-IV-TR* does not consider the individual's degree of control over the behaviours which may be associated with the disorder.[38] For legal purposes, the symptoms relating to lack of awareness and disordered thought which, as outlined above are experienced by those suffering from

[35] Ibid, 301.

[36] Ibid.

[37] Ibid.

[38] American Psychiatric Association, *DSM-IV-TR* above n 6, xxxiii.

schizophrenia, are particularly significant because the law assumes that people have free will and can make rational decisions about how to act.[39]

1.3.2 Legal Definition

Unlike the discipline of medicine, in which symptoms and causes are more important than semantics, the boundaries of an expression such as mental illness are of great significance in the legal context. It may be the difference between holding people responsible for their criminal acts or not, justifying court orders for their involuntary hospitalisation or not, or rendering people competent or incompetent to make a binding contract or will.

In the legal context, the expression mental illness is quite different from that understood by psychiatrists. Rather than relating to the distress experienced by the sufferer, the term tends to be used in the way that psychiatrists use the expression mental disorder – that is, as referring to a 'manifestation of a behavioural, psychological or biological dysfunction'.[40] For example, s4 of the *Mental Health Act (2007)* (NSW) provides that:

> "mental illness" means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

[39] See chapter 6; Peter Arenella, 'Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability' (1991-2) 39 *University of California Los Angeles Law Review* 1511, 1529; Donald Bersoff, 'The Differing Conceptions of Culpability in Law and Psychology' (2004) 11 *Widener Law Review* 83, 84.

[40] American Psychiatric Association, *DSM-IV-TR* above n 6, xxxi.

(a) delusions,

(b) hallucinations,

(c) serious disorder of thought form,

(d) a severe disturbance of mood,

(e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d).

The Act also distinguishes between mental illness and mental disorder, with the latter being defined more broadly than the former. Section 15 provides that:

> A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:
>
> (a) for the person's own protection from serious physical harm, or
>
> (b) for the protection of others from serious physical harm.[41]

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[41] The definition of mental illness in the *Mental Health (Treatment and Care) Act 1994* (ACT) and *Mental Health and Related Services Act* (NT) s6 are substantially the same as the NSW Act. Section 8(1A) of the *Mental Health Act 1986* (Vic) describes a mental illness as 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.' The definition of 'mental disorder' includes a mental illness. Section 12 (1) of the *Mental Health Act 2000* (Qld) provides that: 'Mental illness is a condition characterised by a clinically significant disturbance of thought, mood, perception or memory.' Section 3 of the *Mental Health Act 1993* (SA) provides that: '"mental illness" means any illness or disorder of the mind'. Section 4 of the *Mental Health Act 1996* (WA) provides that: 'For the purposes of this Act a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent.' Section 4 of the *Mental Health Act 1996* (Tas) provides that:

(1) A mental illness is a mental condition resulting in –

(a) serious distortion of perception or thought; or

(b) serious impairment or disturbance of the capacity for rational thought; or

(c) serious mood disorder; or

Thus medical and legal definitions of the same terms can be quite different.[42]

This thesis will adopt the expression mental illness because this is the expression which is most often used in the legal sphere. When used in this thesis it refers a 'manifestation of a behavioural, psychological or biological dysfunction'.[43] It includes people with a personality disorder and those with Alzheimer's disease, but it does not include people with developmental delay.

It must also be noted that the modern semantic practice is to refer to those with mental illness as a person first and as suffering some manner of disability second, rather than referring to them in such a way as to make their condition label them. For example, it is

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(d) involuntary behaviour or serious impairment of the capacity to control behaviour.

[42] As noted on p 22 of this chapter the medical profession does not classify people who are diagnosed with anti-social personality disorder, or psychopathy as it used to be termed, as suffering from a mental illness as such. Yet as discussed in chapter 6 of this thesis for the purposes of the criminal law in some jurisdictions, a person with such a condition is regarded as having a mental illness.

This is partly because the purpose of the law in defining mental illness and the purpose of medicine in undertaking the same task is quite different. Generally speaking, a legal finding that a person has a mental illness results in legal consequences. A medical diagnosis of mental illness has clinical ones. As the response and purpose of each discipline is vastly different it may be suggested that it is not necessarily a fundamental flaw if mental illness is recognised in one but not in another.

Apart from the fact that such responses are too glib, and to some extent avert the issue by refusing to face it head on, they are inadequate because the generalisation as to consequences is not entirely accurate. Legal responses to legal definitions of mental illness do have clinical consequences. For example, as will be discussed in chapter 6, whether a person is to be incarcerated in a prison or to be committed to a psychiatric institution is a legal determination but it has clinical consequences. This fact makes it important for these legal decisions, and legal definitions of medical concepts, to have some correlation with the medical understanding of such concepts. Moreover, as the law knows nothing of medicine, it requires medical practitioners as experts yet only accepts their expertise for undefined 'legal' reasons.

Although it is not the primary focus of this thesis, it is suggested that for an area of law to ignore the reality of medical progress in the mental health field results in the application of legal doctrine that bears no relation to the true situation, and further isolates the law from the members of the community it is designed to serve. Yet this is precisely the current situation – mental illness is of limited significance in the determination of tortious liability and only of restricted relevance in criminal law.

[43] American Psychiatric Association, *DSM-IV-TR* above n 6, xxxi.

preferable to describe people as suffering from schizophrenia rather than to describe them as schizophrenics.[44] Although this semantic preference is more cumbersome than its alternative, it will be adopted in this thesis in an attempt to reduce the stigma which is the fundamental claim of this thesis.

1.4 History

1.4.1 Government Response

The history of state treatment of people with a mental illness can be described as existing in three stages – the pre-carceral era, the carceral era and the post-carceral era.[45] These three stages may be seen as representing the changing medical and social attitudes towards mental illness. For example, in medieval Europe mental illness was conceived in moral terms and was inextricably linked to religious notions of sin and evil. A person who was suffering from a mental illness was regarded as being possessed by demons – a punishment from God.[46] Despite this negative attitude, those with mental illness were largely not considered a threat and there was no organised method of dealing with mental illness.

By the mid 16th century until the 18th century, due in part to the religious zeal generated by the Reformation, this notion of demonical possession had devastating consequences

[44] Burdekin Report, above n 14, 13; John Parry and Eric Drogin, *Mental Disability Law, Evidence and Testimony* (2007) 5; American Psychiatric Association, *DSM-IV-TR* above n 6, xxxi.

[45] Clive Unsworth, 'Law and Lunacy in Psychiatry's 'Golden Age' (1993) 13 *Oxford Journal of Legal Studies* 479.

[46] Perlin, 'On "Sanism"' above n 13, 388; Fulford, Thornton and Graham, above n 4, 149.

for the individuals affected by mental illness. Those with mental illness were often considered to be witches and legislation provided that practising witchcraft was a felony punishable by death.[47] It is estimated that half a million people were tortured and executed for being heretics and witches across Western Europe, although only a minority of this number took place in England.[48] Experts were called on to confirm accusations of witchery. They relied on 'scientific' evidence such as having a third nipple, a pain insensitive area or an inability to shed tears, as evidence of demonical possession.[49]

By the end of the 17th Century, the satanic notions of mental illness and the association between mental illness and witchcraft began to subside.[50] In the 18th century mental illness began to be viewed in a more scientific light. Attitudes towards people with a mental illness became more humanistic and execution of 'witches' ceased.[51]

The official government response to those suffering from mental illness in the 18th and through to the first half of the 20th centuries was to incarcerate them in workhouses and poor houses, along with people with learning disabilities, those who suffered from some

[47] The *Witchcraft Act 1541* (33 Hen. 8) C A P. VIII; *Witchcraft Act 1735* (9 Geo. 2) C A P. V.

[48] Elliott Currie, 'Crimes Without Criminals; Witchraft and its Control in Renaissance Europe' (1969) 3 *Law and Society Review* 7, 10. In England witches were not considered heretics but rather felons according to the common law. This was the result of the *Witchcraft Act 1563* 5 Eliz., c. 16 (1563).

[49] Fulford, Thornton and Graham, above n 4, 149-150; Currie, above n 48, 19-20, 25.

[50] Currie, above n 48, 28.

[51] The *Witchcraft Act 1735* was not officially repealed in NSW until the *Imperial Acts Application Act 1969* (NSW) and in England someone was tried under the *Witchcraft Act 1735* as recently as 1944. Nina Shandler, *The Strange Case of Hellish Nell: The True Story of Helen Duncan and the Witch Trial of World War II* (2006); Malcolm Gaskill, *Hellish Nell: The Last of Britain's Witches*, (2001); Barbara Hately-Broad, "Nobody Would Tell You Anything": The War and Foreign Offices and British Prisoner of War Families During World War II" (2002) 27 *Journal of Family History* 459, 465.

manner of brain dysfunction[52] and other indigent people. It is estimated that by 1815 there were over 4000 work houses and poorhouses in England with over 100,000 residents.[53] It is also estimated that over 2000 of these resident 'paupers' had a mental illness.[54] It was not until a Royal Commission in 1834 aimed at surveying this system of combining those with mental illness and other homeless people that there was any recommendation that people with mental illness be separated from other inmates.[55]

After the passing of a raft of legislation culminating in the *Lunacy Act 1845*[56] designed to respond to those suffering from mental illness, all counties in the United Kingdom were required to have a facility to house people who had a mental illness. They were housed in private madhouses, in registered hospitals and in county asylums.[57] During the 18th and 19th centuries the number of people confined in such institutions rose dramatically.[58]

Regardless of whether or not these institutions were established for positive and humane reasons, the reality is that these places displayed little concern for the treatment and welfare of their patients. Their principle and practice was absolute custody, personal

[52] See above pp 22-23 for the difference between these three types of conditions.

[53] Cyril Joseph Cummins, *The Administration of Lunacy and Idiocy in New South Wales 1788-1855* (1967) 2.

[54] Ibid, 3.

[55] Ibid, 2.

[56] 8 & 9 Vict., c. 100.

[57] Unsworth, above n 45.

[58] Fulford, Thornton and Graham, above n 4, 151-152.

restraint and punishment, and they were rife with neglect, abuse and brutality.[59] Restraint was one of the primary methods of treatment as recently as the early 20th century.[60]

In Australia, during the early years of the new colony, mental illness was of little concern. People who were suffering from mental illness either wandered at large or formed part of the general hospital or gaol population. No formal procedures aimed at providing an organised system for dealing with mental illness is recorded in NSW until the early 19th century.[61] This was because the growth of the NSW population created a need to respond to the overcrowding in prisons. The first asylum in Australia was built in Castle Hill, NSW in 1812. It was under the control of a non-medical superintendent and was staffed by convicts.[62]

Legislation dealing specifically with mental illness was not enacted in New South Wales until 1843. The *Dangerous Lunatics Act 1843* (NSW) was the colony's first attempt to provide a formal systematised approach to dealing with mental illness. The Act was updated in 1867 by the *Lunacy Act 1867* (NSW) and again in 1878[63] and 1898.[64]

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[59] Ibid, 151, Unsworth, above n 45, 484; Cummins, above n 53, 2; Donald McDonald, *The 1878 Lunacy Act and Afterwards: A Study of the Development of Mental Health Legal and Administrative Services in Nineteenth Century New South Wales* (1978).

[60] Harry Solomon, 'Half a Century of Hospital Psychiatry' (1968) 19(12) *Hospital and Community Psychiatry* 367.

[61] Cummins, above n 53, 10.

[62] Cummins, above n 53, 11.

[63] *Lunacy Act 1878* (NSW).

[64] *Lunacy Act 1898* (NSW).

By the mid 19th century, doubts grew regarding the administration and practice of the psychiatric asylums in NSW. A Select Committee of Enquiry on the Lunatic Asylum was appointed in 1846 and it recommended that the head of mental institutions should have medical qualifications and that these institutions should incorporate remedial rather than purely custodial practices.[65] By 1879 there were 2011 patients in psychiatric hospitals of some sort in NSW. Although there were 255 people staffing these hospitals, only six of them had medical training.[66] At the Gladesville psychiatric asylum, for example, there were 677 patients and only two medical practitioners.

By the second half of the 20th century, psychiatric institutions and the practices of incarcerating people with mental illness had become unpopular. These institutions were regarded as inhumane, expensive to maintain, and no longer necessary given the discovery of drugs which provided effective treatment for illnesses such as schizophrenia.[67] As a result, there was a move to close down these institutions and to integrate the former patients into society.[68]

Today, specialist psychiatric hospitals still exist, but the general principle is that where possible, those suffering from mental illnesses should live in the community at large.[69]

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[65] Cummins, above n 53, 18-19.

[66] McDonald, above n 59, 74.

[67] Thomas Ban, 'Pharmacotherapy of Mental Illness – A Historical Analysis' (2001) 25 *Progress in Neuro-Psychopharmacology and Biological Psychiatry* 709, 712-721.

[68] See eg NSW Department of Health, *Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled* (The Richmond Report) 1983; Steven Bottomley, 'Mental Health Law Reform and Psychiatric Deinstitutionalization: The Issues in New South Wales' (1987) 10 *International Journal of Law and Psychiatry* 369.

[69] See eg, *Mental Health Act 2007* (NSW) ss 3, 12-49.

This means that there is a greater percentage of people living in the community who have mental illness than was the case a century ago. There is also, in theory, a greater rate of management of these sufferers.[70]

1.4.2 Medical Response

Modern medicine developed in the latter part of the 18th century. It was at this time the idea of illnesses being mental as distinct from physical developed.[71] Knowledge of psychiatric principles lagged substantially behind the development of medicine generally. It was not until the end of the 18th and beginning of 19th centuries, partly as a result of the availability of patients in asylums for doctors to observe, that medical knowledge in the area of psychiatry advanced, and that special training for nurses and doctors associated with these asylums commenced.[72] Medical practitioners began to question, from a scientific perspective, the causes and treatment of people with mental illness. By the middle of the 19th century a recognisable category of medicine – 'psychiatry' emerged.

Initially a 'moral' or psychological, rather than physical treatment of mental illness was thought to assist the recovery of patients. This theory originated in France and was based

[70] The Burdekin Report, above n 14, 14 states that only about 3% of those who experience a mental illness come to the attention of specialist mental health services; See also Frank Walker, 'Richmond Revisited' Medico-Legal Society of NSW Inc, Scientific Meeting September 2005 http://www.medicolegal.org.au/index2.php?option=com_content&do_pdf=1&id=45 at 1 July 2008.

[71] Kendell, above n 6.

[72] George Rosen, 'Social Stress and Mental Disease from the Eighteenth Century to the Present: Some Origins of Social Psychiatry' (1959) 37(1) *The Milbank Memorial Fund Quarterly* 5, 16; McDonald above n 59, 77; Kendell, above n 6, 490.

on the idea that a structured regime centring on moderation, religious observance and other elements of a supportive environment was effective treatment for mental illnesses.[73]

However, other medical research began to focus on the neurological aspects of mental illness. Psychiatrists believed that the cause of mental illness could be found in the cellular structure of the brain and they endeavoured to find the brain abnormalities that were the basis of the major psychoses.[74] It was during this time that researchers discovered that both Alzheimer's disease and what was known as general paralysis were associated with changes in the brain.[75] In addition, this period of late 19th and early 20th centuries saw the first attempt to categorise mental disorders,[76] the recognition that certain drugs could be effective treatment for mental illness,[77] and the development of theories of psychoanalysis and the power of suggestion as most notably pioneered by Freud.[78]

In the mid 20th century researchers turned their energies to neurochemistry and psychopharmacology. They thought that brain chemistry rather than brain anatomy would explain the causes of the major psychosis. This was as a result of the discovery of certain drugs such as lithium, chlorpromazine and imipramine which appeared to treat the

[73] Dora Weiner, 'Philippe Pinel's "Memoir on Madness" of December 11, 1794: A Fundamental Text of Modern Psychiatry' (1992) 149(6) *American Journal of Psychiatry* 725; Kendell, above n 6, 490; Joseph Morrissey and Howard Goldman, 'Cycles of Reform in the Care of the Chronically Mentally Ill' (1984) 35(8) *Hospital and Community Psychiatry* 785, 786; Rosen, above n 72.

[74] Fulford, Thornton and Graham, above n 4, 152; Solomon, above n 60, 368.

[75] Fulford, Thornton and Graham, above n 4, 152.

[76] Fulford, Thornton and Graham, above n 4, 153; German Berrios, 'Classifications in Psychiatry: A Conceptual History' (1999) 33 *Australian and New Zealand Journal of Psychiatry* 145.

[77] Ban, above n 67, 710-711.

[78] Fulford, Thornton and Graham, above n 4.

symptoms of hypomania, schizophrenia and depression.[79] By the end of the 20th century the focus of psychiatry is once more on biological factors, in particular, psychopharmacology and genetics.[80]

1.4.3 Community Response

General community response to people with a mental illness was similar to that held by the legal and medical community until 19th century. Mental illness was regarded as God's punishment and evidence of demonical possession. Although by the mid 19th century governments and doctors had come to understand that intellectual and planning recourses needed to be directed towards mental illness, the general community response was ambivalent. There was little community interest in the treatment of mental illness beyond the general belief that there was no direct responsibility on community members for providing facilities for such treatment and care.[81] And although notions of demonical possession were no longer popular it was nonetheless considered a significant embarrassment to those associated with someone who had been committed to a psychiatric hospital.[82]

Interestingly, even since the remarkable development in psychiatric principles about cause, diagnosis and cure of mental illness, a plethora of studies indicate that the stigma

[79] Ibid, 155; Ban, above n 77, 712-721.

[80] Fulford, Thornton and Graham, above n 4, 154-155.

[81] McDonald, above n 59, 93, 125.

[82] Ibid, 125; Margareta Ostman and Lars Kjellin, 'Stigma by Association: Psychological Factors in Relatives of People with Mental Illness' (2002) 181 *British Journal of Psychiatry* 494; Kendell, above n 4, 492.

of mental illness still remains.[83] In fact some studies have found that stigmatisation has increased in recent decades.[84] Such attitudes are pervasive and are partly fuelled by ignorance, in particular, a lack of recognition or understanding of mental illnesses, a lack of belief in the effectiveness of treatment and the insistence by the law to largely ignore the fact that it is operating under 19th century knowledge in the 21st century.[85] These negative attitudes develop early in childhood[86] and are often fuelled by the media, which

[83] For a sample see, eg, Andrea Stier and Stephen Hinshaw, 'Explicit and Implicit Stigma against Individuals with Mental Illness' (2007) 42(2) *Australian Psychologist* 106; Bruce Link, Lawrence Yang, Jo Phelan and Pemela Collins, 'Measuring Mental Illness Stigma' (2004) 30(3) *Schizophrenia Bulletin* 51; Sokratis Dinos, Scott Stevens, Marc Serfaty, Scott Weich and Michael King, 'Stigma: The Feelings and Experiences of 46 People with Mental Illness' (2004) 184 *British Journal of Psychiatry* 176; Anthony Jorm and Anne Marie Wright, 'Influences on Young People's Stigmatising Attitudes Towards Peers with Mental Disorders: National Survey of Young Australians and their Parents' (2008) 192 *The British Journal of Psychiatry* 144; Geoffrey Wolff, Soumitra Pathare, Tom Craig and Julian Leff, 'Community Attitude to Mental Illness' (1996) 168 *British Journal of Psychiatry* 183; Peter Byrne, 'Psychiatric Stigma: Past, Passing and to Come' (1997) 90 *Journal of the Royal Society of Medicine* 618; Alison Gray, 'Stigma in Psychiatry' (2002) 95 *Journal of the Royal Society of Medicine* 72; Nicolas Rush, Matthias Angermeyer and Patric Corrigan, 'Mental Illness Stigma: Concepts, Consequences, and Initiatives to Reduce Stigma' (2005) 20 *European Psychiatry* 529; J Read, N Haslam, L Sayce and E Davies, 'Prejudice and Schizophrenia: A Review of the 'Mental Illness is an Illness like any other' Approach' (2006) 114 *ACTA Psychiatrica Scandinavica* 303; M Angermeyer and S Dietrich, 'Public Beliefs about and Attitudes Towards People with Mental Illness: A Review of Population Studies' (2005) 113 *ACTA Psychiatrica Scandinavica* 163; Alan Rosen, Garry Walter, Dermot Casey and Barbara Hocking, 'Combating Psychiatric Stigma: An Overview of Contemporary Initiatives' (2000) 8(1) *Australasian Psychiatry* 19; Anthony Jorm, Ailsa Korten, Patricia Jacomb, Helen Christensen, Scott Henderson, 'Attitudes Towards People with a Mental Disorder: A Survey of the Australian Public and Health Professionals' (1999) 33 *Australian and New Zealand Journal of Psychiatry* 77; Jack Martin, Bernice Pescosolido, Steven Tuch, 'Of Fear and Loathing: The Role of 'Disturbing Behavior,' Labels, and Causal Attributions in Shaping Public Attitudes Toward People with Mental Illness' (2000) 41 *Journal of Health and Soial Behavior* 208; Arthur Crisp, Michael Gelder, Susannah Rix, Howard Meltzer and Olwen Rowlands, 'Stigmatisation of People with Mental Illness' (2000) 177 *British Journal of Psychiatry* 4; Julie Repper and Charles Brooker, 'Public Attitudes Towards Mental Health Facilities in the Community' (1996) 4(5) *Health and Social Care in the Community* 290.

[84] Mathias Angermeyer and Herbert Matschinger, 'Causal Beliefs and Attitudes to People with Schizophrenia Trend Analysis Based on Data from Two Population Surveys in Germany' (2005) 186 *British Journal of Psychiatry* 331; JC Phelan, B Link, A Stueve and B Pescosolido, 'Public Conceptions of Mental Illness in 1950 and 1996: What is Mental Illness and is it to be Feared?' (2000) 41 *Journal of Health and Social Behaviour* 188.

[85] Burdekin Report, above n 14, 200; Anthony Jorm, Lisa Barney, Helen Christensen, Nicole Highet, Claire Kelly and Betty Kitchener, 'Research on Mental Health Literacy: What we Know and What We Still Need to Know' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 3.

[86] Gray, above n 83, 73.

represent people with a mental illness as evil, dangerous and criminal.[87] Studies have even shown that medical students[88] and health professionals stigmatise mental illness.[89]

More importantly, these negative attitudes have real consequences for the people to whom they are directed, and extend to their families.[90] Apart from impacting on such people psychologically, causing feelings of shame and hopelessness,[91] the simple tasks such as finding employment or housing becomes more difficult as a result of social stigma.[92] It is the primary argument of this thesis that this stigma is at the heart of negligence law's response to defendants with a mental illness.

1.5 Childhood Compared to Mental Illness

This chapter has noted that people who have a psychotic mental illness such as schizophrenia may have certain reduced abilities as compared to those who are not

[87] A study in 1996 found that 66% of media items about mental illness on television in the United Kingdom focussed on violence. See, Gray, above n 83, 73; M Anderson, ''One Flew Over the Psychiatric Unit': Mental Illness and the Media' (2003) 10 *Journal of Psychiatric and Mental Health Nursing* 297; Alan Rosen, Garry Walter, Tom Politis and Michael Shortland, 'From Shunned to Shining: Doctors, Madness and Psychiatry in Australian and New Zealand Cinema' (1997) 167 *Medical Journal of Australia* 640; cf Catherine Francies, Jane Pirkis, R Warwick Blood, David Dunt, Philip Burgess, Belinda Morley, Andrew Stewart, Peter Putnis, 'The Portrayal of Mental Health and Illness in Australian Non-Fiction Media' (2004) 38 *Australian and New Zealand Journal of Psychiatry* 541.

[88] GS Malhi, GB Parker, K Parker, VJ Carr, KC Kirkby, P Yellowlees, P Boyce and B Tonge, 'Attitudes toward Psychiatry Among Students Entering Medical School' (2003) 107 *ACTA Psychiatrica Scandinavica* 424.

[89] Gray, above n 83, 74; F Brinn, 'Patients with mental illness: general nurses' attitudes and expectations' (2000) 14(27) *Nursing Standard* 32; Frances Reed and Les Fitzgerald, 'The Mixed attitudes of Nurses to Caring for People with Mental Illness in a Rural General Hospital' (2005) 14(4) *International Journal of Mental Health Nursing* 249.

[90] Harriet Lefley, 'Family Burden and Family Stigma in Major Mental Illness'(1989) 44(3) *American Psychologist* 556; Ostman and Kjellin, above n 82.

[91] Rusch, Angermeyer and Corrigan, above n 83, 530-531.

[92] Gray, above n 83, 74.

suffering from such illnesses. In particular, they may have less awareness of themselves and the world around them, their ability to control their behaviour may be impaired and they may less readily able to engage in what would generally be considered rational thought processes.

Characteristics of childhood are similar in certain respects. It may therefore be assumed that the law would treat the two similarly.[93] This is not to suggest that those with all forms of mental illness are to be regarded as children, but rather that children may represent a useful comparison for three reasons. First, some of the symptoms of a number of mental illnesses are similar to some of the characteristics of children. In particular are the lack of insight and judgment about the world, which is characteristic of a person who is experiencing a psychotic episode. Second, both children and those who suffer from mental illness, due to certain of their reduced abilities, may be regarded as more vulnerable than others in society. Third, in light of the suggestion that there are some similarities between children and those with a mental illness, it is interesting to compare the two because the law appears to be more willing to accommodate in a sympathetic manner the characteristics of childhood than it is the symptoms of those suffering from a mental illness.

There are many theories as to the basis for childhood development – the psychoanalytical perspective, the psychosexual theory, the psychosocial theory, the behaviourism and social learning theory, the cognitive-developmental theory, the information processing

[93] This suggestion is considered in chapters 4, 5 and 7 of this thesis.

theory and the evolutionary theory, just to name a few. The similarity in all these theories is that they recognise that those of immature age either have less developed skill levels (physically, cognitively and socially) as those who have reached adulthood or that they in fact have different ways of thinking, feeling and behaving.[94] The stages or 'capacity levels'[95] outlined by the influential cognitive developmental theorist Jean Piaget provide a clear example.

Birth – 2 years	Infants 'think' by acting on the world with their eyes, ears, hands and mouth. As a result, they invent ways of solving sensorimotor problems.[96] During this period intentionality begins.[97]
2-7 years	Children use symbols to represent their earlier sensorimotor discoveries. Thinking lacks the logical qualities of the remaining two stages.[98]
7-11 years	Children's reasoning becomes logical but it falls short of adult intelligence as it is not yet abstract.[99]
11 years on	Adolescents' capacity for abstraction permits them to reason with symbols that do not refer to objects in the real world.[100] They can

[94] Laura Berk, *Development Through the Lifespan* (3rd ed, 2004) 6.

[95] Leland Stott, *The Psychology of Human Development* (1974) 192.

[96] Berk, above n 94, 19.

[97] Stott, above n 95, 194.

[98] Berk, above n 94, 19.

[99] Ibid.

[100] Ibid.

> also think of all possible outcomes in a scientific problem, not just the most obvious ones.[101]

It is evident that those of immature age have reduced capacity for many tasks.

Although mental illness and childhood are similar in displaying reduced levels of awareness, control and rational thought processes, there are also some difference which may be important from a legal perspective between the two groups.

First, while children, as with those suffering from psychoses, may have reduced ability to engage in rational thought processes or to understand the realities of the world around them, this ability is rather more constant in childhood than is the case with a person suffering from a psychotic illness. The nature of psychotic illnesses such as schizophrenia is such that a sufferer may be completely rational, aware and controlled at one point in time, and then seemingly fairly suddenly experience hallucinations or delusions which significantly reduce these abilities. Thus the same person may be at one time completely rational and capable of understanding and consenting to complex and intrusive medical treatment and at another time completely irrational and incompetent. This is why the *Mental Health Act 2007* (NSW) defines mental illness as "a condition which seriously impairs, either ***temporarily*** or permanently, the mental functioning of the person …"[102] The Act also recognises and is able to accommodate the intermittent nature

[101] Ibid.

[102] *Mental Health Act 2007* (NSW) s 4.

of mental illness by providing for situations of both involuntary commitment[103] and informed consent.[104]

As outlined by Piaget's stages of child cognitive development the reduced capacities of children development tend not oscillate in this way. This potentially intermittent nature of the symptoms of mental illness may pose problems for law makers concerned with regulating behaviour and expectations of such behaviour which it is not faced when dealing with other groups of people who have certain reduced abilities.[105]

In addition, the reduced mental abilities experienced by those suffering from mental illness are often more difficult for others to detect than is the case with children, the physically ill or the developmentally delayed. For a system which is concerned with regulating the interactions between people, this fact may be of particular relevance.[106]

1.6 Conclusion

This chapter has outlined the subject matter of this thesis – mental illness. It has also recognised that the response of others to mental illness has traditionally been characterised by fear, misunderstanding and prejudice. This chapter therefore has set the basis for the claim that the response of the law of negligence to those with a mental illness is affected by similar characteristics.

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[103] *Mental Health Act 2007* (NSW) ss 12-45.

[104] *Mental Health Act 2007* (NSW) ss 91, 93.

[105] This will be discussed in more detail in chapter 5.

[106] See chapter 5.

The following chapter will detail the framework of the law of negligence. It will focus on the objective standard of care as represented by the reasonable person. It will also explain the conceptual difficulty which is created in trying to accommodate a person suffering from some mental illnesses (namely psychoses) within this central tenet of the law of negligence.

CHAPTER 2 - Negligence – Introducing the Problem

2.1 Introduction

The central argument of this thesis is that in light of the law's response to child defendants there appears to be no rational basis for the way in which negligence law responds to defendants who have a mental illness. It is also suggested that the symptoms of mental illness which are theoretically problematic for the law – reduced levels of control, awareness, and rational thought processes, are not ultimately the reason for the law of negligence having developed in the way that it has. Rather, it is suggested that the law has been directed by an historically and culturally constituted fear and misunderstanding of anything associated with mental illness.

Chapter one introduced what is meant by the expression mental illness. It provided a brief history of state, medical and community response to mental illness and compared some of the symptoms of mental illness with the characteristics of childhood. Importantly, it found that there is and always has been a negative stigma associated with having a mental illness. It also suggested that this attitude is not simply due to the symptoms of mental illness, because similar symptoms are also associated with childhood, which is largely free of stigma. It was noted however that childhood and mental illness are different in that the characteristics of childhood are often more stable

and easier for a layperson to recognise and understand than is the case when a person is suffering from a mental illness.

The purpose of this chapter is to understand how the symptoms of mental illness – specifically reduced awareness, control and rational thought – fit within the confines of negligence law. This chapter will outline the context, history and basic structure of negligence law. It will also introduce the specific problem which arises in the case of a defendant to an action in negligence who has reduced mental capacities, whether due to mental illness or for some other reason.

2.2 Context of Negligence

The tort of negligence is based on the fault standard of negligence. Negligent fault sits in between the two opposing fault standards of subjective fault and strict liability.[1]

2.2.1 Subjective Fault and Reduced Capacity

Torts requiring intention as an element of liability are subjective in that fault is determined according to the circumstances of the particular defendant. For example torts of wrongful intention require the particular defendant to have willed the act, knowing the

[1] Izhak Englard, *The Philosophy of Tort Law* (1993) 21, 24; Cf Alan Calnan, 'The Fault(s) in Negilgence Law' (2007) 25 *Quarterly Law Review* 695.

circumstances, and desiring the consequences.[2] Defendants who are unable to fulfil these elements will not be found liable for these torts.[3]

Those torts which do not require intention as to consequences, but merely intention to do the particular act which constitutes the tort are still subjective fault standards because fault is determined by the defendant's actual intention rather than by some external standard. For example, liability in the intentional tort of battery is based on the defendant directly and either intentionally or negligently[4] making unwanted contact with another person.[5] Intention in this context has been interpreted as intent to make the unwanted contact rather than merely an intention to perform an act.[6] Thus, in *Stanley v Powell*[7] although the defendant intended to pull the trigger of the gun which ultimately shot the plaintiff, he did not intend to shoot at or injure the plaintiff and therefore was not found liable for battery.[8]

In the similar case of *Hogan v Gill*[9] a six year old boy shot a four-year-old boy in the head whilst playing a game of Cowboys and Indians. Shepherdson JA found that although pulling the trigger of the gun was a voluntary act consistent with the intent to

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[2] Glanville Williams, *Foundations of the Law of Tort* (2nd ed, 1984) 91.

[3] See eg the tort of conspiracy, *Coomera Resort Pty Ltd v Kolback Securities Ltd* [2004] 1 Qd R 1.

[4] *Williams v Milotin* (1957) 97 CLR 465; *McHale v Watson* (1964) 111 CLR 384. In England, intentional torts such as battery may only be performed with intention. Negligent behaviour is the realm of the tort of negligence only. See *Letang v Cooper* [1964] 2 All ER 929.

[5] Harold Luntz and David Hambly, *Torts, Cases and Commentary* (5th ed, 2002) 679.

[6] Rosemary Balkin and Jim Davis, *Law of Torts* (3rd ed. 2004) 35.

[7] (1891) 1 QB 86; [1886-90] All ER Rep 314.

[8] Ibid, 88.

[9] (1992) Aust Torts R 81.

shoot, the defendant did not expect the consequences which resulted from pulling the trigger.[10] That is, the defendant intended to simulate firing a gun and intended to pull the trigger, but did not intend to actually fire the bullet which hit the plaintiff.[11]

The effect of mental illness on intentional torts was directly at issue in the English case *Morriss v Marsden.*[12] In that case the defendant, who suffered from schizophrenia, violently attacked the plaintiff. He was found unfit to plead to the indictment of the criminal charge of assault but the plaintiff brought a civil action in battery.

Stable J found that people are liable in battery only if they voluntarily perform the act which is said to comprise the tort. That is, the defendant's mind must have been directing the tortious act.[13] Stable J provided that 'if a person in a condition of complete automatism inflicted grievous injury that would not be actionable. In the same way, if a sleepwalker inadvertently, without intention or without carelessness, broke a valuable vase, that would not be actionable.'[14] His Honour found that the defendant in this case, who was suffering from schizophrenia, had performed his actions voluntarily. That is, there is a distinction for legal purposes between an unwilled act (where there is no volition) and a willed act of a diseased mind (where there is volition).[15] Mental illness

[10] Ibid, 15-16.

[11] Ibid, 17.

[12] [1952] 1 All ER 925.

[13] *Morris v Marsden* [1952] 1 All ER 925, 927. See also *Roberts v Ramsbottom* [1980] 1 All ER 7, 15 where the Court referred to automatism as the situation in which the actor has suffered a total lack of consciousness. However other commentators, particularly in the criminal law sphere have regarded automatism as a lack of volition rather than as a lack of consciousness. See chapter 6.

[14] *Morris v Marsden* [1952] 1 All ER 925, 927.

[15] *Ryan v R* (1967) 121 CLR 205, 215.

has not been considered to fit into this category of automatism because it has not been held to negative volition.[16]

In a similar vein, a battery is not committed if the relevant action was one over which the defendant had no control. Control has been interpreted narrowly to refer to cases in which another person or animal is directing the actions of the defendant.[17] It therefore does not encompass mental illness, despite medical findings that people suffering a psychotic episode as a result of a mental illness are sometimes not in control of their actions.[18]

The fact that mental illness may reduce defendants' abilities to appreciate that their acts were wrong is also immaterial for the purposes of subjective fault, in the tort of battery.[19] So too is mistake of fact.[20] Thus a person suffering a delusion that he was hitting a punching bag, but he was in fact hitting a person, cannot use this mistake of fact to defend his action. However it may well be argued that if a defendant, due to a delusion,

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[16]It is thought that even 'actions that irrational perceptions and reasons motivate are nonetheless actions and are therefore distinguishable from involuntary bodily movements or from dissociated states that neurological disorders, extreme trauma or the like produce.' Steven Morse, 'Craziness and Criminal Responsibility' (1999) 17 *Behavioural Sciences and the Law* 147, 156; Balkin and Davis above n 6, 38.

[17] Balkin and Davis, above n 6, 39; If however, the defendant, due to delusions as a result of his mental illness, believed that the plaintiff were about to kill him he may be found to know the nature and quality of his act. The question then arises whether the defendant is able to sustain a defence of self defence. In order to do so the defendant must prove both that it was reasonable in the circumstances to defend himself and that the force used in so doing was reasonable. It is unlikely that hitting a person who could not be regarded as threatening the defendant would be considered reasonable. But the question is from whose perspective reasonableness is judged – the objective bystander, in which case the action would unlikely be reasonable, or the delusional defendant, in which case such actions may well be considered reasonable.

[18] *Fiala v Cechmanek* (1999) 281 AR 248, [11], [15], [16]. Evidence of this nature is readily accepted in criminal cases where the issue of automatism is relevant. See chapter 6.

[19] *Morris v Marsden* [1952] 1 All ER 925, 928.

[20] Ibid, 927.

mistook the plaintiff for a punching bag then the defendant did not have the required intent to perform the relevant act as outlined in *Stanley v Powell*[21] and *Hogan v Gill.*[22] Nevertheless, this is not the law, and although the fault standard of an intentional tort such as battery involves an inquiry into the defendant's state of mind the minimum mental requirement for such intention is fairly low. Thus a person with a mental illness will generally be found to have met the intention requirement for these torts.[23]

2.2.2 Strict Liability and Reduced Capacity

At the other end of the fault spectrum, and generally regarded as the exception rather than the rule in tort law, is strict liability.[24] There are several types of strict liability – conduct-based,[25] relationship-based[26] and outcome-based.[27]

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[21] (1891) 1 QB 86; [1886-90] All ER Rep 314.

[22] (1992) Aust Torts R 81.

[23] *Morriss v Marsden* [1952] 1 All ER 925; *McHale v Watson* (1964) 111 CLR 384.

[24] Since the rule of *Rylands v Fletcher* (1868) LR 3 HL 330 has been subsumed into the law of negligence, vicarious liability is the main example of strict liabitiy in tort.

[25] It exists in tort law if the defendant inadvertently interfered with the property of another person, or if the defendant intentionally interfered with the property but was in no position to know that the property belonged to another person. It also arises in defamation whereby a person may be held liable even if s/he did not know that the published material was defamatory. Strict liability in these cases illustrates the high value our society places on property rights and reputation; See, Peter Cane, *The Anatomy of Tort Law* (1997) 45-46.

[26] Relationship-based strict liability includes what is known as vicarious liability. In such cases, the relationship between two parties creates liability of one party for the wrong doing of the other regardless of any fault on the part of the first party. There are two suggested reasons for the existence of strict liability in these situations. First, the party who engages in an activity for profit should bare the responsibility for any damage arising out of such activity. Second, as a matter of efficient loss distribution, the party who is held vicariously liable will generally be in a better position to compensate the victim than is the actual wrongdoer. Thus relationship-based strict liability has both moral and practical driving factors; See, Cane, *Anatomy* above n 25, 45-49.

[27] Outcome-based strict liability centres on the idea that the person who creates the risk should pay the person whose interest may have been interfered with, regardless of whether damage has actually resulted from the risk. This last form of strict liability is very rare in tort law. It existed only in keeping of dangerous animals, and liability for escape of dangerous things from land. Again, this is a comment on the importance of the interest that is being protected (in this case property rights). The liability in these cases is

Strict liability generally exists to provide extra protection for particular kinds of harm, or from particular kinds of activity.[28] In these cases liability is imposed regardless of the defendant's moral or personal fault – if a rule was broken, or damage was caused, liability ensues regardless of whether such determinations coincide with moral conceptions of fault. It is quite possible that moral notions of fault will coincide with particular findings in strict liability cases, yet it is no defence to such liability to claim that there is incongruence between the two.[29] The defendant's state of mind and therefore mental illness in cases of strict liability is therefore of no significance in determining liability.

2.3 Negligence

In between subjective fault and strict liability sits negligence. The term negligence has many meanings. It refers to a standard of fault, it is a component of other forms of action (for example negligent trespass)[30] and it is a cause of action on its own. This thesis is concerned with the tort of negligence and how that tort deals with mental illness.

Broadly speaking, negligent fault exists where the defendant has failed to act in accordance with a prescribed standard of care. Unlike subjective fault, this is a standard

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strict because it can exist even when the defendant did not intend to cause injury, was not reckless or negligent in creating the risk of injury and did not in fact cause the risk of injury to materialise; See, Cane, *Anatomy* above n 25, 48.

[28] Cane *Anatomy* above n 25, 45-49; Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003) 42-43.

[29] Cane, *Anatomy*, above n 25.

[30] *Williams v Milotin* (1957) 97 CLR 465; *McHale v Watson* (1964) 111 CLR 384.

external to the individual. The tort of negligence however does not attach to all behaviour which falls below the standard of care, but only behaviour within certain confines. This is best explained by Lord MacMillan in *Donoghue v Stevenson*. His Honour explained:

> The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence… The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in breach of that duty.[31]

Thus tortious negligence exists within prescribed limits, and it comprises three basic elements. There must be a duty to act carefully towards certain groups of people. This duty must have been breached – the actual negligent behaviour. Third, there must be a causal connection between this negligent behaviour and the loss caused to the person to whom a duty was owed. The first and third elements of tortious negligence are essentially controlling factors to limit the scope of the law's reach into people's careless behaviour. The second element – the breach of the duty to take care, is the heart of negligence and is the focus of this discussion.

[31] *Donoghue v Stevenson* [1932] AC 562, 618-9.

2.3.1 Development

The tort or negligence grew out of the cause of action 'trespass on the case' which developed in the second half of the 14th century.[32] Before this time, the main cause of action in tort was trespass. By the beginning of the 18th century the formal difference between actions for trespass and actions for trespass on the case became temporal in nature.[33] Trespass was the appropriate cause of action if the defendant's wrongful act towards the plaintiff was immediate, in the sense that it followed 'so immediately upon the act of the defendant that it may be termed part of that act'[34] (for example, hitting a person with an object is immediate). Trespass on the case was the correct cause of action for wrongs which due to 'some obvious and visible intervening cause … is regarded, not as part of the defendant's act, but merely as a consequence of it'[35] (for example, tripping over the thrown object is consequential).

As time passed, trespass on the case became increasingly associated with unintentional or careless behaviour, and from trespass on the case emerged the tort of negligence. Negligence was not initially regarded as an independent tort as such because it did not develop according to an overarching theory or principle. Instead particular situations or relationships were identified as ones in which one party came under a special duty to take care in relation to the other party, and failure to comply with this duty sounds in damages

[32] M J Prichard, *Scott v Shepherd (1773) and the Emergence of the Tort of Negligence* (1976) 7.

[33] *Scott v Shepherd* (1773) 2 Wm Bl 892, 894; Ibid, 13.

[34] *Hutchins v Maughan* [1947] VLR 131 citing W.T.S Stallybrass (ed), *Salmond on Torts* (7th ed, 1928) 230; *Leame v Bray* (1803) 3 East 593, 603.

[35] Ibid.

to the injured party. Such duties arose for example between bailor and bailee, and innkeeper and customer.[36]

By the 19th century however, negligence law was forced to respond to a society which had undergone and was continuing to experience significant social and economic developments. Apart from the general impact of the 18th century Enlightenment thinking which highlighted the notion of human freedom and personal responsibility, the 19th century saw a rapid growth in industry. This was significant for the law of negligence because the circumstances of industrialisation – large populations working with or in close proximity to powerful machinery, coupled with the advent of mass production which meant that the end user had no particular relationship with the producer, saw the vastly increased potential for damage causing behaviour by unrelated parties. It was soon recognised that the existing categories allowing for private compensation by a legally negligent party were inadequate to encompass the expanding sources of risks and losses. Thus the need for legal action to compensate for unintentional damage grew.[37]

In 1932 in *Donoghue v Stevenson*[38] the House of Lords opened the door for an expanded reach of the law into negligent behaviour by articulating a test for identifying when one person may owe a duty of care to others outside of the already established categories of negligence. This established the law of negligence as an important and independent tort

[36] Thomas Grey, 'Accidental Torts' (2001) 54 *Vanderbilt Law Review* 1225, 1243; Luntz, above n 5, 132.

[37] Fleming, *The Law of Torts* (9th ed 1998).

[38] [1932] AC 562; [1932] All ER Rep 1.

unified under guiding principles.[39] Since this crystallization, tortious negligence has taken over large portions of nuisance and trespass law, and the vast majority of tort cases coming before the courts have been, and continue to be, negligence cases. Negligence is now generally regarded as the essence of tort law.[40]

2.3.2 The Law of Negligence

The breach of a duty which is the basis of the law of negligence involves a falling short of a standard of care proscribed by law. This standard of care represents behaviour which is regarded as the appropriate response to the risk of harm being caused as a result of one's actions. Yet this explanation can be interpreted in one of a number of ways. In particular, it raises questions regarding what would entail an appropriate response to the foreseeable risk, (in other words, what is the prescribed standard of care), and how characteristics of the individual actor impact on such determinations.

The general rule in this regard is illustrated by the 19th century case *Vaughan v Menlove*.[41] In that case the defendant kept a hayrick on his property and had been warned that such activity could lead to the hay spontaneously igniting. His response to this risk was to simply 'take the chance'.[42] The hay ignited and damaged the plaintiff's

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[39] See Percy Winfield, 'The History of Negligence' (1926) 42 *Law Quarterly Review* 184; Allan Beever, *Rediscovering the Law of Negligence* (2007) 2 indicating that judges in reality continued to regard negligence law as consisting of separate duties applying to particular situations.

[40] Francis Trinidade and Peter Cane, *The Law of Torts in Australia* (2007) 277; C Walton, *Charlesworth & Percy on Negligence* (2006) 11; Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 97.

[41] (1837) 3 Bing NC 468; (1837), 132 E.R. 490 (C.P.).

[42] *Vaughan v Menlove* (1837) 3 Bing NC 468, 471; (1837), 132 E.R. 490 (C.P.).

neighbouring property. The defendant argued that he could not be found negligent because he was of below average intelligence, and therefore could not be expected to act the way a reasonable person would have acted.[43] Thus the Court was asked to consider whether the test for negligence should be objective (had the defendant exercised the precaution that a prudent person would have exercised under the circumstances) or subjective (whether the defendant had acted bona fide to the best of the defendant's judgment). [44]

Primarily for reasons related to the broader functions of the law of torts, the Court held the relevant standard to be objective.[45] Tindal CJ found that a rule which allowed the defendant merely to act to the best of his abilities would be too vague a standard by which to judge liability, as the ability or judgment of each person is 'infinitely various'.[46] Thus, when considering whether a defendant has been negligent (not responded appropriately to as risk), a judge is not to consider any idiosyncrasies or personal characteristics of a particular defendant but merely whether the defendant had acted the way a person of ordinary prudence would have acted under similar circumstances.[47] That is, the general rule provides that the defendant's actual ability (be it physical or mental) to reach the proscribed standard is irrelevant to determinations of liability.

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[43] George Fletcher, 'The Fault of not Knowing' (2002) 3 *Theoretical Inquiries in Law* 265, 277.

[44] *Vaughan v Menlove* (1837) 3 Bing NC 468, 471 (1837), 132 E.R. 490 (C.P.).

[45] See Beever, above n 38, 79 arguing that the objective standard is not merely one of convenience but is required by corrective justice theory; see also Grey, above n 36, 1266-7.

[46] *Vaughan v Menlove* (1837) 3 Bing NC 468, 475; (1837), 132 E.R. 490 (C.P.) 493.

[47] Ibid.

Therefore, unlike what may be the case in every day thinking, or moral notions of negligence, an actor's best efforts and thoughtful consideration would appear to be of specifically limited importance when considering tortious negligence.[48]

It is interesting to note however that *Vaughan v Menlove* was not a case of a defendant with reduced capacity as a result of age or mental or physical illness, but of an 'ordinary' adult who made a poor decision. There was no proof that it was impossible for the defendant to meet the required standard. This is no doubt why Tindal CJ's decision talks not of the capacity of the defendant but of his 'judgment'. It is possible that although the Court confirmed the objective test for liability in negligence, it did not envisage such a test to extend to cases in which the defendant, because of some physiological or psychological condition, was incapable of reaching the proscribed standard. Nevertheless, the test stands for the principle that the personal characteristics of a defendant are irrelevant to decisions about liability in negligence.

2.3.3 Reasonable Person and Capacity

The standard by which the defendant's behaviour will be judged is that of the hypothetical 'reasonable person' placed in similar circumstances as the actual defendant.[49] That is, defendants will be deemed to have acted negligently if they did not act the way a reasonable person in the same circumstances would have acted in response

[48] Henry Edgerton, 'Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence' (1925-6) 39 *Harvard Law Review* 849, 852.

[49] The relevant standard, until fairly recently was that of the 'reasonable man' but the expression has changed in order to recognised the inherently biased nature of this term.

to a foreseeable risk.[50] In determining the way a reasonable person would have acted the trier of fact weighs various concerns, including the likelihood that damage will be caused to another person as a result of the defendant's action, the seriousness of the damage if it were to occur and the difficulty, or burden that avoiding the risk would impose on the defendant.[51]

Despite the initially clear statement as to what tortious negligence entails, this standard is in reality fairly imprecise. In particular, it comprises two fairly vague elements which beg the questions – who is the 'reasonable person', and what does 'in the circumstances' mean? There have been many statements as to the make up of the reasonable person but in the end none are particularly helpful; other than to confirm the imprecise and even dangerous nature of the concept.

The reasonable man (the precursor to the reasonable person) has been described as 'the man of ordinary intelligence and prudence'[52] the 'man on the Clapham omnibus',[53] and as the 'hypothetical person on the hypothetical Bondi tram'.[54] This implies a standard of ordinariness, normality and reasonableness,[55] but at the same time it has been suggested that this hypothetical person is more careful than most people. Fleming has stated that

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[50] *Wyong Shire Council v Shirt* (1980) 146 CLR 40; See also eg *Civil Liabiltiy Act 2002* (NSW) s5B(1).

[51] This is generally known as the Hand Formula and comes from *United States v Carroll Towing Co* 159 F 2d (1947); See also *Civil Liability Act 2002* (NSW) s5B(2).

[52] Oliver Wendell Holmes, *The Common Law* (1881) 108.

[53] Attributed to Lord Bowen by Collins MR in *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, 109.

[54] *Papatonais v Australian Telecommunications Commission* (1985) 156 CLR 7, 36.

[55] Stephen Todd (ed), *The Law of Torts in New Zealand* (2nd ed, 1997) 394.

the reasonable person is 'the embodiment of all the qualities we demand of the good citizen: and if not exactly a model of perfection, yet altogether a rather better man that probably any single one of us happens, or perhaps even aspires to be'.[56] Yet it has also been suggested that:

> There is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor – his physical attributes, his intellectual powers, probably, if superior, his knowledge and the knowledge he would have acquired had he exercised standard moral and at least average mental qualities at the time of action or at some connected time.[57]

It is not only the precise definition or characteristics of the reasonable person which are somewhat ephemeral, but also the role or function of the reasonable person. Some commentators argue that the reasonable person is a normative standard representing how people should act,[58] yet the characterisation of this person by the courts, as outlined above seem to indicate that the reasonable person is more descriptive than normative.[59]

It is most likely that in fact the reasonable person test is applied both normatively and descriptively, depending on the circumstances. For example, in the case of professionals, a finding that others in that profession would have acted the way the particular defendant

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[56] Fleming above n 37, 118; see Moran above n 18, chapter 1 for detailed discussion of the reasonable person.

[57] Warren A Seavey 'Negligence – Objective or Subjective' (1927-8) 41 *Harvard Law Review* 1, 27.

[58] See eg Moran above n 18, 13-14.

[59] See Peter Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed, 2004) 29-31.

would have acted has in some jurisdictions lead to a finding of no liability for the defendant.[60] Yet in situations such as driving, courts are prepared to impose their own value judgments as to the appropriateness of the defendant's behaviour regardless of whether this behaviour conforms to the behaviour of others performing like activities.[61] Thus it seems that there is little that can really be drawn as to the essential nature of the reasonable person, other than he is somewhere between perfect and the rest of us.[62]

In other areas of law where the reasonable person has been used as a benchmark for determining the appropriateness of behaviour, the reasonable person appears to have characteristics with general terms quite similar to those of the actual defendant. So for example, in the criminal negligence case of *R v Lavender*[63] the High Court of Australia approved the trial judge's direction to the jury that the relevant standard was of a:

> reasonable person who possesses the same personal attributes as the accused, that is to say a person of the same age, having the same experience and knowledge as the accused and the circumstances in which he found himself.[64]

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[60] See eg. *Civil Liability Act (2002)* NSW s5O; *Sidway v Governors of Bethlem Royal Hospital* [1985] AC 871; Cane, *Atiyah* above n 59, 30.

[61] Cane, *Atiyah* above n 59, 30.

[62] Randy Austin, 'Better off With the Reasonable Man Dead or the Reasonable Man Did the Darndest Thing' (1992) *Brigham Young University Law Review* 479, 485; Fleming James Jr, 'The Qualitites of the Reasonable Man in Negligence Cases' (1951) 16 *Missouri Law Review* 1.

[63] (2005) 222 CLR 67.

[64] Ibid, 73. Interestingly however, the quote continues 'and having the ordinary fortitude and strength of mind which a reasonable person would have'. This implies that although age and experience can be attributed to the individual defendant mental state cannot. It is important to note however, that even if this were not the case, and the criminal law were to take a purely objective approach which did not allow for any form of particularisation as to the qualities of the reasonable person or the meaning of 'in the circumstances' of the accused, the existence of the defences which deal with mental disorders allows the issue of mental illness to be raised. See chapter 6. As will be explored in chapter 7 this is not the case in

In the criminal context where the reasonable person has not been said to possess qualities akin to the defendant he has come under intense criticism. For example, in relation to the criminal defence of provocation Murphy J has stated that:

> The objective test is not suitable even for a superficially homogenous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary … Australian. [65]

Likewise, McHugh J stated that:

> In a multicultural society such as Australia, the notion of an ordinary person is pure fiction … Unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard

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tort law. There are two significant differences between negligence standards in tort and criminal law. First, while civil negligence is unconcerned with the extent to which the defendant has veered from the behaviour to be expected of the reasonable person, criminal negligence requires the degree of negligence to be of such a high degree – both as to extent to which the defendant fell below the reasonable standard and the degree of risk to other people as a result of the negligent behaviour – as to warrant criminal punishment.

[65] *Moffa v R* (1977) 138 CLR 601, 626.

> that reflects the values of the dominant class but does not reflect the values of those minorities. [66]

Thus, it has been said in a fairly humorous regard, that:

> 'No one knows just exactly how the Reasonable Man first appeared in the law. Some argue that he evolved. Others maintain that he was created. A few suggest that he is a mythical creature that really doesn't exist at all. Many honest observers have admitted that they could not care less. Most agree that he ought to be put to death regardless.'[67]

What is clear is that the objective standard of the reasonable person is problematic in whatever context it is used. First, from a practical perspective, as the criterion is rather obscure, it is likely that it will be applied inconsistently across similar fact scenarios.[68]

Second, and more fundamentally, a law which measures the legality of an individual's behaviour according to a standard of conduct which requires all to act in a manner similar to a hypothetical 'reasonable' or 'ordinary' person (whatever this means) becomes problematic when a particular defendant does not actually possess the mental or physical

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[66] *Masciantonio v R* (1995) 183 CLR 58, 73-74.

[67] Austin, above n 62, 480, footnotes omitted.

[68] Kenneth Simmons, 'Dimensions of Negligence in Criminal And Tort Law' (2002) 3 *Theoretical Inquiries in Law* 283, 310; Moran, above n 18; Carolyn Sappideen, Prue Vines, Helen Grant and Penolope Watson, *Torts Commentary and Materials* (9th ed, 2006) 460.

capacity to reach this standard.[69] In such a situation, the question arises whether the standard of measurement may be altered in some way to take into account, or more accurately reflect, the actual capacity of the defendant. Alternatively, should the standard remain at a level at which the defendant is profoundly incapable of reaching?

Ironically, capacity is in one sense at the heart of negligence law. Defendants are negligent if they did not act the way ordinary people in a similar situation would have acted. This implies that there was in fact the option of acting otherwise – that it was possible to have taken steps to avoid injury because that is what the ordinary person would have done. If a plaintiff is injured as a result of a defendant's action, under circumstances in which it was not reasonable to expect the defendant or any other ordinary person in the defendant's position to have acted otherwise, liability will not ensue. At the heart of this formulation is capacity for action – not individual capacity for action, but capacity for action more generally.[70] In other words, 'ought implies can'.[71]

Despite the importance of capacity in a general sense to the law of negligence, the basic rule of liability centres on a falling short of the standard of behaviour expected of a person in the circumstances of the defendant, regardless of the defendant's actual

[69] Moran, above n 18, 5.

[70] Moran, above n 18, 142, 165. Stephen Perry, 'Risk, Harm and Responsibility' in David Owen (ed) *Philosophical Foundations of Tort Law* (1995) 321, 341-2; Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 *Law Quarterly Review* 530.

[71] Tony Honoré, *Responsibility and Fault* (1999) Ch 7; Beever above n 38, 76-78; Stephen Perry, 'Responsibility for Outcomes, Risk and the Law of Torts' in Gerald Postema (ed) *Philosophy and the Law of Torts* (2001)72, 91-97; Philip Pettit, 'The Capacity to Have Done Otherwise; An Agent-Centered View' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 21; Arthur Ripstein, 'Private Law and Private Narratives' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 37, 40-42.

capacity to reach this standard. Or, in the words of Alderson B in *Blyth v Birmingham Waterworks*:[72]

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do: or doing something which a prudent and reasonable man would not do.

This objective standard therefore 'eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.'[73]

One of the purported reasons for negligence law not considering the state of mind, or general abilities of the particular defendant is due to the needs of others in society, specifically the plaintiff. As Holmes explained:

> The law takes no account of the infinite varieties of temperament, intellect and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them … [A] man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, not doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect.[74]

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[72] (1856) 11 Ex 781, 784.

[73] *Glasgow Corporation v Muir* [1943] AC 488, 457.

[74] Holmes, above n 52, 108.

In theory, this means that children, people with a physical or mental disability and those with a mental illness will be expected to act in a way that may be completely beyond their actual abilities. Thus the law of negligence, predicated on rational decision making, applies to actors who are perhaps not rational and therefore are held to standards that they cannot meet.[75]

It has been suggested that such an approach is unfair and that a law which requires individuals to act in ways in which they are unable to behave is not so much objective negligent fault, as it is strict liability.[76] For example, in the English Court of Appeal case *Mansfield v Weetabix Ltd*[77] the defendant caused extensive property damage to the plaintiff by driving in a manner which was considered to be below the reasonable person standard. This was because the defendant was at the time suffering from a hypoglycaemic episode which removed the possibility that he could have been aware either of the fact that he was experiencing such an episode or that his driving skills had been significantly impaired. Leggatt LJ took a sympathetic approach to the defendant's

[75] William Rodgers, 'Negligence Reconsidered: The Role of Rationality in Tort Theory' (1980) 54 *Southern Californian Law Review* 1, 18; Fleming James Jr, 'The Qualities of the Reasonable Man in Negligence Cases' (1951) 16 *Missouri Law Review* 1, 2, 6.

[76] See eg Francis Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924-5) 23 *Michigan Law Review* 9; *Fiala v Cechmanek* (1999) 281 AR 248**,** [31]; *Fiala v MacDonald* (2001) 201 DLR (4th) 680, [18], [29]; Moran, above n 18, 42-43; Pamela Picher, 'The Tortious Liability of the Insane in Canada … With a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative' (1975) 13 *Osgoode Hall Law Journal* 193, 225; WM Justus Wilkinson, 'Mental Incompetency as a Defense to Tort Liability' (1944-5) 17 *Rocky Mountain Law Review* 38, 56; Robert Ague, 'The Liability of Insane Persons in Tort Actions' (1955-56) 60 *Dickeson Law Review* 211, 221; Mark Grady, 'The Free Radicals of Tort' in Francesco Parisi and Vernon Smith (eds), *The Law and Economics of Irrational Behavior* (2005) 425, 428; William Rodgers, 'Negligence Reconsidered: The Role of Rationality in Tort Theory' (1980) 54 *Southern Californian Law Review* 1, 14-15; Honoré, 'Responsibility and Luck' above n 70.

[77] [1998] 1 WLR 1263.

circumstances and challenged the notion that ignoring individual capacities is the correct basis on which the law of negligence should proceed. His Honour explained that:

> In my judgment, the standard of care that [the defendant] was obliged to show in these circumstances was that which is to be expected of a reasonably competent driver unaware that he is or may be suffering from a condition that impairs his ability to drive. To apply an objective standard in a way that did not take account of [the defendant's] condition would be to impose strict liability. But that is not the law.[78]

In distinct contrast to this view, Neill J in *Roberts v Ramsbottom*[79] highlighted the relationship between legal and non-legal notions of fault and the role of capacity in both. In that case, the defendant suffered a stroke whilst driving, thereby causing an accident and injuring the plaintiff. His Honour stated that, 'the defendant was in no way morally to blame, but that is irrelevant to the question of legal liability in this case'.[80] Negligence according to this view is not concerned with the actor so much as the act performed by the actor.[81] Negligence is simply conduct which falls short of a standard, and what, if anything, the actor thought of this standard or of her behaviour is largely irrelevant. It is only the act itself, and its connection with the relevant standard which is of legal concern.

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[78] *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263, 1268.

[79] [1980] 1 WLR 823; Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 533, 536.

[80] *Roberts v Ramsbottom* [1980] 1 WLR 823, 833.

[81] Jules Coleman, 'Mental Abnormality, Personal Responsibility and Tort Liability' in Brody and Engelhardt, (eds) *Mental Illness: Law and Public Policy* (1980) 112; Martin Stone, 'On the Idea of Private Law' (1996) 9 *Canadian Journal of Law & Jurisprudence* 235, 251.

Although this negligence-as-conduct view of tortious negligence, or the strict adherence to the objective standard, sometimes has the effect of requiring people to act beyond their means, some scholars argue that this consequence cannot be correctly seen as a form of strict liability. This is because the objective test is not predicated on causation alone as is strict liability. Rather, the objective test is based on a standard of some sort.[82] Thus although the objective fault of negligence does not necessarily coincide with moral fault on every occasion, it does not make determinations of liability regardless of fault. It is simply that negligent fault is based on a standard external rather than internal to the specific defendant. This standard it is argued is one based on conduct rather than state of mind.[83]

Thus there appears controversy surrounding the precise requirements of legal negligence and in particular, the role of fault and capacity in this structure. Yet it would appear that the prevailing view today, at least in theory, is that negligence represents an objective fault standard which is necessarily largely insensitive to the personal element of the defendant.[84]

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[82] See Beever, above n 38, 80-84 for discussion and criticism of *Mansfield v Weetabix Ltd*.

[83] Holmes, above n 52, 77-127; Peter Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 81, 101; Grey, above n 36, 1265; Edgerton, above n 47, 849-852; Beever, above n 38, 82; Yet it is nonetheless interesting that despite the fact that tortious fault bears no necessary connection with moral fault a person labelled with the tag of 'negligent' is generally condemned as blameworthy. Anita Berstein, 'The Communities that Make Standards of Care Possible' (2002) 77 *Chicago-Kent Law Review* 735, 735. There are those who argue that it is not possible, or at least not desirable to have one without the other. See Moran, above n18.

[84] R. F. V. Heuston and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (19th ed, 1987) 216.

It has been suggested that this debate between negligence as a state of mind and negligence as conduct is largely academic, and that very little in fact turns on the issue from a practical point of view.[85] Whether or not this is a valid comment in relation to the majority of negligence cases, it certainly does not accurately represent the impact of the way such fault is categorised when the defendant is a person who suffers from a mental illness. This is because conceiving negligence as conduct does not involve an inquiry into the actor's state of mind, and it does not as readily allow for any of the reduced mental capacities that a defendant with a mental illness may have possessed when engaging in offensive behaviour.

Negligence as conduct would only appear to take into account the defendant's mental illness if it could be regarded as negating the voluntariness of the defendant's actions. In this way it may be argued that the defendant has not acted as such, much in the same way that it may be argued that a person experiencing an epileptic fit has not acted for the purposes of negligence law. However courts have not taken this approach in relation to tortious battery,[86] and conceiving the symptoms of mental illness as resulting in involuntary action is not an approach which is adopted by the medical profession.

Viewing negligence as conduct rather than as a state of mind therefore provides less opportunity for defendants to avoid liability than does negligence conceived as a state of mind or at least negligence which is willing to consider the impact of the defendant's mental state when determining liability.

[85] Edgerton, above n 47, 853, 859.

[86] See pp 47-49.

In addition, tort law, unlike criminal law, does not have a specific mechanism for responding to a person with reduced abilities whether this is due to mental illness or childhood. That is, there is no defence along the lines of those which exist in criminal law which deal directly with this issue.[87] Therefore the only stage at which issues of reduced capacity may be considered is at the stage of determining liability in the first place – that is, whether the defendant has breached a duty. With this in mind, the way in which fault in negligence law is conceived is particularly important for those defendants with reduced mental abilities.

Nevertheless, the law of negligence simply requires people to meet a prescribed standard of care in relation to their activities with certain other people (those who owe a duty of care to others). Evidence of individual capacity is irrelevant. And despite the criticisms levelled at the concept, as well as the application of, the reasonable person standard, such a concept remains essential to the law of tortious negligence. Tortious negligence remains a legal fault standard which does not necessarily coincide with notions of moral fault on every particular occasion. This is because the essential elements of a case in tortious negligence is a failure to reach a standard of care prescribed by law. In theory, regardless of whether or not the defendant has the ability to reach this standard is unimportant to a form of fault which is based on evaluating conduct rather than actors' intentions and capacities.

[87] This will be dealt with in more detail in chapter 6.

2.3.4 'In the Circumstances' and Capacity

The reasonable person in the circumstances test is not quite as rigid as it may first sound. Other than the questions highlighted above regarding the qualities of the reasonable person, there are further questions regarding the meaning of the notion of 'in the circumstances'.[88] That is, the standard according to which a defendant is measured is purportedly objective – that of the reasonable person, yet the requirement that this reasonable person be subject to the circumstances of the particular defendant highlights the potentially flexible nature of the standard. [89]

It is true that these circumstances often relate to factors external to the defendant, but it has been used in certain cases to include some of the defendant's characteristics. For example, Lord Wilberforce has suggested that 'less must be expected of the infirm than of the able-bodied'.[90] Likewise, courts have been willing to take into account factors particular to an individual in several cases where the defendant has suffered a sudden physically incapacitating event, such as a heart attack,[91] pain in the eye,[92] loss of vision[93] or the pain associated with a bee sting.[94] Further, in cases of contributory negligence,

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[88] Ross Parsons, 'Negligence, Contributory Negligence and the Man Who Does Not Ride the Bus to Clapham' (1957) 1 *Melbourne University Law Review* 163, 169-70 refers to the expression 'in the circumstances' as weasel words, 'without which the formulation [of the objective test for negligence] is incomplete, suck its substance'.

[89] The American Law Institute, *Restatement of the Law, Second, Torts* (1965) 283C(a); Thomas C Galligan Jr 'The Tragedy in Torts' (1995-6) 5 *Cornell Journal of Law and Public Policy* 139.

[90] *Goldman v Hargrave* [1966] 2 All ER 989, 996.

[91] *Waugh v James K Allen Ltd* [1964] SC (HL) 102.

[92] *Billy Higgs and Sons Ltd v Baddeley* [1950] NZLR 605.

[93] *Smith v Lord* [1962] SASR 88.

[94] *Scholz v Standish* [1961] SASR 123.

courts have considered the fact that the plaintiff was deaf thereby reducing his ability to hear a car horn,[95] and blind, thereby reducing his ability to avoid obstacles on the road.[96]

Some commentators have stated that physical handicap will constitute part of the circumstances of a defendant and that defendant's mistaken impressions and beliefs may be taken into account when judging his/her conduct. This is especially so if they are not unreasonable in light of the defendant's background and experience.[97] This is particularly important for those experiencing delusions and hallucinations.

Other common law jurisdictions, such as the United States, specifically provide that a defendant with a physical illness is only required to behave the way a reasonable person with the same physical illness or disability would have behaved under the circumstances.[98]

Similarly, the 'reasonable person in the circumstances' test in some situations requires professionals to be judged not according to the capabilities and knowledge of an ordinary non-professional, but according to the reasonable person of the same skills or qualifications as the defendant.[99]

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[95] *South Australian Ambulance Inc v Wahlheim* (1948) 77 CLR 215.

[96] *Haley v London Electricity Board* (1964) 3 All ER 185.

[97] James above n 62, 15-18.

[98] The American Law Institute, *Restatement of the Law, Second, Torts* (1965) 283C.

[99] See, eg *Civil Liability Act 2002* (NSW) s 5O.

Thus it has been suggested that the reasonable person put 'under the circumstances' can allow any degree of individualisation – it can 'relativize negligence to certain individual capacities and traits' and it can also choose to reject such individualisation.[100]

2.4 Conclusion

The law of negligence prescribes an objective test for determining liability. Defendants are required to behave the way in which a reasonable person would behave if placed in similar circumstance as the actual defendant. The two requirements of this test, although purportedly static, do provide judges with some flexibility when determining the reasonableness of a defendant's behaviour and the standard by which the defendant should be measured.

Before considering in detail the way in which courts have applied notions of reasonableness to those suffering from a mental illness, the following chapter will first consider whether the general purposes and nature of negligence law may help in explaining how the tort of negligence should respond to defendants with reduced mental abilities whether they be as a result of mental illness or otherwise.

[100] Simmons, above n 68, 312.

CHAPTER 3 - Tort Theory and Mental Illness

3.1 Introduction

This thesis argues that there is incoherence in the law of negligence, and that this incoherence is perhaps due to a fear and misunderstanding of mental illness. Chapter one explained what is meant by the term mental illness and recognised the existence of a stigma which continues to attach to people who have a mental illness. Chapter 2 outlined the basic structure of negligence law. In particular it discussed the objective standard which is at the heart of negligence and which theoretically refuses to take into account any personal characteristics of an individual defendant. It noted that this approach can lead to the seemingly unfair situation that people with reduced mental abilities are required to reach a standard – to behave in a certain way – which they are simply unable to meet. Some commentators have suggested that this creates internal difficulties for the law of negligence where liability is generally predicated on notions of fault. These commentators argue that to require people to act in a way that they are simply unable to do is to make them liable regardless of fault. In other words, it is to turn fault based liability into strict liability.[1]

Chapter 2 also highlighted that the objective test on which liability in negligence is based – the reasonable person in the circumstances – does allow for certain elements of

[1] See footnote 76 of Chapter 2.

individualisation, as in the case of the child,[2] the person who suffers a sudden physical incapacity[3] and in some jurisdictions the professional.[4] This suggests that the apparently insensitive and inflexible objective standard is in fact more malleable than would originally appear.

The aim of this third chapter is to consider whether tort theory provides guidance about how negligence law should respond to defendants who are suffering from a mental illness. In particular, should it utilise the potential flexibility of the objective standard, or rather strictly adhere to it in such situations?

In order to answer this question, it is obviously necessary to have some understanding of the philosophical underpinnings of tort law even if only in general terms. The first point of note is that there appears to be no consensus whatsoever amongst tort theorists about these philosophical underpinnings.[5] For example, some scholars analyse tort law according to a single value or principle – such as, corrective justice or economic efficiency.[6] These scholars believe that viewing tort law in this way is the only way in which to guarantee coherence in the single body of law.[7]

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[2] This will be discussed in more detail in chapter 4.

[3] See pp 69-70.

[4] See p 70.

[5] *The Law of Torts* (9th ed 1998) at 17 has explained, 'no particular arrangement of the vast and complex material which passes under the name of torts has found universal favour. There are many possible approaches, each with its own appeal and disadvantage'.

[6] Izak Englard, *The Philosophy of Tort Law* (1993) 30.

[7] See eg, Ibid; Richard Wright, 'Right, Justice and Tort Law' in David Owen (ed) *Philosophical Foundations of Tort Law* (1995) 159, 160; Gerald Postema, 'Search for an Explanatory Theory of Torts' in Gerald Postema (ed) *Philosophy and the Law of Torts* (2001) 15-17; Earnst Weinrib, *The Idea of Private Law* (1995) 13, 40; Richard Wright, 'The Standards of Care in Negligence' in David Owen (ed)

Other scholars take a more pragmatic approach to tort theory and argue that no one justification can adequately explain tort law comprehensively. These 'pluralist' theorists view tort as being based on several different, often competing principles. They recognise that tort law aims to find a balance between a series of dichotomies, including freedom and security, moral responsibility and social utility, corrective justice and distributive justice, fault and strict liability, individualism and communitarianism.[8] Pluralists attempt to articulate a theory which appropriately explains when and where to draw a line between these competing interests.[9]

A third approach to understanding tort law regards it as unhelpful and artificial to find a principle which explains courts' decisions. Theorists who adopt this view reject altogether that tort law can be understood in terms of values or principles. Instead they argue that it is important to understand the reality of the decision making process. According to such a view, the body of rules which constitutes the law of torts is simply a

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Philosophical Foundations of Tort Law (1995) 11; Guido Calabresi, *The Cost of Accidents* (1970); Richard Posner, 'A Theory of Negligence' (1972) 1 *Journal of Legal Studies* 29; Richard Posner and William Landes, *The Economic Structure of Tort Law* (1987).

[8] Englard, above n 6, 2.

[9] Postema, above n 7, 17; Izhak Englard, 'The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law' in Owen, above n 7, 183; Bruce Chapman, 'Pluralism in Tort and Accident Law: Towards a Reasonable Accommodation' in Postema, above n 7, 276; Peter Cane, *Responsibility in Law and Morality* (2002); Jules Coleman, 'The Mixed Conception of Corrective Justice' in Earnst Weinrib (ed), *Tort Law* (2002) 427; Richard Lippke, 'Torts, Corrective Justice and Distributive Justice' (1999) 5 *Legal Theory* 149; Tony Honoré, *Responsibility and Fault* (1999); *McFarlane v Tayside Health Board* [2000] 2 AC 59, 82-83.

series of almost ad hoc court decisions which are based on the individual political ideals, values or interests of each judge.[10]

There is even more dispute regarding the substantive questions of tort theory. As noted above, such questions centre on the competing values of freedom and security, moral responsibility and social utility, corrective justice and distributive justice, fault and strict liability, individualism and communitarianism. The numerous theories of tort liability all fall at different levels in relation to these values.

This lack of consensus in tort scholarship is not confined to questions regarding the best way to approach an understanding of tort law. There is dispute about whether or not there exists a unifying principle under which to adequately categorise or understand actions which come under the heading of torts[11] or whether it is instead better to regard it as a collection of disparate civil wrongs which protect certain interests of people living in society (including person, property and ability to contract).[12] Thus there has always been debate amongst tort scholars as to whether it is more appropriate to refer to a law of torts or a law of tort.[13]

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[10] See eg Richard Abel, 'A Critique of Torts' (1989-90) 37 *UCLA Law Review* 785; Joanne Conaghan, *The Wrongs of Tort* (2nd ed 1999); George Christie, 'The Uneasy Place of Principle in Tort Law' in Owen, above n 7, 113; Englard above n 6, 60-61.

[11] Warran Seavey, 'Principles of Torts' (1942) 56 *Harvard Law Review* 72.

[12] See generally William Prosser, *Handbook of the Law of Torts* (1955) 1; Harold Luntz and David Hambly, *Torts, Cases and Commentary* (5th ed, 2002) 99; R. F. V. Heuston and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (19th ed, 1987) 15, 39; Peter Cane, *The Anatomy of Tort Law* (1997); Peter Cane, 'Justice and Justifications for Tort Law' (1982) 2 *Oxford Journal of Legal Studies* 30; Stephen Todd (ed), *The Law of Torts in New Zealand* (2nd ed, 1997) 7-13.

[13] See eg, Cane *Anatomy* above n 12, 21; Fleming, above n 5, 7-8. Carolyn Sappideen, Prue Vines, Helen Grant and Penolope Watson, *Torts Commentary and Materials* (9th ed, 2006) 3-4.

There is also dispute surrounding the history and development of tort law. Two of the most influential tort scholars of the late 19th century gave vastly varying accounts of the commencement and development of torts and its relationship with fault.[14] Holmes argued that torts was initially steeped in considerations of moral culpability, expressed through the concept of intention, but that over the years external standards were introduced into this law. It became possible to be found liable in tort even if people were not morally culpable.[15] Wigmore on the other hand saw the development of tort law to be entirely the opposite – starting as liability regardless of fault, and slowly developing a moralistic tone as the centuries passed.[16] Others suggest that neither of these views is entirely correct.[17]

This chapter considers whether the way in which the law of negligence has reacted to defendants with a mental illness can be explained by reference to the theoretical underpinnings of this category of law.

3.2 Overview of tort theory

Although many of the theories of tort law differ radically, they are all nevertheless directed to answering the same question. That is, when should people be legally

[14] Heuston and Buckley above n 12, 24-26.

[15] Oliver Wendell Holmes Jr, *The Common Law* (1881) Lectures III and IV.

[16] John Wigmore, 'Responsibility for Tortious Acts' (1893) 7 *Harvard Law Review* 315.

[17] Heuston and Buckley above n 12, 26.

responsible for their behaviour such that they are required to pay compensation to another party?[18]

What is also generally recognised is that negligence sits alongside state funded social security systems and various forms of insurance funds as one of the ways by which society responds to accidents and the misfortune in society.[19] The way tort law does this is by shifting loss from one person to another, or if the defendant is insured and insurance companies take into account their losses from such accidents, from one person to many other people.

As noted above, beyond these two basic points, there is little consensus either regarding why one person is required to pay another person compensation for damage or what relationship tort law should have with social security and insurance. The principal theories explain this in a variety of ways: It is because the defendant is morally at fault, in the sense of blameworthy; or because the defendant caused the injury; or because the defendant is in a better position than the plaintiff to carry the financial burden of the accident; or because by requiring the defendant to pay is the most cost efficient option;[20] or because of a combination of all or even none of these but other reasons.

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[18] Martin Stone, 'On the Idea of Private Law' (1996) 9 *Canadian Journal of Law and Jurisprudence* 235; For further questions which any comprehensive theory of tort law must address see Tony Honoré, 'The Morality of Tort Law – Questions and Answers' in Owen, above n 7, 73; For an analysis of tort law which does not ask this question but rather focusses on the parties rights see Robert Stevens, *Torts and Rights* (2007).

[19] Fleming James Jr, 'Social Insurance and Tort Liability: The Problem of Alternative Remedies' (1952) 27(4) *New York University Law Review* 537, 540; Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 *Modern Law Review* 820; Peter Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed, 2004).

[20] See, eg Calabresi, above n 7; Posner, above n 7; Posner and Landes, above n 7; J O'Connell and C Robinette, 'The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns

Historically, the purpose of awarding compensation was as a means of civil control. Requiring offenders to buy off victims' wrath was a measure aimed at preventing retaliation against offenders by victims and their family.[21] Early actions in tort, relying primarily on trespass indicate that defendants were liable for damage unless they could disprove fault.[22] This rule elevates the interests of the plaintiff, with the concomitant values of security and social utility, over that of the defendant and related values of freedom and moral responsibility.

Over the years, particularly in response to modern notions of freedom, individualism and the need to serve the requirements of a growing economy, the rationale for awarding compensation moved from civil control to considerations of justice. It was thought that as a matter of justice, the person who had acted 'wrongly' should be required to pay for any resulting damage.[23] Thus tort law was not considered to have a compensatory role as such and payment from offender to victim was generally regarded as a form of punishment thought to deter future unacceptable behaviour in a similar vein to the criminal law.[24] This illustrates a shift in focus from plaintiff to defendant. It also explains why no person is required to compensate for injuries for which no human being

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of Gary Schwartz and Patrick Atiyah', (2000) 32 *Connecticut Law Review* 137, 138; Warren F Schwartz 'Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims' 78 *Georgetown Law Journal* 241 (1989-90); Harold Latin, 'Problem-Solving Behaviour and Theories of Tort Liability' (1985) 73 *California Law Rev*iew 677.

[21] Glanville Williams, *Foundations of the Law of Tort* (2nd ed, 1984) 90; Alan Calnan, *Justice and Tort Law* (1997) 1.

[22] See, eg *Weaver v Ward* (1616) Hob 134; 80 ER 284; *McHale v Watson* (1964) 111 CLR 384.

[23] Williams, above n 21, 90; Todd, above n 12, 14-15; Heuston and Buckley above n 12, 24; Abel, above n 10, 788.

[24] Fleming, above n 5, 10.

is responsible, such as injuries caused by natural misfortune.[25] It is in this way and for this broad consideration of justice that tort law generally (although not exclusively)[26] operates only in the case of harm caused by human fault, in the sense of either wrongful intention or negligence.[27]

In the late 19th and through to the mid 20th century, this view of tort law began to change, largely due to the ever increasing risk of accidents (as opposed to intentional interference with the rights of others) in the modern machine age. The pertinent question for tort liability became, and continues to be, who is to pay for the injuries caused by our modern way of life, particularly in those situations when the injurer would not be regarded at fault in the traditional or moral sense?[28] Framing the primary question of tort in this way indicates a shift back from elevating the interests of the defendant, to greater consideration once again to the needs of the plaintiff. This is not to say that there is no moral content in legal negligence or that notions of moral fault are completely separate from torts but rather that compensation has become a primary concern for negligence.[29]

Thus the focus of tort liability over the years appears to have swung between interests of plaintiff and defendant. It moved away from its original interest in the plaintiff and the ideas of security, social utility and strict liability, towards a focus on the defendant and

[25] Williams above n 21, 90.

[26] Eg vicarious liability.

[27] Williams above n 21, 90; *Weaver v Ward* (1616) Hob 134; 80 ER 284.

[28] Fleming, above n 5, 10-11; Abel, above n 10, 788.

[29] Cane, *Atiyah* above n 19, 40.

the ideals of freedom, moral responsibility and fault, but more recently has reverted back toward considerations of the plaintiff.[30]

3.2.1 Economic Theories

In response to the modern world – where industry increased the potential for accidents between unrelated parties, where negligence liability had become the most prominent cause of tortious action, and where there had occurred a shift from considerations purely of justice to ones of compensation – a contemporary wave of tort scholars began to emerge.[31] These scholars began to articulate sophisticated theories of tort liability. These expanded on judicial comments from judges such as Lord Denning who provided that a judge's job was to determine 'on whom the risk should fall'[32] and even more particularly from judicial formulas such as the Hand formula.[33]

Known broadly as 'law and economic' theorists, these scholars rejected the established fault based notion of tort law predicated on the ideals of moral responsibility and freedom of action. They instead argued along the utilitarian line that tort law is best regarded and best focussed on the maximisation of net social welfare.[34] That is, the aim of a system of

[30] Prue Vines, 'Tort Reform, Insurance and Responsibility' (2002) 25(3) *University of New South Wales Law Review* 842, 847; Sappideen et al, above n 13, 460-462.

[31] For a history and development of tort theory see Owen above n 7; Alan Calnan, *A Revisionist History of Tort Law* (2005).

[32] *White v White* [1949] 2 All ER 339, 351.

[33] *Unites States v Carroll Towing Co* 159 F 2d (1947).

[34] See, eg Calabresi, above n 7; Posner, above n 7; Posner and Landes, above n 7; O'Connell and Robinette, above n 7, 138; Schwartz, above n 20; Latin, above n 20.

law which primarily deals with accidents – tort law – is to reduce the cost of accidents.[35] This aim is to be achieved in three potentially conflicting ways.[36]

Deterrence

The first way in which economic theories propose to reduce the cost of accidents in the community is through efficient deterrence of risky or non-wealth maximising behaviour before it occurs.[37] This is because reducing the occurrence of accidents is ultimately the best way of ensuring that the cost of accidents to society is reduced. According to law and economic theorists, reducing accidents is best achieved by placing the burden or the cost of accidents on the party who is in the best position of ensuring that such accidents do not happen. In this way it is thought that civil liability can deter people from engaging in risky behaviour.[38] Thus as a matter of economic theory, those with more ability will be able to take more care than those with less ability.[39] Likewise, some people should not engage in certain activities at all because the cost of taking care would be more than the benefits of performing the activity.[40]

Yet this theory presupposes rational human beings who are likely to be deterred by the threat of civil liability. It also assumes that tort liability is the most effective way of deterring individuals from engaging in risky behaviour. However there is insufficient

[35] Calabresi, above n 7, 24.

[36] Richard Wright, 'Principled Adjudication: Tort Law and Beyond' (1999) 7 *Canterbury Law Review* 265 281; Calabresi, above n 7, 29.

[37] Calabresi, above n 7, 26-27.

[38] Cane, *Atiyah* above n 19, 362.

[39] Schwartz, above n 20, 243.

[40] Ibid, 244.

data and therefore little evidence to suggest that either of these presumptions is correct.[41] First there is evidence to suggest that other mechanisms outside of the tort system such as 'self-preservations instincts, market forces, personal morality and government regulation'[42] are much more effective and efficient methods of deterrence and accident avoidance.[43] Second, many scholars suggest either that the threat of civil liability does not deter people in the way that law and economic theorists propose or that if there is such an effect it is moderate at best.[44] This is particularly so today when most defendants are covered by insurance such that it is the insurance company who shoulders the burden of the accident costs rather than the person who is found liable for the damage.[45] Of course there is no adequate data on this either.[46] Some commentators have argued that the fact of insurance means that defendants are unlikely to be deterred,[47] whereas others

[41] Englard, above n 6, 43-44; Stephen Sugarman, 'Doing Away with Tort Law' (1985) 73 *California Law Review* 555, 587-590; Michael Trebilcock, 'The Future of Tort Law: Mapping the Contours of the Debate' (1989) 15 *Canadian Business Law Journal* 471; Don Dewees and Michael Trebilcock, 'The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence' (1992) 30 *Osgood Hall Law Journal* 57; Sappideen et al, above n 13, 8-11.

[42] Sugarman, 'Doing Away' above n 41, 561.

[43] Michael Treblicock, 'Incentive Issues in the Design of 'No-Fault' Compensation Systems' (1989) 39 *University of Toronto Law Journal* 19; Cane, *Atiyah* above n 19, 364; Wright, 'Principled Adjudication' above n 36, 281.

[44] Treblicock, *Future* above n 41; Trebilcock, 'Incentives' above n 43; Dewees and Trebilcock, above n 41; Sugarman, above n 41, 564-573; Daniel Shuman, 'Psychology of Deterrence in Tort Law' (1993) 42 *Kansas Law Review* 115; Abel above n 10; Englard above n 6, 44; Gary Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994-95) 42 *University of California Los Angeles Law Review* 377; Lisa Perrochet and Ugo Colella, 'What a Difference A Day Makes: Age Presumption, Child Psychology, And the Standard of Care Required of Children' (1992-3) 24 *Pacific Law Journal* 1323, 1354-5; Luntz and Hambly, above n 12, 51; Cane *Atiyah* above n 19, 363-368.

[45] Sugarman, above n 41, 573-581.

[46] Don Dewees, David Duff and Michael Trebilcock, *Exploring the Domain of Accident Law* (1996) 22-26.

[47] Shuman, above n 44; Abel above n 10; Englard above n 6, 44; Gary Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994-95) 42 *University of California Los Angeles Law Review* 377; Lisa Perrochet and Ugo Colella, 'What a Difference A Day Makes: Age Presumption, Child Psychology, And the Standard of Care Required of Children' (1992-3) 24 *Pacific Law Journal* 1323, 1354-5; Luntz and Hambly, above n 12, 51; Cane *Atiyah* above n 19, 368.

suggest that deterrence may be achieved not only from experiencing once off large financial loss but also from increased insurance premiums and other social factors.[48]

The likelihood of liability having the required deterrent effect at the individual level seems even more remote when the people the law is aiming to deter are suffering from a mental illness. That is, those who potentially do not meet the assumption of rational decision makers required by the law and economics theorists. Although there has been no research directly on the issue of deterrence and those with a mental illness in the context of tort law, it has been considered in relation to the law of crime. In that context it has been found that the threat of punishment has little deterrent effect on defendants with a mental illness and immature defendants.[49] It may well be assumed that as defendants who are immature or have a mental illness have been found to be undeterred by the threat of punishment as meted out by the criminal law, it is unlikely that the threat of civil liability will have any significant deterrent effect on these people.[50] If this is the case, it would seem that economic theory would not require or cannot justify the finding of liability in such cases. It also suggests that deterrence cannot be seen as the guiding principle of tort law more generally.

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[48] Vines, above n 30, 844-5; Sugarman, above n 41, 574-581.

[49] See eg, Helen Shin, 'Is the Death of the Death Penalty Near? The Impact of Atkins and Rober on the Future of Capital Punishment for Defendants with a Mental Illness' (2007) 76 *Fordham Law Review* 465, 512; Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173; Michael O'Neill, 'The Biology of Irrationality: Crime and the Contingency of Deterrence' in Francesco Parisi and Vernon Smith, *The Law and Economics of Irrational Behavior* (2005) 287.

[50] Jules Coleman 'Mental Abnormality, Personal Responsibility and Tort Liability' in Brody and Engelhardt, (eds) *Mental Illness: Law and Public Policy* (1980) 117; Patrick Kelley, 'Infancy, Insanity, and Infirmity in the Law of Torts' (2003) 48 *The American Journal of Jurisprudence* 179, 207.

Despite this, law and economics theorists have suggested that it is appropriate to subject defendants with a mental illness to 'strict liability' for their damaging actions for the same reasons that it is appropriate to subject those engaged in ultra-hazardous activities to strict liability. [51] That is, their behaviour poses a high risk to others. Yet this makes little sense given that one of the rationales for strict liability is deterrence, which, as noted above, seems to have little effect on the defendant with a mental illness.[52]

Compensation

The second way in which tort law, as seen through the eyes of law and economic theorists, can maximise net social welfare is through efficient compensation for losses that have already occurred.[53]

Regarding tort as a system designed to compensate for injury suffered is to focus almost exclusively on the interests of this injured party. As the plaintiff therefore is of primary concern in determining liability in negligence, the fact that particular defendants may be unable to reach the standard required of them by negligence law would appear to be of little importance. The capacity of individuals is only significant in respect of their ability to compensate efficiently. This would imply that a defendant's mental illness is irrelevant to determining liability.

However, viewing tort law solely or even primarily as a compensation scheme does not explain why the particular defendant rather than anyone else must provide the

[51] Posner and Landes above n 7, 128.

[52] See chapter 2.

[53] Calabresi, above n 7, 27-28.

compensation to the injured party. If compensation were the real issue, the fact that a person's loss is the same regardless of whether it came about through wrongful behaviour or otherwise would be accounted for by the compensation system.[54]

Explaining tort according to compensation goals is also problematic because it does not explain why money is to be paid exclusively to one person. In a healthy functioning social democracy it probably makes more sense for the money to be given to society's representative – the State – to make the best use of recourses in accordance with its aims.[55] It also does not explain why there are people who, although injured, cannot claim compensation under tort law. Tort as compensation does not provide adequate account of the fundamental structure of tort law – the concepts of duty, breach or causation. And from a practical point of view, regarding tort law largely as a form of compensation condemns it to being judged vastly inadequate in this task.[56]

Insurance

If it is accepted that a system of law is aimed at compensating injured people, it is necessary to consider whether one of the parties is in a better position than the other to shoulder the loss, either through personal means or through insurance.[57]

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[54] Weinrib, above n 7, 43; Stone, above n 18, 237.

[55] Stone, above n 18, 238.

[56] See eg Abel, above n 10, 796; Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67(3) *Modern Law Review* 384, 394; Cane, *Atiyah* above n 19, 150; Dewees, Duff and Trebilcock, above n 46, 412-413; Luntz and Hambly, above n 12, ch.1; The Woodhouse Report: National Committee of Enquiry, *Compensation and Rehabilitation in Australia* (1974); Sappideen et al, above n 13, 5-7.

[57] Kenneth Abraham, 'Liability Insurance and Accident Prevention: The Evolution of an Idea' (2005) 64 *Modern Law Review* 573.

However judges have traditionally been unwilling to consider the relative financial strengths or the nature of any insurance holdings of each party when deciding tortious liability in particular cases. In fact in England the rule of practice was such that when juries heard civil liability cases they were not to be told about the insurance position of the parties.[58] This practice accords more closely to a corrective justice view of tort law than with an economic one.[59] As Lord Diplock has explained;

> It is not the function of a law of negligence to allocate the cost of compensating individual cases of personal injury caused by accident in such a way as to spread the burden over a wide section of the public by imposing it, irrespective of fault, on whoever can most easily cover the risk by liability insurance… It is outside the province of the law of tort: spreading risk is not a function to be undertaken by judges under the guise of defining a duty of care owed by one citizen to another.[60]

However, this refusal of judges to openly consider the role of insurance in negligence law has been regarded as a fiction, considering the evident impact that insurance has on almost every aspect of negligence law, from decisions about suing, to final payment of compensation.[61] In recognition of this apparent reality some judges have been willing to

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[58] Richard Lewis, 'The Relationship Between Tort Law and Insurance in England and Wales' in Gerhard Wagner (ed) *Tort Law and Liability Insurance* (2005) 61, 67.

[59] The corrective justice analysis of tort law will be considered on pp 90-99 of this chapter.

[60] Lord Diplock, 'Judicial Developments of the Law in the Commonwealth' [1978] 1 *Malayan Law Journal* cviii, cxii.

[61] Richard Lewis, 'The Relationship Between Tort Law and Insurance in England and Wales' in Gerhard Wagner (ed) *Tort Law and Liability Insurance* 2005; Tom Baker, 'The View of an American Insurance Law Scholar: Six Ways that Liability Insurance Shapes Tort Law' in Gerhard Wagner (ed) *Tort Law and Liability Insurance* 2005; Gerhard Wagner, 'Tort Liability and Insurance: Comparative Report and Final Conclusions' in Gerhard Wagner (ed) *Tort Law and Liability Insurance* 2005; Peter Cane, *Atiyah's*

examine the insurance background relevant to particular disputes. For example, Lord Denning explained:

> Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable… Thus we are … moving away form the concept: 'No liability without fault.' We are beginning to apply the test; 'On whom should the risk fall?' Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.[62]

This approach has also been adopted in Australia to a limited extent. The court in *Lynch v Lynch*[63] found that:

> 'In the particular context of a compulsory insurance scheme, and when claims against an uninsured defendant who renders gratuitous services could be regarded

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Accidents, Compensation and the Law (1999) 203; Simon Deakin, Angus Johnson and Basil Markesinis, *Markesinis and Deakin's Tort Law* (2003) 3; John Fleming, 'Accident Liability Reconsidered: The Impact of Liability Insurance' [1948] 57 *Yale Law Journal* 549, 551. Cf Stapleton, above n 19; William Prosser, *Handbook of the Law of Torts* (1971).

[62] *Nettleship v Weston* [1971] 2 QB 691, 699. See also *Morris v Ford Motor Co Ltd* [1973] QB 792, 798.

[63] (1991) 25 NSWLR 411.

> as quite exceptional, the considerations of policy in favour of allowing the claim far outweigh those that tell in favour of rejecting it.[64]

Likewise, in *Kars v Kars*[65] the High Court recognised that the compulsory car insurer rather than the defendant personally would be paying the plaintiff's damages. However this overt recognition of the relevance of insurance still must be regarded as the exception to the general rule that the existence of insurance is not a factor for courts to consider when determining tortious liability.[66]

Efficient administration

The final way in which law and economics theorists propose to maximise net social welfare is through the efficient administration of the systems which are set up to achieve deterrence and compensation – the litigation process.[67] Economic theorists argue that including subjective elements into the law of negligence will not produce optimal economic results. This is why the objective standard is to be preferred over the alternative of tailoring the standard of care to more accurately reflect the abilities of the defendant or others like the defendant. They argue that the real benefit of relying on a standard of behaviour to which all must comply is the reduced litigation costs and time associated with determining individual abilities and optimal care for every defendant in every case.[68] That is, ignoring the fact of a defendant's reduced mental abilities is

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[64] (1991) 25 NSWLR 411, 420.

[65] (1996) 187 CLR 354.

[66] Sappideen et al, above n 13, 11. This will be considered in more detail on pp 93-94 of this chapter.

[67] Calabresi, above n 7, 28; See critique in Richard Wright, 'Principled Adjudication: Tort Law and Beyond' (1999) 7 *Canterbury Law Review* 265.

[68] Schwartz, above n 20, 246; Posner and Landes above n 7, 128.

economically efficient despite its lack of deterrent effect. Of course if this were the primary consideration it must be recognised that social security would be a much more efficient means of delivering compensation than a private tort system.[69]

Thus using the law and economics theories for guidance on how best to respond to defendants with a mental illness is not entirely helpful. From the perspective of ease of administration, ignoring a defendant's mental illness may be more economically efficient than taking it into account. Likewise, economic efficiency in terms of compensating an injured person would suggest that the personal abilities of the defendant should not be relevant to tort law. But if economic efficiency is ultimately regarded in terms of deterrence, it makes little theoretical or practical sense to ignore a defendant's mental illness in determining liability in tort.

This confusion however is ultimately unimportant to this inquiry because it is apparent that the economic analysis does not in fact reveal the fundamental nature of tort law. Apart from the concerns with the law and economics theory of tort law already noted, there are more general criticisms of this approach. It has been argued that economic theories are inconsistent with the very nature of tort law. Not only do they not explain the role of duty, breach and causation, they are structurally incompatible with negligence law. That is, economic theories are essentially forward looking because they regard the consequences of imposing liability (compensation, deterrence and economic efficiency more generally) as the primary consideration when determining whether it is appropriate

[69] Abel, above n 10, 807.

to impose liability. In contrast, tort law is ultimately backward looking because it is primarily concerned with attributing responsibility for past behaviour. Thus, it is argued, economic efficiency theories simply do not sit well or adequately explain the realities of tort law.[70]

These and other concerns[71] indicate that our tort system is concerned with more than maximising net social welfare through compensation or deterrence. Tort law therefore cannot be completely explained according to economic theories.

3.2.2 Corrective Justice

Partly in response to the law and economics movement, a new wave of tort theorists rose to prominence in the latter part of the 20th century. These scholars rejected the functional approach to understanding tort law as offered by the economic account. Instead they provided a rights-based analysis of tort law predicated on notions of corrective justice.[72]

The origins of corrective justice are found in Aristotle's Nichomachean Ethics in which he outlined three distinct categories of justice. Retributive justice imposes just desserts

[70] Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72(5) *Fordham Law Review* 1811, 5; Stone, above n 18, 239; Weinrib, above n 7, 43, 47; Cane, *Responsibility* above n 9, 61.

[71] For example, it does not explain why tort law differentiates between different sorts of losses (personal injury as opposed to economic loss for example). According to economic theory, all loss is treated the same. In addition, economic theory does not explain why people who choose too little safety may be penalised but people who choose too much safety even though, from an economic point of view, to do so is inefficient, are not. See Abel, above n 10, 795-807.

[72] Weinrib, above n 7; George Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537; See James Gordley, 'Tort Law in the Aristotelian Tradition' in Owen above n 7, 131 for a history and development of the concept of corrective justice in tort law.

for wrongful behaviour, and is therefore the realm of criminal law. Distributive justice relates to the responsibility society has to ensure that its citizens have an adequate and fair share of the goods within society and is therefore traditionally the realm of public law. And corrective justice concerns the relationship between private citizens and the responsibility they have for how their actions affect others. It is therefore traditionally the realm of private law.[73]

The essence of corrective justice is that a party who causes losses to another party is under a duty to correct, or make good those losses. Unlike distributive justice, corrective justice is unconcerned with the relative strength of each party. People with limited means who cause losses to those with ample means are nevertheless required to compensate such losses regardless of how 'unfair' this may seem from a distributive perspective. Unlike retributive justice, corrective justice is unconcerned with the moral character of the person who has caused losses to another. Corrective justice is simply concerned with rectifying losses, not with punishing wrongful behaviour, or reallocating wealth. In the words of Aristotle:

> [I]t makes no difference whether a good man has degraded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equals, if one is in the wrong, and the other is being wronged, and if one inflicted injury and the other received it. Therefore, this kind of injustice

[73] Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72 (5) *Fordham Law Review* 1811; Calnan, *Justice* above n 21, 77-118.

> being an inequality, the judge tries to equalize it; for in the case also in which one has received and the other inflicted a wound, or one has slain and the other been slain, the suffering and the action have been unequally distributed … [T]herefore corrective justice will be the intermediate between loss and gain.[74]

Modern theorists claim that tort law is best explained by notions of corrective justice because they both have a similar structure.[75] In particular, tort law and corrective justice are for the most part both concerned with only two parties to a transaction – the doer and the sufferer of harm. Further, these two parties are connected to each other through this harm. One party caused harm, another party suffered harm, and this latter party therefore seeks recompense from the former party. Thus nothing beyond these two parties and their role in the loss created need be considered when determining liability. In this way, tort law, and indeed corrective justice, has been described as bipolar.[76]

For corrective justice theorists, the reason why one party pays compensation to another is that as a matter of justice rather than consequences, that party should be required to do so. That is, unlike the economic theories of tort law which favour the ideals of security, social utility, strict liability and communitarianism, the corrective justice theorists see the

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[74] Aristotle, *The Complete Works of Aristotle* V.4.1132a2-.1132a9, 1132a19, 1786 (Jonathan Barnes ed., 1984) (Revised Oxford Translation).

[75] Weinrib, above n 7, 10, 18-19, 28. It has been suggested that Aristotle intended corrective justice to apply only to intentional acts, but modern tort theorists have extended the theory to apply to unintentional ones as well. See, eg David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (1969) 131-56; Gordley, above n 72, 140.

[76] Weinrib, above n 7, 75.

basis of tort law as being steeped in ideals of freedom, moral responsibility, fault and individualism.

Thus corrective justice theorists regard tort law as a means of redressing private wrongs. They do not deny that in redressing such wrongs there may be certain consequences as highlighted by the law and economic theorists – such as deterrence and compensation. They make no comment as to whether tort law in fact achieves adequate compensation and deterrence. But they argue that it is incorrect to consider tort law in terms of these consequences, and to elevate them to reasons for the existence of tort law itself. The payment of compensation and any deterrent effects of imposing liability are by-products rather than fundamental to tort law. Tort law is about the relationship and justice between plaintiff and defendant. Factors such as compensation and deterrence which are in a sense external or beyond these two parties are better dealt within a system external to tort law such as legal manifestations of distributive justice – public law.[77]

Role of Insurance

For corrective justice theorists, who regard tort as simply finding the appropriate balance and justice as between two parties, the existence or otherwise of insurance is irrelevant and there is no justification for it to be regarded as a factor which affects liability.[78] This

[77] Weinrib, above n 7, 37-43; Lewis Klar, 'The Role of Fault and Policy in Negligence Law' (1996-7) 35 *Alta Law Review* 24, 31, 36; Stone, above n 18, 253; Stapleton, above n 19, 828.

[78] Stapleton, above n 19, 824.

is the traditional judicial approach to the questions about the relevance of insurance in civil liability.[79]

Agency and mental illness

Essential to the theory of corrective justice is the notion of agency and free will. Only those who possess these characteristics can be held responsible for their actions and be subject to the duty to correct losses they have caused.[80] In fact, some corrective justice theorists argue that only those actions which are intentional can be subject to the corrective justice duty, in which case defendants cannot be liable unless they did in fact form the intention to do the particular act which forms the tort.[81]

Others reject only the notion of strict liability but support the objective standard of care.[82] This is so despite the suggestion that corrective justice theories have difficulty in justifying liability imposed for losses which were caused by non-culpable wrongdoing – of which negligence law may well be an example in some instances.[83] As discussed in

[79] 'In determining the rights *inter se* of A and B the fact that one or other of them is insured is to be disregarded' *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 577.

[80] Allan Beever, *Rediscovering the Law of Negligence* (2007) 74-78; Stone, above n 18, 265; Weinrib, above n 7, 84-90; Jules Coleman, 'The Mixed Conception of Corrective Justice' in Earnst Weinrib, (ed) *Tort Law* (2002) 442-3; Jules Coleman, 'The Practice of Corrective Justice' (1995) 37 *Arizona Law Review* 15, 26; Stephen Perry, 'The Moral Foundation of Tort Law' (1992) 77 *Iowa Law Review* 449, 509; Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003) 21.

[81] Cane, *Responsibility in Law and Morality* above n 9, 23; Peter Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 81, 208-215.

[82] Weinrib, above n 7, 178.

[83] Perry, 'Moral Foundations' above n 80, 508.

chapter 2 this is problematic when defendants are unable to reach the relevant standard. In such cases, the objective standard has itself been regarded as a form of strict liability.

Supposing negligence is an applicable fault standard for corrective justice theorists, the fact that an actor has reduced mental abilities may still be relevant to decisions about liability, depending on the impact such mental illness has on agency. According to some proponents of corrective justice, it is appropriate to hold actors with a mental illness liable so long as they meet the minimal standard of agency. This involves the ability to form intentions, the ability to transform them into human conduct and the ability to understand the relation between the two.[84] It has further been suggested, that:

> 'To the extent that emotional disorders involve, for example, unprovoked violent outbursts as in the manic stages of manic depressiveness, agency may be lacking. Similarly, in both catatonic and paranoid schizophrenia, the disabled person may be unable to translate intentions into actions.'[85]

That is, the 'individual is not the compelling force in his actions' and therefore not to be held liable in negligence.[86]

Yet the categorisation of those with certain sorts of mental illness as lacking agency is, in many cases, to misunderstand the nature of the particular mental illness. In some cases it

[84] Jules Coleman, 'Mental Abnormality, Personal Responsibility and Tort Liability' in Brody and Engelhardt, (eds) *Mental Illness: Law and Public Policy* (1980) 128-9.

[85] Ibid, 130.

[86] Ibid, 131; See also Englard above n 6, 49.

may be appropriate to say that a person suffering a psychotic episode is in a sense not in control. For example expert evidence in the Canadian case *Fiala v Cechmanek*[87] provided that:

> 'What essentially had happened is that Bob MacDonald per se was no longer in control. He had a brain that was over-activated, misfiring, sending him misinformation that had taken actually total control of his situation. He was in a highly energized state that we can only begin to imagine. The thoughts coming into his head, if I'm speaking 25 miles an hour, for example, and we think a bit faster normally, perhaps you are thinking at 30 or 35, his brain was firing off ideas to him 500, a thousand miles an hour. He was being bombarded by everything in his brain and everything in the environment in an energy state where these people have a totally adrenalized state that we can't even begin to appreciate and it's totally out of control and mind is driving the physical activity where the person can't stop it or has no control over it. The mind is just going and the body goes with it because of the huge chemical imbalance and this huge energized state, so there is no time to think a thought true [sic] because the thoughts come quicker than we can ever imagine, one to the next to the next and he was no longer in control. The Bob MacDonald that his wife knew or that I came to know – of what was going on that day, his brain was no longer his.'[88]

[87] See expert evidence provided in *Fiala v Cechmanek* (1999) 281 AR 248, [11], [16].

[88] *Fiala v MacDonald* [2001] 201 DLR (4th) 680, [16].

That is, the medical understanding of mental disease recognises that there are some conditions which enable sufferers to understand the nature, morality and legality of their acts but nevertheless prevent them from exercising their free volition as to whether or not to should perform that act.[89] For example, individuals suffering from command response hallucinations may well be able to understand what they are doing and that what they are doing is wrong (thereby satisfying the cognitive test of the M'Naghten rules) and yet be so driven by a particular delusion that they are unable to stop themselves from committing the criminal offence.[90]

Yet in other instances a person experiencing delusions and hallucinations can in fact translate intentions into conduct. It is simply that the reality on which the intentions are based, the assumptions about the world are completely irrational and fantastic.[91] For example, in the Wisconsin case *Breunig v American Family Insurance Co*[92] the court found that:

> The evidence established that Mrs Veith … saw a white light on the back of the car ahead of her. She followed this light for three or four blocks…

[89] Paul Fairall and Stanley Yeo, *Criminal Defences in Australia* (2005) 259.

[90] Victorian Law Reform Commission, *Defences to Homicide: Final Report* 2004 Chapter 5 'People with Mentally Impaired Functioning Who Kill' 207; Ellen Byers, 'Mentally Ill Criminal Defendants and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?' (2004) 57 *Arkansas Law Review* 447, 457.

[91] This has been one of the criticisms of the criminal law's response to defendants with a mental illness. See chapter 6; Stephen Morse, 'The Jurisprudence of Craziness' in Francesco Parisi and Vernon Smith (eds), *The Law and Economics of Irrational Behavior* (2005) 225, 226.

[92] 45 Wis. 2d 536, 173 N.W. 2d 619 (1970).

> The psychiatrist testified Mrs Veith told him she was driving on a road when she believed that God was taking ahold of the steering wheel and was directing her car. She saw the [plaintiff's] truck coming and stepped on the gas in order to become air-borne because she knew she could fly because Batman does it. To her surprise she was not air-borne before striking the truck, but after the impact she was flying.[93]

Not only is the application of corrective justice theory to defendants suffering from a mental illness inadequate, but the theory itself is problematic. For example, it is argued that it is incomplete to view tort law solely or even principally as a formal application of corrective justice because the structure of tort law does not actually allow for this. That is, corrective justice explains what is to be done when one party wrongfully inflicts damage on another party – the loss must be corrected. Yet this is only a remedial concept. It does not adequately explain which actions are wrongful, which duties need rectifying and it provides inadequate explanation or framework for any of the prospective elements of responsibility, such as maximisation of law-compliant behaviour.[94] In other words, corrective justice notions of tort law become operative and relevant when the prospective responsibilities have not been fulfilled – when law has been broken or behaviour has been wrongful. Yet they have little to say about these prospective

[93] 45 Wis. 2d 536, 173 N.W. 2d 619 (1970) 622.

[94] Cane, *Responsibility* above n 9, 60; Hanoch Sheinman, 'Tort Law and Corrective Justice' (2003) 22 *Law and Philosophy* 21, 28-35.

elements – they do not explain which 'wrongs' the law will remedy. For example, they do not explain the concept of the duty of care in negligence.[95]

Similarly, the test of reasonable care, based on the mathematical approach of the Hand formula,[96] and vicarious liability are not easily explained by corrective justice.[97] This suggests that corrective justice does not adequately and comprehensively account for the nature and operation of tort law.

3.2.3 Pluralist theories

It seems then that the tort theories which may be termed 'monovalue' in nature cannot adequately explain tort law. They are therefore unhelpful for understanding how it does and should respond to the defendant who is suffering from a mental illness, and to factors outside of the relationship between defendant and plaintiff, such as insurance.

What is clear is that the way in which tort law is conceived may have considerable impact on the way it responds to the actor who suffers symptoms such as reduced awareness, control or rational thought. If compensation represents tort law's theoretical underpinning, the abilities of the actor are simply irrelevant and whether the defendant is in a good position to carry the financial burden of the injury is of most concern. If deterrence is fundamental then the ability of those with reduced mental abilities to be

[95] Cane, *Responsibility* above n 9; Sheinman, above n 95.

[96] See also, *Wyong Shire Council* and the various statutory replacements of this common law eg *Civil Liability Act 2002* (NSW) s5B2.

[97] See Beever, above n 80, 96-111; Fleming, above n 5, 131; Wright, *Standards* above n 7.

deterred is the main element of consideration. Yet at the same time, reduced cost of proof associated with the objective standard of care has been cited as a reason for its survival. And if corrective justice and agency represents the theoretical underpinning of tort law, then the holding of insurance is of no significance to liability, but the state of mind of the defendant becomes more relevant, either as it impacts on agency, or as it impacts on the fault element of intention. Either way, the extent to which these issues relate to the defendant with mental illness is questionable.

In light of the inadequacy of monoist theories to comprehensively explain tort law, it seems more likely that a pluralist or even sceptical approach may represent a more realistic and satisfactory understanding of the underpinnings of tort law. This chapter recognises that these pluralist understandings of tort law have in common the belief that tort law consists of a number of different and possibly competing aims and interests. The aim of pluralists is to articulate a theory as to where and when to draw a line between these competing interests. Some have suggested that this is determined according to notions of equality,[98] others according to notions of distributive justice[99] or combined notions of distributive and corrective justice[100] and yet others utilise concepts from the discipline of physics to find the right balance.[101]

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[98] Ripstein, above n 103.

[99] Cane, *Responsibility* above n 9.

[100] Lord Steyn, 'Perspectives of Corrective and Distributive Justice in Tort Law' [2002] 23 *Irish Jurist* 1; Tony Honoré, *Responsibility and Fault* (1999) 13; *McFarlane v Tayside Health Board* [2000] 2 AC 59, 83; *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 502.

[101] Englard, above n 6 and n 9.

Many of these theorists have suggested that a subjective standard would favour the defendant to the unfair detriment of the plaintiff, whereas strict liability favours the plaintiff to the unfair detriment of the defendant. They therefore justify the objective standard of negligence as a fair representation of the middle ground between the plaintiff and defendant.[102] Even if this is the case, it does not provide guidance about whether it is appropriate or not to tailor this objective standard for those with mental illness in the way it is tailored for children,[103] or whether there may be cause to create a defence of mental illness along the lines of the law of crime or whether defendants with mental illness are simply to be required to act in a way that they are unable to do.

3.3 Conclusion

The philosophical underpinnings of tort law do not appear to present a solution to the problem whether the standard of care in negligence should adapt to defendants with mental illness. It may be, as a matter of reality, that courts' decisions are made more often than not in response to political and other value judgments rather than according to any definitive adherence to principle. As will be evident from the discussions in the proceeding chapters, this rather than adherence to principles of any sort appears to be the case when it comes to deciding cases concerning defendants with mental illness.

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[102] Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune' 41 *McGill Law Journal* 91, 112-3; Beever, above n 80, 81; Cane, *Responsibility* above n 9; Cane, 'Responsibility and Fault' above n 81, 106; Arthur Ripstein, *Equality, Responsibility and the Law* (2001) 269-70; Alan Calnan, 'The Fault(s) in Negligence Law' (2007) 25 *Quinnipiac Law Review* 695, 726; This is also Weinrib's reason for supporting the objective standard. Weinrib, above n 7, 177-78.

[103] This will be considered in detail in Chapter 4.

The following chapter will consider how tort law has responded to child defendants. This inquiry will be undertaken as a point of comparison. Child defendants are regarded as a useful comparison because, as noted in chapter 1, there are often similarities between them and those with mental illness. In particular, both children and people with a mental illness may possess reduced capacity as compared to mentally well adults.

CHAPTER 4 - Children

4.1 Introduction

This thesis considers how Australian negligence law responds to defendants who have a mental illness. Chapter two highlighted that a person's liability in negligence is determined according to an objective standard of care. All people must act reasonably in response to risks which are avoidable in present day society. Reasonableness is determined by reference to the likely behaviour of the ordinary prudent person. The defendant's personal characteristics are not relevant in this determination.

Yet it was also noted that in reality this objective standard is at times individualised to take into account some of the defendant's characteristics. The previous chapter attempted to find answers from tort theory regarding when such tailoring is appropriate and when it is not. It was noted that the way in which tort law is conceived does impact on decisions about how best to respond to a defendant with mental illness. However, it was also observed that tort law's suggested philosophical underpinnings are many, varied and at times in conflict with each other such that the absolute implementation of one might mean the exclusion of another. The law of torts therefore appears to comprise a plurality of interests, aims and considerations and as such it attempts to find an appropriate balance, or draw a line between these competing interests.

Thus it seems that the best that can be learnt about the most appropriate way for negligence law to respond to the defendant with a mental illness from tort theory is that no definite answer can be given in this regard.

The reason for inquiring into the law of negligence's response to children is not to suggest that those with mental illness are to be regarded as childlike, or that children are akin to someone suffering from one of any number of mental illnesses. Rather, the comparison is relevant because some of the symptoms of some mental illnesses are similar in some respects to some of the characteristics of childhood. In particular, both groups may at times have reduced (or at least different from the objective norm) self awareness or understanding of the world around them, and less ability to engage in what would be regarded as rational adult thought processes.[1]

It is also useful to consider negligence law's response to childhood in light of the claim that the essence of the law of negligence is a falling short of a static, objective standard of care which is insensitive to the particular characteristics of the individual defendant. The example of child defendants shows that this categorisation is not entirely accurate. If this is the case, it is argued that there must be other reasons for ignoring the fact of a defendant's mental illness when determining liability in negligence. Thus it is anticipated that some insight into how courts may respond, and why they have not responded sympathetically to the defendant with a mental illness may be gained through an analysis of the way in which courts have responded to child defendants.

[1] See chapter 1.

4.2 The General Rule

There are two ways in which negligence law could conceivably take into account the age of a defendant. It could form a defence on its own, similar to the defences of contributory negligence or voluntary assumption of risk. Alternatively it could be regarded as a factor relevant to determinations as to the reasonableness of a defendant's behaviour and liability in the first place.

The general rule relating to a child's liability in negligence was considered in 1966 by the High Court of Australia. In *McHale v Watson*[2] a twelve year old defendant injured a nine year old plaintiff when he threw a sharp metal object at a tree. The object ricocheted off the tree and hit the plaintiff in the eye. The trial judge, Windeyer J, found that the age of the defendant was relevant to a finding of liability in negligence. His Honour found that decisions about the reasonableness of a defendant's behaviour should take into account the defendant's immature age.

In light of the general discussion of the nature and structure of negligence law in chapter 2 it may seem that to consider the age of the defendant in such a way would be to take account of the individual characteristics of a particular defendant, thereby turning an objective test into a subjective one. However Windeyer J did not classify childhood as an idiosyncrasy or personal trait as such and therefore declared that he was not required to disregard the age of the defendant when determining whether he had acted reasonably.[3] His Honour concluded that despite the fact that the defendant was 'obviously old enough

[2] (1966) 115 CLR 199.

[3] *McHale v Watson* (1964) 111 CLR 384, 396-397.

to be well aware of the danger'[4] associated with the activity in which he was engaged, he had not fallen below the standard as altered to take into account his age and he was therefore not liable in negligence.

In some senses this is a strange decision, regardless of whether the reasonable person standard is regarded as being based on what the ordinary person would have or should have done.[5] That is, even though the defendant had the foresight required for liability in negligence and therefore had the cognitive capacity to avoid the injury, the Court determined either that others of his age would also have acted the way in which he acted (descriptive understanding of the standard of care) or that others of the same age as the defendant should not have been expected to act any more carefully than the defendant did (the normative construction of the standard). That is, foresight of harm, coupled with 'boyish impulse'[6] will lead to a finding of no liability for child defendants – at least male ones.[7]

On appeal the majority of the High Court upheld the trial judge's decision. It did not however settle on a precise test to apply to child defendants. Owen J formulated the rule for the appropriate standard of care in such cases as that which is to be expected of 'a

[4] *McHale v Watson* (1964) 111 CLR 384, 396.

[5] See chapter 2.

[6] *McHale v Watson* (1964) 111 CLR 384, 396.

[7] See Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003) for a discussion on the difference in the courts' treatment of male and female child defendants. See also Peter Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations* (1998) 142, 149.

child of the same age, intelligence and experience'[8] whereas Kitto J suggested that the test should be that which should be expected 'of a child, meaning any ordinary child, of comparable age'.[9] McTiernan ACJ did not offer a test but merely concluded that the trial judge had not erred in his judgment.

There is considerable difference between the tests of Owen and Kitto JJ. The test formulated by Owen J allows a greater level of individualisation than does Kitto J's as it refers not only to the age of the defendant but also to his intelligence and experience. This is the approach which has been adopted by courts in the United States[10] and sometimes in Canada.[11] However it would seem that Australian courts have adopted Kitto J's test and have interpreted the decision in *McHale v Watson* so as to limit individualisation to the issue of age.[12] The United Kingdom has also adopted this approach[13] and courts in Canada tend to oscillate between the two.[14]

Thus Australia and the United Kingdom take a narrower or less tailored approach to child defendants and do not provide as much leeway for the individual differences between

[8] *McHale v Watson* (1966) 115 CLR 199, 234.

[9] Ibid, 215.

[10] American Law Institute, *Restatement of Law (Second) Torts* (1965) s283A.

[11] Allen Linden, *Canadian Tort Law* (7th ed 2001)143.

[12] See, eg, *Mye v Peters* (1967) 68 SR (NSW) 298, 304; *Griffiths v Wood* (1994) 62 SASR 204.

[13] *Gough v Thorne* [1966] 1 WLR 1387; [1996] 3 ER 398, 400; *Mullin v Richards* [1998] 1 All ER 920, 924 in discussing *McHale v Watson* Hutchison LJ commented that 'I venture to question the word 'intelligent' in that sentence, but I understand Owen J to be making the same point essentially as was made by Kitto J'.

[14] Linden, above n 11, 142-3.

child defendants than is the case in the United States and possibly Canada.[15] Nevertheless, the decision in *McHale v Watson* confirms the general rule in Australia that youth is relevant to a determination of liability in negligence. Furthermore, the way in which age is relevant is not by creating a defence of childhood, which would negate liability once it had been found, but rather by adjusting the standard of care so as to affect the determination of liability in the first place.

There were several reasons for the Court's decision in *McHale v Watson*, but one of the most fundamental was the recognition that children have less capacity than adults.[16] McTiernan ACJ referred to a minor's inability to form culpable intention, and also the more general proposition that a person who is 'unable to understand the nature and likely consequences of his actions' will be found not liable in negligence.[17]

Owen J noted the significance of children's reduced capacity, and also pointed to other features of children such as the ability of others to track their development and to recognise that they may have reduced capacity. In addition his Honour found that applying a reasonable person standard to a child is contrary to common sense – a cornerstone of the common law.[18]

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[15] Ibid, 143; American Law Institute, *Restatement of Law (Second) Torts* (1965) s283A.

[16] This approach is mirrored in cases concerning the minors' consent to medical treatment. See eg *Secretary, Department of Health and Community Services v JWB (Marion's case)* (1992) 175 CLR 218. The psychological research relating to childhood capacity was not canvassed by the Court in *McHale v Watson*. It instead regarded the issue as one of common knowledge. See, eg, Lisa Perrochet and Ugo Colella, 'What a Difference A Day Makes: Age Presumption, Child Psychology, And the Standard of Care Required of Children' (1992-93) 24 *Pacific Law Journal* 1323, 1333.

[17] *McHale v Watson* (1966) 115 CLR 199, 205.

[18] Ibid 232.

Kitto J regarded capacity as relevant to liability, not in terms of the personal capacity of each defendant, but of general capacity as a natural stage of development and normality.[19] In a similar vein to the trial judge, his Honour reasoned that age is not a personal or idiosyncratic characteristic specific to the individual defendant, but merely a 'characteristic of humanity at his stage of development'.[20] His Honour found that as childhood is in this sense 'normal', taking account of the age of the defendant when considering the relevant standard is not to circumvent the objective test of negligence but merely to recognise that 'normality is for children something different from what normality is for adults'.[21]

There is support for this emphasis on capacity from other common law jurisdictions which also alter the standard of care for child defendants in negligence cases. For example, the American Law Institute's draft *Restatement of the Law (Third) of Torts (2001)* provides that the altered standard of care for child defendants is in recognition of the reality that children are less able than adults to understand and maintain attentiveness towards risks or to appreciate and choose alternative courses of actions.[22]

The decision in *McHale v Watson* was also influenced by a desire for uniformity in the law relating to standard of care. The Court therefore considered cases where child

[19] Ibid 213.

[20] Ibid.

[21] Ibid.

[22] American Law Institute, *Restatement of the Law (Third) of Torts – Draft* s10.

plaintiffs were defending claims of contributory negligence. In such cases plaintiffs' age is a factor relevant to the decision whether they have acted reasonably. Although some scholars have provided justifications for the different standards in primary and contributory negligence,[23] all majority judges in *McHale v Watson* held that due to the desirability of consistency, primary negligence and contributory negligence should be treated similarly in relation to standard of care.[24]

Commentary and cases from other common law jurisdictions provide additional reasons for altering the standard of care for child defendants to negligence actions – although it must also be noted that these rationales themselves have been subject to criticism.[25] For example, it has been argued that child defendants need protection from the consequences of some of their actions.[26] This rationale was especially powerful when contributory negligence was a complete defence to a claim by an infant plaintiff. Lowering the standard of care for child plaintiffs, who were increasingly being injured on the road in circumstances in which they were partly at fault, enabled these plaintiffs to recover for the damage they had suffered.[27]

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[23] This was the approach taken by Menzies J in dissent at 223. See also Ross Parsons, 'Negligence, Contributory Negligence and the Man Who Does Not Ride the Bus to Clapham' (1957) 1 *Melbourne University Law Review* 163, 171-182; Fleming James Jr and John Dickinson, 'Accident Proneness and Accident Law' (1950) 63 *Harvard Law Review* 769, 786-789; *Dellwo v Pearson* 107 N.W. 2d 859 (Minn) 863.

[24] *McHale v Watson* (1966) 115 CLR 199, 205, 215, 223, 230.

[25] Caroline Forell, 'Reassessing the Negligence Standard of Care for Minors' (1985) 15 *New Mexico Law Review* 485, 498-506.

[26] American Law Institute, *Restatement (Second) of Torts* (1965) s283A comment b.

[27] Forell, above n 25, 499.

A second rationale for lowering the standard for children is that it is important for children to be allowed to mature and develop by engaging in certain activities. This maturing process would be hindered if children were held liable for the mistakes they make whilst engaged in such learning.[28] A third reason for altering the standard of care for children appeals to basic notions of fairness. That is, it is simply "unfair" to hold children to a standard which they are unable to meet.[29]

In summary, there are a number of views provided by courts and commentators as to why negligence law incorporates an adjusted standard of care for child defendants:

- Because it makes good sense for standards in negligence and contributory negligence to be consistent.
- Because children do not have the same level of capacity as adults.
- Because not only do children have less capacity but this is their normal state of being.
- Because of this last reason, coupled with the fact that others are able to recognise the possibility of limited capacity in children.
- Because children need to be allowed to learn from their mistakes without suffering harsh consequences.

[28] American Law Institute, *Restatement (Second) of Torts* (1965) s283A comment a; Note, 'Torts: Application of Adult Standard of Care to Minor Motor Vehicle Operators' (1962) *Duke Law Journal* 138, 139; Note, 'A Proposal for a Modified Standard of Care for the Infant Engaged in an Adult Activity' (1966) 42 *Indiana Law Journal* 405, 408.

[29] *Dellwo v Pearson* 107 N.W.2d 859 (Minn. 1961), 863.

- Because as a matter of common sense and fairness it seems nonsensical to judge a child according to an adult standard.

Whatever the precise reason or reasons, it is evident that the principle of objective reasonableness is not absolute, that the standardised test may be tailored to take into account some of the characteristics of the defendant, and that one of the characteristics that will be accounted for is the defendant's immature age.

The test of negligence for children can now be described as a hybrid subjective/objective test, or an objective test with subjective side constraints.[30] That is, although the standard of care is tailored to take into account the difference in age and therefore capacity between a particular defendant and other people, the particular defendant is nevertheless judged according to the external or objective standard of reasonable person of the same age and not simply according to whether the particular defendant had acted to the best of his/her abilities.[31] As noted above, this emphasis on objectivity is particularly strong in Australia as compared to some other common law jurisdictions such as the United States, with their test for child defendants allowing for the child's intelligence and experience to be considered in addition to age.

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[30] Harry Korrell, 'The Liability of Mentally Disabled Tort Defendants' (1995) 19 *Law & Psychology Review* 1, 22; Harry Shulman, 'The Standard of Care Required of Children' (1927) 37 *Yale Law Journal* 618, 625; Linden, above n 11, 142.

[31] The United Kingdom has followed Australia's approach to child defendants in negligence actions; see *Mullin v Richard* [1998] 1 All ER 920 but some United States jurisdictions have adopted a presumption of incapacity approach which is similar to the law of crime and contracts. See, eg, American Law Institute, draft *Restatement of Law (Third) of Torts* (2001) s10 and comment d.

4.3 Exception to the Rule

It is clear that the general rule for child defendants to negligence actions is that they are only required to act the way that others of a similar age would have acted in similar circumstances. However some common law jurisdictions have developed an exception to this rule. The United States has recognised such an exception since the middle of the 20th century. The leading illustration is the 1961 Minnesota case *Dellwo v Pearson.*[32] In that case a twelve year old boy injured the plaintiff while driving a motorised boat. The Court found that children are rightly judged by standards commensurate with their age when they are engaged in behaviour which is appropriate to their age, but when they are engaged in the operation of automobiles, airplanes or powerboats they are to be held to the same standard as adults.[33]

Elsewhere the exception to the child standard has been formulated in other ways. The *Restatement of Law (Second) of Torts* provides that any child engaging in an activity 'which would normally be undertaken only by adults and for which qualifications are required'[34] would be held to the adult standard. In one way this test is broader than the *Dellwo* test because it encompasses all activities which are normally undertaken by adults rather than limiting the activities which fall under this exception to those involving motorised vehicles. Yet in another way it is narrower, as it makes license qualifications a requirement for an activity to fall within the exception and the defendant in *Dellwo* may not have fallen within this exception.

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[32] 107 N.W.2d 859 (Minn. 1961), 863.

[33] *Dellwo v Pearson* 107 N.W.2d 859 (Minn. 1961), 863.

[34] American Law Institute, *Restatement of Law (Second) of Torts* (1965) S283A comment c.

More recently, the draft *Restatement of Law (Third) of Torts* suggests that the exception applies when a child engages in a 'dangerous activity' which is 'characteristically undertaken by adults.'[35] Articulating the exception in this way is arguably broader than either of the two preceding tests as the license requirement has been removed and replaced with the much more encompassing and somewhat vague 'dangerousness' qualification. This development suggests that in the United States the exception to the child standard of care is expanding so that children are more often, or at least potentially more often, being held liable for their damaging behaviour.[36]

In Canada the exception may be even broader. Robins J in *McErlean v Sarel*[37] declared that the exception applies when children are engaged in what may be classified as an 'adult activity'. His Honour did not give particular guidelines as to which activities would be regarded as adult and it seems that what he is chiefly referring to are those activities which involve motor powered vehicles.[38] In this sense it is unclear whether the case represents a broad exception to the general rule or whether it is of the more narrow exception as provided by *Dellwo*.

No Australian court has specifically dealt with this issue. Both McTiernan ACJ and Owen J in *McHale v Watson* quoted authority which referred to the adult activities

[35] *Restatement of Law (Third) of Torts – Draft* (2001) s10(c).

[36] Patrick Kelley, 'Infancy, Insanity, and Infirmity in the Law of Torts' (2003) 48 *American Journal of Jurisprudence* 179, 246.

[37] (1987) 61 O.R. (2d) 396 (CA).

[38] *McErlean v Sarel* (1987) 61 O.R. (2d) 396 (CA), 412.

exception but neither of the Justices addressed the issue or made specific comment on this point.[39]

The 1956 South Australian Supreme Court decision *Tucker v Tucker*[40] is sometimes cited as authority for the adult exception because the sixteen year old defendant in that case was held to the adult standard.[41] However it would be unwise to regard *Tucker* as implying that Australia has adopted any form of the exception to the child standard. While the court in that case imposed liability on the sixteen year old driver it did so without providing reasons for its decision in this regard. It therefore provides no principled basis for imposing the adult standard in such cases.[42] It should also be noted that *Tucker* was decided before *Dellwo* and before the High Court's emphatic decision concerning the general standard of care for child defendants in *McHale v Watson*.

As Australian courts have not considered in depth whether an exception to the child standard applies, it is difficult to know how they may rule if faced with this issue. In light of the growth of the exception in the United States and Canada, as well as the High Court's reference to the exception in *McHale v Watson* it may be considered that Australian courts would be likely to incorporate the exception in some form into Australian tort law. On the other hand, it is possible that due to Australia's more demanding objective approach to child defendants there is not as much incentive to

[39] (1965) 115 CLR 199, 205, 208, 234.

[40] [1956] SASR 297.

[41] Danuta Mendelson, *The New Law of Torts* (2007) 315.

[42] Irish Law Reform Commission, *Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors* (1985) 26.

provide an exception here as there is in jurisdictions in which the child standard is implemented more subjectively.

4.3.1 Rationale for the exception

Although Australian courts have not yet ruled on this issue, it is nonetheless prudent to briefly consider what this exception in fact entails and what its rationale may be, in the anticipation that it may shed some light on negligence law's response to the defendant with a mental illness. As noted above, there is little consensus regarding the essential qualities of the exception – be they activities that are 'adult' in nature, 'dangerous' in nature or involve some other categorisation. What is clear is that most activities which have fallen under this exception involve motorised vehicles.[43] Surprisingly, shooting, which may be thought to be both adult and dangerous in nature has not come under the exception.[44] It is also interesting to note that most of the activities subject to the exception are those which are generally covered by insurance. Some commentators have suggested that this is no accident. Fleming has argued that holding children to the adult standard of care in such cases is a more desirable situation because of the opportunity for loss distribution through insurance.[45]

Not only is it unclear what activities fall within the ambit of the exception, there is even less consensus regarding the justification for such an exception. The *Dellwo* court held

[43] Irish Law Reform Commission, above n 42, 16, and cases cited in fn 101-108; Forell, above n 25, 487.

[44] See eg *Purtle v Shelton* 251 Ark. 519, 474 S.W. 2d 123 (1971); *LaBarge v Stewart* 84 N.M. 222, 501 P.2d 666 (Ct. App. 1972); *Thomas v Inman* 282 Or. 279, 578 P.2d 399 (1978). See Forell above n 25, for the argument that shooting should fall within the ambit of the exception.

[45] John Fleming, *The Law of Torts* (9th ed 1998) 126.

that it is required by 'the circumstances of contemporary life' – presumably meaning the prevalence and accessibility of dangerous motors[46] and this in turn presumably means that the need for compensation justifies the exception.

The *Dellwo* court also highlighted the unfairness of a situation which would subject people to greater risk than it is reasonable for them to expect. In such circumstances they are unaware, and have no way of discovering that they may need to take greater steps to guard against such risk.[47] That is, ordinarily when people interact with children they can anticipate that the standard of care likely to be exercised by the child would be different to the level of care which would reasonably be expected of an ordinary adult. The person engaging with a child in this situation is therefore given the opportunity to take greater precautions than would be necessary if engaging with an ordinary adult. When a child is in a motor vehicle however, there is little warning to others with whom the child may come into contact that they may be required to make more of an effort to guard against the risk of injury to themselves.[48]

However this reasonable expectations theory appears not in fact to be the reason for the court's decision in *Dellwo*. Directly following the Court's explanation of reasonable expectations, it noted that even if people were able to recognise this reduced standard of

[46] *Dellwo v Pearson* 107 N.W.2d 859 (Minn. 1961), 863.

[47] Ibid.

[48] This reasonable expectations theory has also been used to explain the difference in the law's general approach to child defendants and defendants suffering from mental illness and will be discussed in more detail in chapter 5. David Seidelson, 'Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent' (1981) 50 *George Washington Law Review* 17.

care, the exception should nevertheless continue to operate because there is little they could do to protect themselves against the risk regardless. This comment then seems to negate the relevance of the explanation preceding it.[49]

The Court also broadly commented that 'we should be sceptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence'.[50] Underlying this statement would appear to lie considerations of deterrence and compensation,[51] although as noted in chapter 3, there is considerable scepticism regarding the extent to which tort liability can be considered an effective method of deterrence, particularly in relation to defendants like children who have reduced capacity.[52]

In addition to arguments based on compensation, deterrence and reasonable expectations, it has been suggested that the reason for the exception to the child standard is based on the simple notion that 'if you act like an adult you will be treated like one',[53] or, in more sophisticated terminology 'when the rights of adulthood are granted, the responsibilities of maturity should also accompany them'.[54] Yet this does not explain why there would exist any additional requirement for the exception. And as noted above, whichever

[49] Forell, above n 25, 502 fn 98.

[50] *Dellwo v Pearson* 107 N.W.2d 859 (Minn. 1961), 863.

[51] Kelley, above n 36, 246.

[52] Forell, above n 25, 499-500.

[53] Note, 'Torts: Standard of Care Applied to Minors in the Operation of Dangerous Instrumentalities' (1966) 3 *Tulsa Law Journal* 186, 188.

[54] Linden, above n 11, 145. See also Irish Law Reform Commission, above n 42, 53.

formulation of the exception is accepted, there seems to be more required (whether that be dangerousness or licensing) than simply an adult activity.

Finally, it has been suggested that the real reason for the exception to the child standard is that when children are engaged in activities which are insured, the balance between the competing interests of plaintiff and defendant fall in favour of the plaintiff recovering because many of the arguments used to justify the child standard (primarily unfairness and the need for protection from the consequences of their actions) are militated against by the existence of insurance.[55] It is here suggested that this is in fact the real reason behind the exception. That is, it is unfair to hold a child to a standard of behaviour which they simply cannot meet. However when the child will not be facing the burden of their damaging behaviour, but rather such burden will be spread amongst a wider number of people who could also potentially cause damage to others, the line to be drawn between the defendant's freedom and the plaintiff's protection would seem to fall in favour of the latter.

4.4 Conclusion

It is clear that the law of negligence can and does accommodate the particular characteristics associated with childhood. It is not entirely clear however why courts are willing to take this approach – notions of common sense and fairness to the child

[55] Linden, above n 11, 145; Allen Smith, 'The Misgenetic Union of Liability Insurance and Tort Process in the Personal Injuries Claim System' (1969) 54 *Cornell Law Review* 645, 680; Note, 'Torts: Application of Adult Standard of Care to Minor Motor Vehicle Operators' (1962) *Duke Law Journal* 138, 143; Bruce Dunlop, 'Torts Relating to Infants' (1996) 5 *Western Law Review* 116, 118, 119; Forell, above n 25, 503-506.

defendant, the ability of others to recognise the defendant is a child and therefore may have reduced abilities in certain respects, or because childhood is a normal stage of development.

It also appears that some common law jurisdictions have moved toward creating an exception to this accommodating response. Again, it is not entirely clear when this exception applies, or more correctly, which activities engaged in by a child will be subject to the child standard and which will be subject to the adult standard. Why this exception actually exists is even more controversial – it may be based on the expectations of others or because the child's behaviour is covered by insurance. Yet despite this fact, and despite the fact that Australia cannot properly be said to have adopted this law, the arguments in favour of both the general child standard and the exception may shed some light on the real reasons behind the law relating to defendants suffering from mental illness, and to assist in determining whether this law is appropriate.

The next chapter considers some of the scholarly attempts to explain courts' willingness to take account of the reduced capacity which is a result of childhood when determining liability in negligence, but their unwillingness to do so when the defendant's reduced capacity is caused as a result of a mental illness.

Chapter 5 - Childhood and Mental Illness: explaining the difference in legal treatment

5.1 Introduction

The central argument of this thesis is that negligence law's response to defendants who are suffering from a mental illness is perhaps not fuelled by legal principle or theory, or even by policy considerations based on accurate information. Rather that the law may be directed by fear and misunderstanding of mental illness and stigma towards those suffering from such illnesses. This is not to say that there is no support in principle for the current law, but that the choice to opt for one of a number of competing principles is a decision which is made by reference to a particular attitude towards mental illness which is not apparent towards other groups of defendants, such as children.

In order to substantiate this claim, chapter 2 has explained that the law of negligence theoretically requires all defendants to be judged according to the objective standard of reasonableness regardless of any characteristics particular to the defendant which would make such a requirement impossible for the defendant to meet. However chapter 4 highlighted that Australian courts have been flexible in their approach to this rule when the defendant's reduced capacity is due to childhood. In such cases the reasonableness of child defendants' behaviour is judged according to a more individualised standard which takes into account their age and the general characteristics which ordinarily accompany such immaturity.

Chapter 1 highlighted the fact that some of the symptoms of mental illness are similar to those of childhood. In particular, they both have the propensity to have reduced abilities to engage in rational thought, to control behaviour, or to posses high levels of awareness or insight. In light of this, it may be thought that courts would consider, from a legal perspective, treating these two groups of defendants alike. As will be discussed in detail in chapter 7, courts in Australia and in other common law jurisdictions have not taken this step. Defendants with a mental illness are liable for not acting like the ordinary person without a mental illness, but child defendants are liable only if their behaviour falls short of the behaviour of an ordinary child of the defendant's age.

Thus the law of negligence allows both the holding of actors to standards which they cannot meet, as well as the contrary position of tailoring the standard so that actors may be in a better position to reach it. Understanding the bases for courts' decisions to choose either one of these options in a particular case may assist in explaining negligence law's response to the defendant who has a mental illness.

It has been noted in chapter 3 that turning for guidance on these issues to the theoretical bases of tort law is unhelpful. This is partly because there appears to be no consensus as to what these essential bases may be and partly because the individual theories themselves are at times inconsistent or inadequate in how they may apply to a defendant suffering from a mental illness.

This thesis takes the position that negligence is underpinned by competing policies including compensation, deterrence and moral adjudication. The law attempts to find a balance between these policies and therefore between the interests of the plaintiff, defendant and wider society. Yet this conclusion does not assist in determining when and where to draw the line between these competing interests in particular circumstances. Yet this difficulty is only secondary to the main claim in this thesis. This thesis argues that these philosophical underpinnings are not ultimately the reasons behind the development of the law of negligence as it relates to defendants with a mental illness. In order to substantiate the argument that the law of negligence, so far as it applies to defendants who are suffering from certain mental illnesses is based on a prejudice against such people, it is necessary to eliminate any rational and plausible explanations for the current law.

It is therefore the purpose of this chapter to understand whether there is any principle associated with courts' decisions to standardise or particularise in individual cases, or if instead the claim that tort law is inconsistent in its approach to the objective standard is accurate.

Commentators have criticised the way in which negligence law responds to defendants who have a mental illness.[1] But few have turned their mind to addressing the question of

[1] See, eg, Pamela Picher, 'The Tortious Liability of the Insane in Canada … With a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative' (1975) 13 *Osgoode Hall Law Journal* 193; Elizabeth Goldstein 'Asking the Impossible: The Negligence Liability of Those Who Have a Mental Illness' (1995-96) 12 *Journal of Contemporary Health Law & Policy* 67; WGH Cook, 'Mental Deficiency in Relation to Tort' (1921) 21 *Columbia Law Review* 333; Francis Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924-5) 23 *Michigan Law Review* 9; Robert Ague, 'The Liability of Insane Persons in Tort Actions (1955-56) 60 *Dickenson Law Review* 211; William Castro 'The Tort

why it responds in the way that it does or to explain why negligence law treats the child defendant and defendants with a mental illness differently. This chapter will consider some of the scholarship which has attempted to answer these questions. It will primarily examine the ideas of Jules Coleman,[2] Tony Honoré[3] and David Seidelson.[4] Coleman and Honoré both try to provide moral justifications for the objective test. Coleman focuses specifically on its application to those who have a mental illness. Honoré frames his inquiry more broadly so as to encompass those situations in which the defendant, due to an inability to meet the objective test of reasonableness, may be regarded as having been subject to strict rather than objective liability. David Seidelson directly addresses the issue of the difference in legal treatment of children and those who have a mental illness.

5.2 The Compensation Objective

Jules Coleman was the first of these three scholars to focus directly on the issue of tort liability of those who have a mental illness. His article 'Mental Abnormality, Personal Responsibility and Tort Liability'[5] justifies in terms other than moral fault and

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Liability of Insane Persons for Negligence: A Critique' (1971-72) 39 *Tennessee Law Review* 705; Ellis James, 'Tort Responsibility of Mentally Disabled Persons' (1981) *American Bar Foundation Research Journal* 1079; WMB Hornblower, 'Insanity and the Law of Negligence' (1905) 5 *Columbia Law Review* 278; Okianer Christian Dark, 'Tort Liability and the "Unquiet Mind": A Proposal to Incorporate Mental Disabilities into the Standard of Care' (2004) 30 *Marshall Law Review* 169; WM Justus Wilkinson, 'Mental Incompetency as a Defense to Tort Liability' (1994-5) 17 *Rocky Mountain Law Review* 38**.**

[2] Jules Coleman, 'Mental Abnormality, Personal Responsibility and Tort Liability' in Baruch Brody and Tristram Engelhardt, (eds) *Mental Illness: Law and Public Policy* (1980).

[3] Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 *Law Quarterly Review* 530 and reprinted in Tony Honoré, *Responsibility and Fault* (1999).

[4] David Seidelson, 'Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, The Mentally Impaired, and the Mentally Incompetent' (1981) 50 (1) *George Washington Law Review* 17.

[5] Coleman, above n 2.

consequentialist arguments the objective test of negligence. Coleman considers the imposition of tortious liability both in a general sense and more specifically in relation to defendants with a mental illness.[6]

In a similar vein to chapter 3 of this thesis, Coleman eliminates some of the suggested theoretical bases of liability so far as it relates to defendants with a mental illness. He argues that conceiving negligence law primarily as a system designed to deter future damaging behaviour does not adequately explain why the current law holds defendants with a mental illness liable for their tortious actions. That is, as civil liability has an unlikely deterrent effect on those who have a mental illness, there is no basis for holding them liable for their actions.[7] Coleman also argues that the 'traditional' conception of tort law which grounds responsibility in moral culpability does not explain why tort law requires those who have a mental illness to pay for their damaging behaviour when they are genuinely unable to measure up to the standard of care expected of them and therefore cannot be regarded as morally at fault.[8]

Coleman concludes that the only way to justify applying the objective standard to defendants with a mental illness is by regarding tort law as a system of compensation. He reaches this conclusion not only as a matter of elimination, but also because adopting this analysis is the most satisfactory explanation of tort law in its own right. This he says is because of the similarity in focus of the objective test and compensation. They are

[6] Ibid, 112.

[7] Ibid, 116-117.

[8] Ibid, 111-112, 118.

both concerned not with actors but with actions – they are plaintiff or victim focussed.[9] This is why negligence law does not take into account the personal characteristics of the defendant or the fact that the defendant may not be able to act the way negligence law requires. In terms of the balance of competing interests inherent in society this analysis of tort law raises those of the plaintiff above those of the defendant.

Although in this article Coleman conceives negligence as a system of compensatory justice and therefore concerned with acts rather than actors, he does not propose that under such a system defendants with a mental illness should always be held liable for their tortious actions. Coleman, like the corrective justice theorists discussed in chapter 3 considers that human action or agency is a prerequisite for liability in tort. This is why acts which are often referred to as 'acts of God' such as weather conditions, do not fall within the ambit of tort liability. Likewise, it is why a sleepwalker will be regarded as having acted involuntary and therefore not necessarily responsible for actions performed whilst sleepwalking. Coleman suggests that if people cannot be said to have actually acted, in the sense that they lack 'authorship' of the act, they too cannot be held liable for any resulting damage. Thus Coleman considers that some mental illnesses may operate so as to deny this assumption of agency and therefore the assumption that the person's bodily movements can in fact be classified as the person's acts and therefore subject to legal judgement.

[9] Ibid, 125-126.

Coleman argues that people lack agency when they are unable to form intentions or to control actions in relation to those intentions. Thus evidence of inability to form intentions, to translate them into human conduct or to understand the relationship between the two may exonerate a person from liability. This is not, Coleman insists, an exception to liability which is based on a denial of culpability as per moral responsibility theories. Coleman is quite prepared to accept that liability in tort can be imposed even if a defendant is not morally at fault. For Coleman, the proposed agency exception to liability is an exception not because the defendant was 'innocent' or not culpable, but because the defendant could not be regarded as having actually engaged in an action. It is the denial of agency or action rather than fault which forms the basis of Coleman's exception.[10]

According to Coleman some forms of mental illness may act so as to deny agency and therefore not be appropriately found liable for damage caused by their 'actions'. For example, he suggests that people who suffer from psychotic disorders, are sometimes unable to translate intention into action and are sometimes not the compelling force in their action. If this is the case, Coleman regards that such people lack agency such that their bodily movements cannot be correctly termed as their own actions. They should therefore not be held liable for their otherwise tortious behaviour.[11]

Coleman's analysis appears to offer an explanation as to why the objective standard does not consider the capacities of or the mental illness suffered by the defendant. It also

[10] Ibid, 128.

[11] Ibid, 130-131.

provides a moral justification for this – tort is concerned primarily with compensation. However this analysis, as well as his application of it to those who have a mental illness is problematic. Although there may be more focus on the victim in tort law than there is in criminal law,[12] tort law is clearly not primarily focussed on the plaintiff's interests.[13] The test of negligence, for example, first asks about the defendant's reasonableness and not the plaintiff's needs. This second question is only asked after, and is contingent upon the answer to the first. Negligence is not ultimately a forward looking system centring entirely on the plaintiff's needs. It is also concerned with adjudicating the past behaviour of the defendant.

Further, as outlined in chapter 3, regarding torts as a system of compensatory justice does not explain why careless and damaging action which requires compensation is limited by the legal requirement of duty of care.

Assuming however that Coleman's analysis of tort law as an expression of compensatory justice is correct, his application of it to sufferers of mental illness seems to misunderstand the nature of mental illness. As noted in chapter 3, the agency denial approach to responding to mental illness does not take into account the fact that while in some cases it may be appropriate to say that a person suffering a psychotic episode is in a sense not in control,[14] in other instances a person experiencing delusions and

[12] Peter Cane, *Responsibility in Law and Morality* (2002); Peter Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations* (1998) 142, 145-46.

[13] See chapter 3.

[14] See expert evidence provided in *Fiala v Cechmanek* (1999) 281 AR 248, [11], [16].

hallucinations can in fact translate intentions into conduct. Such a person may intend to drive a car quickly but may be doing so because of the belief that s/he is being chased and potentially killed by work colleagues. That is, when experiencing a psychotic episode a person may intend to perform the relevant action but the reality on which the intentions are based, the assumptions about the world are completely irrational and fantastic.[15]

Moreover, even if Coleman were correct in his categorisation of tort law as compensatory justice, and even if his application of it to defendants with a mental illness made scientific sense, his analysis only serves to reinforce the view that courts have taken an inconsistent or anomalous approach to standard of care. That is, if it is justifiable to judge defendants according to their acts rather than their abilities, it is unclear why courts have been flexible in their approach to the test of objective reasonableness as it applies to child defendants. Apart from very young infants, children cannot be said to be lacking agency in the way Coleman intends.[16] They intend their actions much the same way that people who suffer from a mental illness intend their actions. And as with those who have a mental illness, it is simply that sometimes children are lacking in awareness of the world around them and sometimes make questionable judgement calls in relation to their intentions and desires.[17]

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[15] Stephen Morse, 'The Jurisprudence of Craziness' in Francesco Parisi and Vernon Smith (eds), *The Law and Economics of Irrational Behavior* (2005) 225, 226.

[16] Lisa Perrochet and Ugo Colella, 'What a Difference A Day Makes: Age Presumption, Child Psychology, And the Standard of Care Required of Children' (1992-3) 24 *Pacific Law Journal* 1323; Laura Berk, *Development Through the Lifespan* (3rd ed, 2004) 19; Leyland Stott, *The Psychology of Human Development* (1974) 192-194.

[17] See chapter 1.

In fact, Coleman's theory would not allow the objective standard to be altered in any way for any group of defendants, be they children, the physically impaired or professionals, unless agency were denied. Thus it is unclear why a compensation focussed, plaintiff oriented approach to liability is adopted when the defendant has a mental illness, but not when the defendant is a child.

Coleman's account therefore does not adequately explain the difference in legal treatment between children and those who have a mental illness.

5.3 Luck

Tony Honoré's aim is similar to that of Coleman's as he too attempts to justify in moral rather than policy terms the objective test of negligence. His focus however is not specifically on those who have a mental illness but more broadly on those situations in which the defendant was unable to reach the standard of reasonableness. Nevertheless his analysis does shed some light on understanding the current law as it relates to those who have a mental illness.

It has been suggested that the imposition of liability in such situations may be regarded as a form of strict liability. This form of strict liability has been regarded as potentially useful from a legal perspective, but 'irrational as a moral position'.[18] In 'Responsibility

[18] Thomas Nagel, 'Moral Luck' in Thomas Nagel, *Mortal Questions* (1979) 24, 31. See Cane, 'Moral Luck' above n 11; Peter Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 81, 100-102 who disputes that this can be regarded as strict liability. For Cane, the essential difference between strict

and Luck: The Moral Basis of Strict Liability'[19] Honoré attempts to show why this strict liability is not just useful from a legal perspective but how it can also be supported as a moral position.

In a similar vein to Coleman, Honoré rejects the suggestion that the objective standard is justified only by expediency and by reference to the social goal of reducing accidents. In other words, he denies the argument that ideally a person should only be found liable if he could actually have acted differently but that given certain policy considerations imposing liability becomes justifiable. Instead, he, like Coleman aims at providing a moral rather than policy based justification for the objective test.[20]

Honoré's basic premise is that we live in a society in which people are held responsible for what they do, even in circumstances where they could not foresee the consequences of their actions or did not intend to act in the way that they did. This he refers to as outcome responsibility.[21] The reason we adhere to such a system, according to Honoré, is that being responsible for one's actions is part of what it is to be a human being – to be a person operating in the world. He claims that to deny responsibility for actions is to deny one's status as a person.[22] In addition, he also raises an argument which in some sense resembles the deterrence, or at least consequentialist line of reasoning. He argues

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liability and liability based on fault is that the latter provides a standard of measurement whereas the former does not.

[19] Honoré, above n 3.

[20] Honoré, *Responsibility and Fault* above n 3, 9.

[21] Ibid, 15.

[22] See also Peter Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations* (1998) 142, 143.

that 'accepting responsibility for our actions makes for a better society because it encourages us to do well and to enjoy the credit that comes from doing well.'[23] If this is the case, not only does Honoré defeat his own attempts to move beyond such consequentialist based approaches to tort law, but we are faced once again with the question of how liability should be imposed on those who are unable to be deterred, or are unable to respond positively to the potential of receiving credit for doing well.[24]

This concern aside, it is necessary to understand more clearly the details and the impact of Honoré's thesis. Because of our commitment to outcome responsibility even though it sometimes holds people responsible for things beyond their control, 'luck' plays a significant role in the apparent fairness of a finding of legal liability. Luck, for Honoré, concerns both people's natural abilities (dispositional luck) and the circumstances in which they find themselves (circumstantial luck). Good luck is the blessing of having been born with average or superior personal attributes and finding oneself in favourable circumstances. Bad luck is the misfortune of having been born with inferior personal attributes and being faced with less than favourable circumstances.[25]

Honoré argues that in being held responsible for the outcomes of their actions, people are sometimes held responsible for their bad luck of being constituted in a particular way, or

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[23] Honoré, *Responsibility and Fault* above n 3, 10.

[24] Ibid. Interestingly, this emphasis on identity and character is in complete contrast to Coleman's thesis that tort law is not concerned with the person, and in particular the objective test of negligence cannot be explained except by reference to acts rather than actors.

[25] For a more detailed explanation of the notion of luck see Bernard Williams, *Moral Luck* (1981); Cane, 'Moral Luck' above n 11; Susan Hurley, *Justice, Luck and Knowledge* (2003). See also John Goldberg and Benjamin Zipursky, 'Tort Law and Moral Luck' (2007) 92 *Cornell Law Review* 1123 for a broader analysis and defence of tort law in light of the element of luck which is inherent in it.

of finding themselves in particular circumstances – shortcomers, as he calls them. In some circumstances this may result in a situation which would appear intuitively unfair – such as holding someone responsible even if they were simply incapable of acting reasonably. Yet he argues that this seemingly unfair situation cannot be viewed in isolation as it is only a part of the wider operation of the law of negligence. The system of outcome responsibility must be viewed in its entirety. Imposing liability on those who were unable to act otherwise must be regarded in light of its correlative – that people are also held responsible for the good luck of their actions turning out better than they had foreseen, or of having found themselves in favourable circumstances. Honoré argues that the essential fairness in this system of outcome responsibility is that we are responsible for our good and our bad actions – it cuts both ways. This is what he refers to as taking the rough with the smooth.[26]

Honoré does not claim that liability in every case is fair under this system, but rather in general findings of liability are so.[27] This is due to three factors. First, the system works reciprocally – people are held responsible for their good luck and for their bad luck. No one person is singled out for different treatment and the system applies equally to everyone.

[26] Honoré, above n 3. It has been argued by Peter Cane in 'Moral Luck' above n 11, 151 that Honoré does not explain why defendants rather than plaintiffs are required to bear this burden of luck. Cane suggests that the answer to this question is that being responsible for our acts is part of what it means to be a human being. However this seems to be precisely what Honoré provides as his primary reason.

[27] See, Arthur Ripstein, 'Private Law and Private Narratives' in Cane and Gardner, above n 18, 37, 39.

Second, outcome responsibility is regarded as a beneficial system of responsibility even though it may sometimes appear to result in holding people responsible for activities or outcomes which were not in their control because people generally have the benefit of experiencing more good consequences of their actions than bad. Honoré claims that in choosing to act, people essentially bet on the outcome of their behaviour. He also claims that the reason this system is in most people's best interests is that most people will be in credit rather than debit with regards the positive consequences of their actions. However Honoré does not clearly explain why or even if this is in fact the case. His assumption that people are generally the beneficiaries of such a system appears to be largely unproven but relies heavily on the third condition on which the application of outcome responsibility rests.

This third condition is similar to Coleman's agency argument. That is, outcome responsibility should only apply to those who possess the minimum capacity for reasoned choice and action.[28] This is not to say that any time people are unable to meet a standard or to behave in a particular way that they are immune from responsibility, but rather that people must have the general ability to perform the type of behaviour that is required of them. For example, although people may sometimes drive unsafely, they do generally have the ability to drive in a safe way. We can therefore say that they have the general capacity to drive but on this particular occasion they were not able to do so. A new born infant, on the other hand, does not have the general ability to drive at all and therefore

[28] Honoré, above n 3, 26-27, 32.

does not possess the required minimum capacity.[29] The reason why a minimum capacity is required for outcome responsibility is because those who lack this base level of capacity are likely not to have the benefit of more credit than debits with regard their actions, thus creating an unacceptable balance between positive and negative actions. This ultimately results in an unfair application of outcome responsibility.[30]

Thus Honoré justifies liability in negligence, based on the objective standard which in theory does not take into account the capacities of the defendant when judging behaviour, according to this system of responsibility for the outcomes of our personhood, as represented by our actions. This system is justifiable because it requires responsible people to in fact be competent agents, thereby only attributing actions to those who have some authorship of them, it treats all people equally and it is largely in people's best interests.

It is not entirely clear how those suffering from a mental illness fit into Honoré's analysis. From the outset, Honoré is uncomfortable in denying people responsibility for their actions because of his belief in its relationship with personhood, identity and self respect.[31] Yet he also recognises that although for most people outcomes as seen by ourselves and as seen by others are not radically different, this may not in fact be the case for a person who suffers from a mental illness. This is because one of the significant features of some mental illnesses is that the sufferer has a distorted view of the world.

[29] Honoré, above n 3 11-12, 38. See also Herbert Hart, *Punishment and Responsibility* (1968) 152, Cane, 'Moral Luck' above n 11, 148-149.

[30] Honoré, above n 3, 28, 32.

[31] See also Cane, 'Moral Luck'above n 11, 143.

This suggests that this connection between outcome responsibility and identity is not quite as significant for those who have a mental illness.[32]

Putting those who have a mental illness into the category of those who do not possess minimum capacity is problematic for similar reasons that it is problematic for Coleman and the agency theorists. That is, categorising those who have a mental illness as people who do not possess the capacity for forming intentions or in transforming them into actions (as is the case when a person experiences an epileptic fit or is engaged in sleep walking) does not explain, from a scientific perspective, what is really at issue for a person with mental illness. Their lack of capacity is related to an inability to engage in rational thinking and to have a rational awareness of themselves and the world around them. It is not based generally on an inability to physically control their behaviour or to form and act on intentions.[33]

However Honoré has elsewhere suggested that liability should only be imposed on actors when they were able to make a rational decision about what to do.[34] This is a very different understanding of capacity than simply being able to form intentions and to translate them into actions and may lead to the conclusion that defendants with a mental illness should be exempt from liability.

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[32] Tony Honoré, 'Appreciations and Responses' in Cane and Gardner, above n 18, 219, 226.

[33] See chapter 1; Michael Smith, 'Responsibility and Self-Control' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 1, argues that a person can be capable of acting intentionally but nevertheless be a victim of circumstance in the sense that such a person has no rational control.

[34] Honoré, 'Appreciations' above n 32, 219-220.

But if we are to understand general capacity in the way most often described by Honoré, it would seem not to encompass this requirement of rationality. Instead it seems to mean being able, more often than not to engage in the activity in which on the particular instance ability was lacking. It is unclear how this interpretation relates to the intermittent and vastly different ability levels that a person with mental illness may experience. A person with a mental illness that manifests in psychotic episodes may be as capable and rational as any other person when not experiencing these symptoms, but has an incredibly distorted view of reality when in the midst of a psychotic episode.[35] It is unclear from Honoré's account whether these varying abilities of a person can be adequately accounted for.

Another example may explain further. Suppose a healthy adult suffers an accident which results in serious brain damage such that her abilities today are far less than they were yesterday. Does Honoré judge her at the standard of her abilities of yesterday, where she would ordinarily have the benefit of good luck most of the time, or of her abilities of today – abilities which would more likely mean that she may get more than her fair share of bad luck when attempting to engage with the world around her? One would assume that Honoré would judge her by her new standard, despite overall more positive rather than negative results of her attempts to engage in certain activities to date.

The question then is whether the same notion applies for a person experiencing a psychotic episode. Is she to be judged according to whether, when having psychotic

[35] This is recognised by the various state mental health legislation. For example, the definition of mental illness in s4 of the *Mental Health Act 2007* (NSW) recognises that a such illness may seriously impair either permanently or temporarily the mental functioning of the person; See Chapter 1.

episodes, she is more or less likely to have more good rather than bad experiences over time, or whether the person's abilities are cumulative so that her generally positive experiences when not in a psychotic state overshadows her generally negative experiences when psychotic?

If we were to assume that the person suffering from a mental illness would be treated the same way for the purposes of Honoré's theory as the person who has been physically damaged (and there seems no reason to think that these two situations should be treated any differently), then Honoré's theory does not adequately explain why those with reduced mental abilities as a result of a mental illness are held to the objective standard of reasonableness when experiencing a psychotic or like episode.

Although Honoré does not specifically address issues particular to defendants with a mental illness, he does explore the relationship between the objective standard and children. For Honoré child defendants have minimum capacity, but if they are held to the adult standard, they will not have the benefit of more positive than negative outcomes of their behaviour because they cannot generally act the way an adult would. This is why the standard is altered for them – we judge them according to the standard that they are usually able to attain.[36] As discussed in chapter 4, this is not correctly regarded as a subjective standard, because the child is still required to meet external criteria. For Honoré, this response to child defendants is simply to give the expression 'capacity to act

[36] Honoré, above n 3, 34.

otherwise' which as we have seen in chapter 2 is the basis of negligence law, a more plausible meaning.[37]

This then seems to add a new dimension to Honoré's theory. That is, children do have minimum or general capacity, they are subject to the rough and smooth of outcome responsibility, and depending on their age and the activities in which they are engaged in, they tend to benefit from more positive than negative outcomes from their actions. Honoré seems to imply that it is justifiable to alter the standard so as to ensure this last condition.

Defendants with a mental illness are similar in all relevant regards. They generally have minimum capacity in the way envisaged by Honoré, they received the good and the bad consequences of their behaviour, and depending on the state of their illness they may or may not receive the benefit of more positive than negative consequences of their actions. It seems plausible to argue that the standard of care for those with some forms of mental illness should be tailored to make 'capacity to act otherwise' more realistic for them in the same way as it is for children.

Finally, apart from these concerns regarding the adequacy of Honoré's theory as it applies to those who have a mental illness, his theory of outcome responsibility and its concomitant acknowledgment of the role of luck in tort law does not explain the disparity in legal treatment of those who have a mental illness and children – why is it that the bad

[37] See eg Philip Pettit, 'The Capacity to have Done Otherwise: an Agent-Centred View' in Cane and Gardner, above n 18, 21.

luck of mental illness is to be borne by the defendant but not the bad luck of not yet being of mature age?

5.4 Reasonable Expectations

David Seidelson's task and approach is different from that of Coleman's and Honoré's. He does not aim to provide a moral justification for the objective test of negligence, but instead seeks to explore from a descriptive perspective why the law will sometimes adjust the objective standard of care to take into account particular characteristics of the defendant.[38] His article addresses the specific question asked by this chapter – why is there a different legal response to child defendants and defendants with a mental illness.

Seidelson proposes that an orderly society requires people to pursue their goals and organise their lives based on expectations about the behaviour of other people. The role of law in this scheme is to mediate or control these expectations to ensure that they are reasonable.[39] In other words, to find an appropriate balance between the interests of the plaintiff, defendant and wider society.

Seidelson's thesis is that both the reasonable person test and the exceptions to this test can be explained according to this theory of reasonable expectations. He explains that when the defendant acts in a way that injures the plaintiff, the defendant has factually

[38] Seidelson does not differentiate between plaintiff or defendant but instead focusses on the 'actor' whether in primary or contributory negligence and his/her requirement to meet the standard of care.

[39] See, also Patrick Kelley, 'Infancy, Insanity, and Infirmity in the Law of Torts' (2003) 48 *American Journal of Jurisprudence* 179, 227.

frustrated the expectations of the plaintiff. The plaintiff did not expect to be injured under the circumstances and, given the circumstances, this expectation was reasonable. Seidelson proposes that if the law does not find the defendant liable it would factually frustrate as well as legally frustrate the plaintiff's expectations.[40]

According to Seidelson, whether expectations are reasonable or not will depend on any relevant knowledge one person has of another, particularly in relation to capacity. Only if a person is or should be aware of the reduced capacity of another is it justifiable to require expectations (and therefore the objective standard) to be altered.[41] This is because if a plaintiff does not know of special facts which may make the defendant unable to act reasonably, the plaintiff cannot in turn act so as to compensate for the defendant's special characteristics. The plaintiff's reasonable expectations are therefore unreasonably, rather than justifiably frustrated.[42]

Seidelson applies his theory to several cases – the minor, the person with developmental delay and the person with a mental illness. He finds that the altered standard of care for children as well as the exception to this standard makes sense in light of his analysis. Indeed, as noted in chapter 4, one of the reasons provided by the courts deciding the exception to child standard cases is a form of reasonable expectations arguments.

[40] Seidelson, above n 4, 19.

[41] Seidelson, above n 4, 29.

[42] Ibid.

Likewise, where questions arise regarding the standard of reasonableness a developmentally delayed person must meet, Seidelson cited favourably from a Missouri Court of Appeal case in which the judge found that the defendant 'had intimately known plaintiff since he was twelve years of age, and knew he was mentally subnormal'[43] so could not expect him to act the way a reasonable adult would have done.

Reasonable expectations also explained why the Wisconsin court in *Breunig v American Family Insurance Company*[44] found the defendant liable when she drove across the dividing line and crashed into the plaintiff even though the defendant was at the time experiencing a psychotic episode due to her undiagnosed schizophrenia.

Thus Seidelson appears to have articulated a theory which explains the difference in treatment of children and those with a mental illness, as well as explaining the varied standards for children. That is, the relevant difference between children and people suffering a mental illness is that people are generally cognisant of a child's reduced level of capacity but it is more difficult to identify reduced capacity in an adult who is suffering from a mental illness.[45] As a result, those engaging in transactions with children have more opportunity to modify their expectations and their behaviour than those engaged in transactions with those who have a mental illness.[46]

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[43] *Lynch v Rosenthal* 396 S.W.2d 272 (Mo. Ct. App. 1965), 276.

[44] 45 Wis. 2d 536, 173 N.W. 2d 619 (1970).

[45] Seidelson, above n 4, 29. This is reminiscent of Oliver Wendell Holmes Jr, *The Common Law* (1881) 109 stating that '[W]hen a man has a distinct defect of such a nature that all can recognise it as making certain precautions impossible, he will not be held answerable for not taking them…'. It is also the argument on which *Cook v Cook* (1986) 162 CLR 376 proceeds.

[46] Ibid.

However Seidelson's descriptive theory is problematic for several reasons. First, although his proposal comes some way to explaining the difference in legal treatment of children and defendants with a mental illness, it does so at the expense of consistency in relation to another group of defendants – those who have experienced a sudden physical illness such as epilepsy. Given the difficulty in recognising the potential for reduced capacity in such people, reasonable expectations theory would require these defendants to be held liable for their damaging behaviour in the same way as defendants with a mental illness. But courts have been reluctant to find liability in such cases.[47] Likewise, courts have found that a person who caused a car accident after having been stung by a bee[48] or having a sudden pain in the eye[49] had not acted unreasonably and were therefore not liable for the damage they caused. Yet given the inability of others to recognise the fact that they may have been likely to cause an accident, Seidelson's theory would no doubt impose liability in such situations. The reasonable expectations theory is therefore unable to provide overarching consistency in the law's approach to defendants with reduced capacity.[50]

Seidelson notes this inconsistency and uses it to ultimately reject the law in relation to defendants with a mental illness. He notes that if the interests of the plaintiff injured by a

[47] See, eg, *Roberts v Ramsbottom* [1980] 1 All ER 7; *Waugh v James K Allan Ltd* [1964] SC (HL) 102.

[48] *Scholtz v Standish* [1961] SASR 123.

[49] *Billy Higgs & Sons ltd v Baddeley* [1950] NZLR 605.

[50] See also, John Finnis, *Natural Law and Natural Rights* (1980) who has articulated a theory based on co-ordinating norms. Society functions according to patterns of conduct or societal conventions, and if those patterns are disrupted, one party feels wronged and law's role is to vindicate this wrong. He finds that the reason there is no liability imposed on defendants who have suffered sudden physical illnesses such as epilepsy is that there is no co-ordinating norm or societal standard connected to such an activity.

defendant who has experienced a sudden physical illness can be legally frustrated, then the same can apply for those injured by a defendant who has a mental illness. Seidelson says that in such cases, the frustration of the plaintiff's interests give way to the inappropriateness of holding a person incapable of culpability, liable in negligence.

Thus it has been said of Seidelson's article that 'we have the unusual case of an author who develops a brilliantly successful descriptive theory and then immediately rejects that theory as normatively inadequate.'[51] It has been suggested that Seidelson's dilemma was created because his theory 'ultimately fell back on a seemingly ad hoc balancing test, with no principled basis in the purpose of negligence liability to decide which claim was better.'[52]

It is here suggested that another problem with this theory is that it simply does not explain the complete reason why judges make their findings about the standard of care in the way they do. As noted in chapter 4, the fact that a person driving on the road is not aware that there may be a child driving another car on the road is only part of the reason for finding the child liable in such cases. The court also noted that even if the plaintiff driver were aware of this fact, he could not do anything to ensure his safety anyway.[53]

[51] Kelley, above n 39, 210.

[52] Ibid.

[53] *Dellwo v Pearson* 107 N.W. 2d 859 (Minn. 1961), 863.

Seidelson's theory is also problematic because it does not accurately reflect the actual requirements of negligence law.[54] Liability in negligence is imposed on defendants who have not behaved the way an ordinary person in that position would have behaved – this is a defendant rather than plaintiff focussed approach. Theories based on reasonable expectations are plaintiff directed – they are about the plaintiff's expectations rather than the defendant's reasonableness. As such, the theory of reasonable expectations does not in fact accord with the general principles of the law and it is ultimately unconvincing.

5.5 Conclusion

It would therefore seem that none of these analyses adequately explains why courts are unwilling to take into account the symptoms of reduced awareness, control and rational thought when they manifest in those suffering mental illness, but their willingness to do so when they manifest by reason of immature age.

Perhaps the best reason that can be offered as to why there appears to be no logical explanation for the differences in treatment between the reduced capacities in one group of defendants and not in others, is because the corrective justice theorists are correct in their claim that a plurality of interests can only lead to incoherence. That trying to balance competing interests, and being forced to draw a line between such interests, leads to inconsistency in particular instances. Yet a plurality of interests is the base on which our current tort system appears to rest, and an incoherent tort system appears to be the

[54] There is also concern regarding the existence of any principled way of characterising what is meant by reasonable expectations. See, eg, Bailey Kuklin, 'The Justification For Protecting Reasonable Expectations' (2001) 29 *Hofstra Law Review* 863, 865.

result. Alternatively, it may be that there is no rational explanation for negligence law's response to a defendant with mental illness other than a misunderstanding and fear of people with any such illness.

The criminal law has adopted what has become known as the 'M'Naghten Rules' to determine criminal responsibility of those suffering a mental illness. The next chapter considers whether these rules provide an insight into an alternative method of dealing with defendants with a mental illness in tort. This chapter will briefly review the approach adopted in the criminal law. It will point out the difficulties with that approach and will query whether it provides a useful response to tort liability given the quite different policies at play.

Chapter 6 - Mental Illness and Criminal Law

6.1 Introduction

The aim of this thesis is to understand and evaluate negligence law's response to defendants who have a mental illness. Throughout the majority of this work this task has been approached from a perspective internal to tort law – examining the details of negligence, its theoretical bases, and attempts by tort scholars to justify the position it takes to those suffering from mental illness. It is apparent that while negligence law allows the bar by which to judge a defendant's behaviour to be both particularised and standardised, no tort analysis has satisfactorily indicated which of these two options the law should take. The tort perspective therefore does not provide a definitive or even plausible explanation for the law relating to defendants who have a mental illness. The most that tort offers is the conclusion that negligence is concerned with drawing a line between the competing interests of the individual, society and the wider community.

It is therefore productive to move beyond this narrow confine of tort enquiry and turn for guidance to another legal category to consider whether its law and scholarship can assist in understanding negligence law's response to defendants who have a mental illness. Criminal law, which has dealt with issues surrounding those suffering from mental illness extensively for centuries, is an appropriate contender because the role of both crime and tort is to respond to behaviour it considers is wrongful. In so doing, both attempt to resolve the tension which exists in both of them, and which is based on fundamental but

competing interests. These opposing interests may be described in a number of ways – one person's security and another's freedom, community welfare and individual autonomy,[1] society and defendant,[2] harm and fault principles[3] or consequentialist and justice based philosophies.[4]

Tort and crime respond differently to these competing interests and weight them and draw the line between them in differing places. This is largely because the consequences of wrongful behaviour in tort and crime are different. In the law of crime, wrongful behaviour is punished by the State. Such punishment will vary depending on the severity of the wrongful action, but it will range from monetary fines to be paid to the State, to incarceration for extended periods of time, and in some jurisdictions, even death. The consequence of wrongful behaviour in tort, on the other hand, is the requirement to pay compensation to the victim of the wrongful action. Generally speaking the level of compensation is commensurate with the level of harm suffered by the victim. Despite these differences, the fact that both areas of law grapple with the appropriate legal

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[1] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 11.

[2] See generally Peter Cane, *Responsibility in Law and Morality* (2002).

[3] Stephen Morse, 'Craziness and Criminal Responsibility' (1999) 17 *Behavioural Sciences and the Law* 147, 149, 155.

[4] Ibid 149. These sets of opposing interests are intimately connected, as they represent different aspects of the same concept. In other words, the harm principle bases decisions as to the criminal nature of an action on whether it has produced sufficient harm to the community to warrant blame and punishment, and whether enforcing punishment will have a deterrent effect on this and other like defendants. This is a consequentialist approach, basing the morality of an act on the outcome that it produces, thereby elevating the interests of the victim and society over that of the agent. The fault principle, on the other hand, imposes blame and punishment only on those who were sufficiently at fault or culpable for committing the particular harm and therefore deserving of the consequences of retribution. This approach represents a deontological argument, focussing on the agent and ideas of free will and autonomy rather than on the consequences that the offensive behaviour produces. It therefore draws the line between the competing interests of defendant and society more closely to the former than to the latter.

response to 'wrongs' means that using criminal law to understand tort law may prove fruitful.

The purpose of examining criminal law's response to defendants who have a mental illness is not to offer a detailed critique of the subject matter, or to provide suggestions for reform. Rather this brief inquiry will be used to shed light on tort law's response to mental illness. It may be argued that as tort and crime have different motivations and provide different responses to wrongful behaviour, there is nothing the one can teach the other, or that it is dangerous to use one to inform the other.[5] Yet such an inquiry is informative, it is argued, if the relevant differences are kept in mind. Moreover the differences between the two legal categories are of limited importance given that primary argument of this thesis is that the law's response to defendants who are suffering from a mental illness is not determined by principles behind the law itself, but rather by negative stigma associated with mental illness.

This chapter will provide a brief description of the way in which Australian criminal law responds to those suffering from mental illness. It will then consider some of the criticisms or limitations of this approach. Finally, this chapter will outline some suggestions for the apparent limitations in the law in this regard. Of particular interest for this thesis is the suggestion that the deficiencies in the criminal law so far as it applies to those suffering from mental illness is due to an entrenched, unconscious and pervasive misunderstanding, distrust and fear of all things related to mental illness.

[5] These arguments are raised in *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, 60-66. See chapter 7.

6.2 History, Assumptions and Purposes

There are two main themes running through the criminal law, both of which are relevant to the law's response to defendants who have a mental illness. The first is the basic assumptions about human nature, referred to in chapter 1, on which both crime and tort law rests. The second is the stated purposes of the criminal law. A brief history will assist in putting these themes into context.

Early English criminal laws and modes of proof were based primarily on moral and religious notions which assumed that God rather than human beings was the final arbiter of guilt or innocence.[6] There was no organised system of punishment as we know it today until the early 19th century. Up until this time the main disincentive to engage in violent crime was the fear of private vengeance which would invariably degenerate into private war, blood feuds and anarchy.[7]

In these early years of the criminal law, liability was predicated largely on causation. Defendants were generally found guilty of committing a criminal offence if evidence showed that they had brought about a particular unwanted event. In this way the history

[6] These laws were not so much part of a set of unified principles as they may be described to a certain extent today, but rather a list of various offences – largely against the king, public justice, or religion. Offences against the individual were barely referred to in the old texts. Crime has been an established category of law since Roman times and although the exact time, by whom and to what degree these principles were first introduced into England is uncertain, it is clear that the principles of English common law were drawn, at least to some extent, from this Roman law. See James Stephens, *A History of the Criminal Law of England* (1883) vol 1, 9, 52- 56, 59-72; Peter Arenella, 'Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability' (1991-2) 39 *University of California Los Angeles Law Review* 1511, 1528; VF Nourse, 'Hearts and Minds: Understanding the New Culpability' (2002-3) 6 *Buffalo Criminal Law Review* 361, 366.

[7] When punishment did begin to develop some systematic structure it comprised either compensation to the injured party, compensation to the king, or corporal punishment. See Stephens, above n 6 57, 60; David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Criminal Laws* (2006) 55.

of tort and crime are similar.[8] As the law developed, a guilty verdict came also to require that the defendant had some realisation of, or mental connection with this particular event. By the 13th century a guilty verdict would only be handed down if the defendant were found to have both performed the wrongful act and had some manner of intent to do so.[9] These two requirements came to be known as the actus reus (guilty act) and mens rea (guilty mind).

This distinction between bodily action and mental states is, it could be said, supported by understanding from all cultural spheres. For example, the cementing of the division of criminal offences into these two elements reflects the dualistic view of human action explained by 17th century early Enlightenment philosophers such as Descartes. In his philosophical accounts, human beings were seen as consisting in two distinct elements – the body, which is public, observable and physical and which in the criminal law is reflected in the actus reus; and the mind, which is private, unobservable and non-physical and which in criminal law is reflected in the mens rea. Despite modern concerns about the accuracy of this view, the 17th century notion of human beings still forms an important philosophical basis for the criminal law today.[10]

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[8] See chapter 2.

[9] Brown et al, above n 7, 320; Peter Shea, 'M'Naghten Revisited – Back to the Future? (The Mental Illness Defence – A Psychiatric Perspective)' (2000/2001) 12 *Current Issues in Criminal Justice* 347, 349. Christopher Slobogin, 'An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases' (2000) 86 *Virginia Law Review* 1199, 1215.

[10] It has been said that this dualistic concept of human beings is 'the beginning of all wisdom and all confusion in the scheme of criminal responsibility'. Brown, et al, above n 7, 331. The American Psychiatric Association, *Diagnostic And Statistical Manual of Mental Disorders Text Revision* (4th ed, 2000) (*DSM-IV-TR*) xxx states that the expression mental disorder 'unfortunately implies a distinction between 'mental' disorders and 'physical' disorders that is a reductionist anachronism of mind/body dualism.'

A century later, during the latter part of the Enlightenment period, philosophical ideas had a significant impact on criminal law. Instead of being seen as inherently flawed and tainted by original sin, human beings came to be seen in a way that emphasised that people are autonomous and rational individuals.[11] Viewing humans in this way did not sit well with a criminal justice system which was generally vicious, corrupt and irrational.[12] Not only did such a system offend rational individuals from a philosophical perspective, but from a practical perspective, when viewed as a means of social control the existing justice system did not work. Legal reformers, following the ideas of the Enlightenment, argued that as people were rational beings they would respond positively to a rational and knowable criminal justice system. They believed that as a result crime would be largely eliminated.[13]

The requirements of the modern criminal law indicate that these assumptions about criminal law – that it regulates rational beings that are comprised of the two distinct elements of mind and body still form the bases for the modern criminal justice system.

Although the law about both tort and crime centres on responding to behaviour which is considered wrongful, one of the main differences between these two legal categories is

[11] Arenella, above n 6, 1529.

[12] Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (1993) 21.

[13] Morse, 'Craziness' above n 3, 152. See also Arenella, above n 6, 1529 'Judges and commentators treated the criminal law as a mechanisms for social control that had two primary functions; to deter rational, self interested defendants from violating legally protected state interests and to incapacitate those individuals who were not deterred.' However, the belief that reform would virtually eliminate crime did not eventuate, largely because those who had advocated this new system had an idealised rather than a realistic view of people. They had based their theory on human beings who comprised only one of the aspects of 'real' people – their ability to reason and calculate, but did not consider the multitude of other elements which impact on and interrelate with this potential for rationality. Nourse, above n 6, 362; Norrie, above n 12, 23.

the way in which they respond to such behaviour. This is intimately connected with the stated purpose of each area. As discussed in chapter 3, tort law, broadly speaking, seeks to determine which behaviour will attract a requirement to pay compensation. Criminal law on the other hand aims to identify behaviour which should result in punishment. The difficult task for both is to determine which behaviour is wrongful for its purposes.

It is not the intention of this thesis to consider this issue of wrongfulness in detail, particularly in so far as it relates to the criminal law. It is suffice to recognise that some law makers and criminal law scholars argue that wrongful behaviour is that which is regarded as 'immoral'[14] and others suggest that it is behaviour that causes harm to others.[15] As with similar debates surrounding wrongful behaviour in tort law[16] it is most likely that modern criminal law comprises a mix between these two concerns. Punishment is meted out to individuals who are deserving of it, but only 'if the net consequences of doing so are positive'.[17] The way in which the criminal law responds to defendants who have a mental illness provides a good illustration. In such cases law makers have recognised that on the one hand society must be protected from harm but on the other hand blaming and punishing people for violation of rules they were incapable of following is both unfair and ineffective.[18]

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[14] Patrick Devlin, *The Enforcement of Morals* (1965).

[15] HLA Hart, *Law, Liberty and Morality*, (1963). Chief Justice Haynsworth said, in *United States v Chandler* (4th Cir. 1968) 393 F.2d 920, 929 'The criminal law exists for the protection of society.' This was cited by the High Court in *Fardon v Attorney General for the State of Queensland* 223 CLR 575, 589; Findlay, above n 1, 2 suggests that conduct will be regarded as criminal if there is a public interest in ensuring that such conduct does not recur.

[16] See chapter 3.

[17] Morse, 'Craziness' above n 3, 150.

[18] Ibid, 152; Stephen Morse, 'Inevitable Mens Rea', 27 *Harvard Journal of Law and Public Policy* 5, 61.

6.3 Defendants with a mental illness

In order to establish criminal liability, the prosecution must prove beyond a reasonable doubt that the defendant has satisfied the two elements of the offence for which the defendant is charged. These elements are the actus reus – the physical act which is said to constitute an offence, and the mens rea – the mental requirement or fault intention required for commission of the offence. Once these elements have been proven a defendant may rebut the finding of criminal liability by proving on the balance of probabilities one of several defences.[19]

Theoretically, there are therefore two possible stages in the criminal proceedings during which issues of the defendant's mental illness may be relevant. First it may raise a doubt about whether the defendant has satisfied the elements of the offence – the actus reus or mens rea. This is in essence is a claim that the prosecution has not adequately proven its

[19] Australian criminal law has been described as somewhat piecemeal not so much because criminal law in Australia is dealt with both at the State and Federal level but rather because some states adopt the common law approach (New South Wales, Victoria, South Australia and Australian Capital Territory) whereas others have codified the law in what is known as the Griffith Code (Queensland, Western Australia, Tasmania and the Northern Territory).

In 1991, in recognition of this lack of unity, a Model Criminal Code developed by the Standing Committee of Attorneys-General, through its Criminal Law Officers Committee (renamed the Model Criminal Code Officer's Committee in 1993) was developed. Despite the intention of the Code developers, and the agreement of all jurisdictions to implement the whole of the Code by 2001, to date the ACT and the Commonwealth are the only jurisdictions to have done so and in fact some States have enacted legislation inconsistent with the Code (see eg the New South Wales treatment of the defence of intoxication in *Crimes Act (NSW)* 1990 Part 11A). Nevertheless, as the core elements of the criminal law in all jurisdictions are essentially similar the Code will be the main reference for discussion of the Australian criminal law. See *General Principles of Criminal Responsibility* Report of Criminal Law Officers Committee of the Standing Committee of Attorneys-General, December 1992; G McDonald, 'Towards a National Criminal Law' (1996) 68 *Reform* 16; Bernadette McSherry, 'Mental Impairment and Criminal Responsibility: Recent Legislation' (1998) 6 *Journal of Law and Medicine* 10; Brown et al, above n 7 319; Paul Fairall and Stanley Yeo, *Criminal Defences in Australia* (2005) x.

case. Second, it may be relevant to establishing a defence to liability once the elements of the offence have been established.

As discussed elsewhere in this thesis, that there are two stages at which mental illness may be relevant – establishing liability or excusing liability – is the same in tort law.[20] Although mental illness does not appear to be significant to tort law, some negligence cases which have taken into account the mental illness suffered by the defendant have adopted the language of a defence of mental illness somewhat similar to that provided by the criminal law.[21] However tort law's approach to child defendants has not been to establish a defence of childhood, but rather to see immature age as relevant to determining the reasonableness of a defendant's behaviour. It is therefore unclear if tort law were to take into account mental illness, how it would in fact do so.[22] The law of crime on the other hand is quite clear on the issue. It requires that evidence relating to the defendant's mental illness must be dealt with under a separate defence.[23]

6.3.1 Elements of an offence - Actus Reus and Mens Rea

The first step in establishing criminal responsibility is to determine whether the defendant has voluntarily performed the act which is said to constitute a criminal offence – the actus reus. Consistent with the principles of free will and choice which underlie legal

[20] See, eg chapters 2, 4 and 7.

[21] See chapter 7.

[22] See chapters 7 and 8.

[23] See pp 158-59.

responsibility, Australian criminal law requires an act at a minimum to be accompanied by some operation of the will.[24] If a defendant's action was done without volition it lends itself to a claim of automatism.

The criminal law of automatism has theoretically come to deal with the issue of mental illness as a result of the divide of automatism into two categories – insane and non-insane. The difference between the two is that the involuntary action which is the subject of insane automatism occurs as a result of a 'mental disease', whereas the involuntary action in non-insane automatism is caused by other factors, generally of a physical nature such as epilepsy or somnambulism.

This is not merely a difference in categorisation, but has real practical consequences. A person who is found to have suffered from non-insane automatism at the time of

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[24] Section 4.2 of the Model Criminal Code provides that:

> (1) Conduct can only be a physical element if it is voluntary.
>
> (2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.
>
> (3) The following are examples of conduct that is not voluntary:
>
> (a) a spasm, convulsion or other unwilled bodily movement;
>
> (b) an act performed during sleep or unconsciousness;
>
> (c) an act performed during impaired consciousness depriving the person of the will to act.

If action were not to be regarded in this way it would imply that animals are capable of 'action' the same way that humans are. Such a view is antithetical to law's understanding of human beings. It would necessarily cover human muscular contractions which we tend not to regard as 'acts' as such, for example the heart beat and digestion. See Morse, 'Craziness' above n 3, 151-152 who notes that it can be argued that the difference between human and animal behaviour is that human behaviour is reason driven and is a product of intention that arises from the desires and beliefs of the agent. Alternatively human action can be seen as 'no more than just another mechanistic phenomena of the universe subject to the same natural, physical laws that explain all phenomena'. He notes however that unlike social sciences, which use both accounts of human behaviour, law uses only (or at least largely) the former conception. See also Brown, above n 7, 337; Fairall and Yeo, above n 19, 280, 282, 299; *R v Rabey* (1967) 121 CLR 205, 214; Edward Coles, 'Scientific Support for the Legal Concept of Automatism' (2000) 7 *Psychiatry, Psychology and Law* 33, 45.

engaging in the otherwise criminal offence will be acquitted outright. A person who is found to have experienced insane automatism on the other hand will be treated in the same way as a person who has been successful in proving the defence of insanity.[25] The defendant is subject to what is known as a 'special verdict' – not guilty due to mental illness.[26] The result is that instead of the defendant being unconditionally free as would be the case of a normal acquittal, the judge will determine how best to deal with the defendant. This will generally result in the defendant being committed to a psychiatric hospital.[27]

The reason for this difference in treatment between insane and non-insane automatism is that procedural requirements disallow claims of mental illness from being raised at the actus reus stage of proceedings.[28] Mental illness can only be used to prove the defence of insanity. Thus a claim of insane automatism is subsumed into the defence of insanity.

The second element of an offence is the mens rea or fault element. As is the case in tort law, fault in criminal law may be subjective (intention,[29] knowledge[30] or recklessness[31]),

[25] See eg s38(1) *Mental Health (Criminal Procedure)* Act 1990 (NSW). See below pp 160-164.

[26] See, eg *Mental Health (Criminal Procedure Act) 1990* (NSW) s38.

[27] Model Criminal Code s7.3(6) provides that 'A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.' See also *Crimes Act 1900* (NSW) s39.

[28] Model Criminal Code s7.3(6).

[29] See eg, Model Criminal Code s5.2.

[30] See eg, Model Criminal Code s5.3.

[31] See eg, Model Criminal Code s5.4; See also *R v Crabbe* 156 CLR 464.

objective (negligence[32]) or strict.[33] Consistent with moral notions of culpability a killer will be treated differently depending on whether the killing was done intentionally, accidentally or in circumstances where there existed no ability to act otherwise.[34]

It may be thought that a defendant's mental illness would be more relevant to crimes requiring subjective rather than objective mens rea because such crimes turn on the state of mind of the defendant at the time of committing the actus reus. Yet the same procedural requirement which directs issues of mental illness away from the actus reus also directs them away from the mens rea.[35] The only time at which a defendant's mental illness may be raised is when the defendant is proving the defence of insanity. That is, no evidence of mental illness can be raised to determine whether or not a defendant had the mental capacity to form the mental element necessary to commit the relevant crime. Therefore unlike in tort law where the defendant's mental illness may affect each tort differently, in criminal law a defendant's mental illness is equally irrelevant to all mens rea or fault standards.

Thus a defendant's mental illness may be relevant from a scientific perspective for indicating whether the defendant was capable of satisfying the elements of actus reus and

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[32] Although in practice this is not a static standard but incorporates some of the characteristics of the defendant. See, Fairall, and Yeo, above n 19, 20; See eg, Model Criminal Code s5.5.

[33] See eg, Model Criminal Code ss 6.1, 6.2.

[34] Brennan J has stated that 'criminal responsibility depends not only upon a persons' act or omission but also upon circumstances in which the act is done or the omission made, usually upon his state of mind at the time and sometimes upon the result of his act or omission.' *R v He Kaw Teh* (1985) 15 A Crim R 203, 233; Morse, 'Craziness' above n 3, 149.

[35] Model Criminal Code s7.3(6).

mens rea[36] but defendants are not permitted to argue this point.[37] They can only raise these issues when trying to prove that even though they have purportedly satisfied the elements of the offence, they should be not guilty due to the defence of mental illness.

Although funnelling issues of mental illness into one area may have practical advantages in terms of ease of process, it also has significant disadvantages for the defendant who has a mental illness. Most importantly, it alters the standard of proof which is applied in all criminal cases. Instead of the prosecution proving beyond a reasonable doubt that the defendant satisfied the actus reus and mens rea and the defendant only being required to raise a reasonable doubt about the issue, the burden of proof is altered so that defendants are required to disprove these elements of the offence by satisfying the requirements of the defence of insanity.[38] The way in which the criminal law responds to defendants who have a mental illness therefore represents an exception to the 'golden thread'[39] of criminal law that the crown is to establish beyond a reasonable doubt the elements of the

[36] In *Felstead v* R [1914-15] All ER 41 the court stated that 'if the defendant was insane at the time of committing the act he could not have had a mens rea'. This was approved in the *Attorney General's Reference (No. 3 of 1998)* [1999] 3 All ER 40; Brown, above n 7, 540.

[37] For example, section 7.3(6) of the *Criminal Code Act* 1995 (Cth) provides that: 'A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.'; *R v Falconer* (1990) 171 CLR 30, 82. According to *R vHawkins* (1994) 68 ALJR 572 medical evidence has been relevant however, to prove the specific intent requirement of a particular crime. This goes to mens rea rather than actus reus and as it related to the Tasmanian Criminal Code it is therefore uncertain whether the High Court ruling in that case applies equally to common law jurisdictions in which the specific and basic intent requirements are different, See Fairall, above n 19, at 297-299; Note however the argument that mental disorder rarely negates mens rea because if a person acts under a delusion she is still acting intentionally, the reasons for so acting are just irrational; See Morse, 'Craziness' above n 3, 162.

[38] *R v Falconer* (1990) 171 CLR 30, 63, 77, 86; Fairall and Yeo, above n 19, 273.

[39] *Woolmington v DPP* [1935] AC 462, 481-2.

offence.[40] This anomalous burden of proof for mental illness (whether it is in determining insane automatism or insanity),[41] appears to have been recognised and accepted by the High Court.[42]

6.3.2 Insanity

After the prosecution has proved beyond a reasonable doubt the actus reus and mens rea of the offence (bearing in mind the fact that any inability to satisfy these elements due to mental illness is ignored at this stage), defendants may nonetheless escape criminal liability by providing a defence for their otherwise criminal conduct. The primary defence for a person with mental illness is what is known at common law as the defence of insanity. This defence is also variously referred to as the defence of mental illness or mental impairment and has been a part of Western law for centuries.[43]

The modern law of insanity is derived from the 1843 English case of *M'Naghten.*[44] In that case, the defendant, Daniel McNaghten, in a delusional belief that he was being

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[40] By contrast, the defendant who wishes to rely on a claim of sane automatism, or a defendant wishing to dispute the mens rea for a reason other than mental illness, such as accident or mistake, needs only raise a reasonable doubt as to the matter. *R v Falconer* (1990) 171 CLR 30, 63, 77, 86.

[41] Owen Dixon, 'A Legacy of Hadfield, M'Naghten and Maclean' (1957) 31 *Australian Law Journal* 255.

[42] *R v Falconer* (1990) 171 CLR 30; This has the effect of limiting the opportunity to avoid criminal consequences for those claiming reduced mental capacity and reduces the credibility of the criminal justice system by turning the processes of proof into mere rhetoric. See Author Unknown, 'Required Scope of Insanity Defense' (2006) 120 *Harvard Law Review* 223, 228 'It is a fundamental principle of American jurisprudence that the prosecution must prove all elements of a crime beyond a reasonable doubt to overcome a defendant's presumed innocence. Such a burden could prove meaningless if the defendant did not have a corresponding right to present evidence to rebut the prosecution's case.'

[43] Shea, above n 9, 348.

[44] *R v M'Naghten* (1843) 10 CL & Fin 200.

persecuted by the Prime Minister's Tory party, shot and killed a minister whom he mistook for the Prime Minister. Following substantial medical evidence as to the mental state of McNaghten, which included evidence as to insane delusions, he was acquitted and admitted to a mental hospital until his death years later.

In response to significant public outcry at this result, Queen Victoria asked the House of Lords to review the matter. They in turn referred five questions to the Law Lords who had decided the case.

Amongst other things, the judges were asked:

> What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?[45] And
>
> In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?[46]

Tindal CJ, on behalf of the Court, responded that:

[45] Ibid, [203].

[46] Ibid.

> The jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party defendant was labouring under such a defect of reason, from disease of the mind, as not to know the nature of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. [47]

This response and the test into which it has developed, consists of three basic elements. The first is a statement of the type of mental condition that is required for the defence (defect of reason from disease of the mind). The second and third elements relate to the consequences which must flow from this required state of mind (did not know the nature of the act or that it was wrong).[48]

The M'Naghten rules still form the basis for the defence of mental illness in all jurisdictions in Australia (and most common law countries), although most jurisdictions have revised them to some extent. There are now eight different forms of what were originally the M'Naghten Rules in operation in Australia.[49]

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[47] Ibid, [210].

[48] Shea, above n 9, 347. The Hansard debates of the time indicate that these questions were meant to clarify the law in relation to defendants who have a mental illness. Ironically, it is commonly accepted that 'conflict of opinion exists … regarding almost every word of the famous opinion of the judges and its numerous and motley progeny'. See Hansard debates (1843) vol LXVII 714 732-3; Faye Boland, *Anglo-American Insanity Defence Reform, The War Between Law and Medicine* (1999) 1, 4-5; S Glueck, *Mental Disorder and the Criminal Law* (1925) 226.

[49] The original form exists in NSW and there are seven variants. The main change in all the variants has been the removal of the phrase 'defect of reason' so as to remove the limiting cognitive element of the test, although, as discussed below, it is still heavily weighted in cognitive considerations due to the second and

Unlike the case with other defences to criminal liability, defendants who successfully prove the defence of mental illness are not acquitted but rather are subject to what is known as a special verdict – not guilty due to mental illness.[50] As a consequence of this verdict, a judge must decide the most appropriate course of action to take in relation to the defendant. This generally results in defendants being detained in a psychiatric institution for an undefined duration.[51]

As the power to detain a person after a mental impairment verdict is based on an analogy with civil commitment rather than punishment it is concerning that due to resource shortages, forensic patients are sometimes detained in prison instead of in psychiatric hospitals – on 30 June 2003 almost 10% of forensic patients in NSW were being detained in prison.[52] Thus it has been suggested that although a successful defence of insanity is a

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third elements of the test. Further, the expression 'disease of mind' has been replaced with one of a number of alternatives - 'mental impairment' (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s20; the *Criminal Code* (Cth) s7.3), *Criminal Code 2002* (ACT) ss27-29; *Criminal Code* (NT) s43Cor 'mental incompetence' (*Criminal Law Consolidation Act 1935* (SA) s269A. These have all been directed at widening the range of mental illnesses that can come under the defence. The second and third elements of the defence as developed from M'Naghten have largely remained unchanged except to include a volitional element to the defence in some case. See Shea, above n 9, 348. The Model Criminal Code for example provides that:

7.3 (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct as perceived by reasonable people, was wrong); or

(c) the person was unable to control the conduct.

[50] See eg *Mental Health (Criminal Procedure) Act 1990* (NSW) s38(1).

[51] See eg *NSW Crimes Act 1900* (NSW) s 39.

[52] Tessa Boyd-Caine and Duncan Chappell 'The Forensic Patient Population in New South Wales' (2005) 17 *Current Issues in Criminal Justice* 5, 14; Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility Report* (1992) 35. The Human Rights and Equal Opportunity Commission has

finding that the defendant is not guilty, the result may be imprisonment under another name.[53]

6.3.3 Diminished Responsibility

The defence of diminished responsibility also enables defendants who have a mental illness to avoid the normal legal consequences of their acts. Only four Australian jurisdictions have a diminished responsibility defence[54] and although the details differ between each jurisdiction, the general elements are nevertheless the same.[55] Diminished responsibility:

(1) Reduces murder to manslaughter;

(2) Requires a substantial impairment of the defendant's ability to judge right or wrong; and

(3) Requires that the impairment be due to an abnormality of the mind.[56]

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highlighted this concern by noting that using commitment to solve the problem of what to do with the defendant who has a mental illness is based on treatment rather than punishment. Yet the overarching purpose of the governor's pleasure detention is protection of the public and not treatment. Disturbingly, such detention can act as a 'particularly severe punishment because it is not subject to the normal legal protections which apply to those convicted of crimes.' *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) (the Burdekin Report) 797-8.

[53] This means that while insanity is of general application in theory, it is rarely raised, and when it is, it is done so only in relation to serious offences of physical violence. Brown, above n 7, 14.

[54] See *Criminal Code* (Qld) s 304A; *Crimes Act 1900* (ACT) s 14; *Criminal Code* (NT) s 37; *Crimes Act 1900* (NSW) s 23A.

[55] The defence of diminished responsibility was introduced both in England and Australia when mandatory sentencing gave judges no discretion to consider circumstances which they felt would lessen the severity of a crime and the resulting sentence. While the defence has been regarded by some as unnecessary in jurisdictions which no longer have the death penalty or mandatory sentencing, it has been retained due to its more scientifically sound understanding of mental impairment as existing on a continuum rather than merely as the two absolutes of sanity and insanity.

[56] The *Crimes Act 1900* (NSW) s 23A, is illustrative of the general concepts. The section, titled 'substantial impairment by abnormality of mind' provides:

Thus the scope of diminished responsibility is both broader and narrower than that of insanity. It is narrower because insanity is available for all crimes and excludes criminal responsibility altogether, but diminished responsibility is only available to those accused of murder, and if successful, merely diminishes criminal responsibility.

It is broader than insanity because the requirements of diminished responsibility are generally easier to meet. Abnormality of mind may encompass conditions which would not be considered a mental disease for the purposes of the defence of insanity such as volitional capacity, extreme emotional states and some cognitive disorders.[57] It is also broader than insanity because diminished responsibility only requires the defendant's capacity to be substantially impaired whereas insanity requires the defendant to be wholly lacking in capacity. Interestingly, the diminished responsibility defence is infrequently raised.[58]

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(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

(a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition [meaning a pre-existing mental or physiological condition, other than a condition of a transitory kind], and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

[57] NSW Law Reform Commission *Report 82 (1997) – Partial Defences to Murder: Diminished Responsibility* [3.7]; Fairall and Yeo, above n 19, 311.

[58] Between January 1990 and September 1993, diminished responsibility was only raised in 42 out of a possible 256 cases – 16.1% of cases. Brown et al, above n 7, 533.

6.4 The limitations

Criminal law's response to defendants who have a mental illness has been subject to significant and sustained criticism.

6.4.1 Arbitrariness

It has been argued that the current law relating to defendants who have a mental illness is inadequate because it results in arbitrary line drawing. For example, as the difference between sane and insane automatism centres on a finding of mental disease, courts must determine whether a particular mental state is to be regarded as a disease or not. One of the tests which has been used to make this determination is known as the internal-external test. This test provides that those mental malfunctions which arise from a source internal to the defendant, for example his/her psychological make up are to be regarded as a mental disease, but mental malfunctions which are produced by some specific external factors such as intoxication or concussion are not.

This has led to some unusual distinctions. For example, the condition which results from an excess in blood sugar has been regarded as deriving from factors external to the individual and has therefore not been categorised as a disease of the mind. A person who experiences a state of automatism as a result of this condition will be found to have experienced sane automatism.[59] Yet the condition caused by a deficiency of blood sugar

[59] *Hennessy v R* (1989) 89 Cr App Rep 10.

has been regarded as generated by something within the individual and therefore any experience of involuntary action will be categorised as insane automatism.[60]

The existence of such apparently arbitrary distinctions has led Toohey J to state that the internal/external test is 'artificial and pays insufficient regard to the subtleties surrounding the notion of mental disease'.[61]

Another test which has been used for determining the meaning of mental disease is the continuing danger test. Denning J explained the test as follows:

> It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.[62]

However Denning J's test has the potential to lead to unusual distinctions much in the same way as the internal/external test. According to this approach, a person who has an undiagnosed and untreated mental illness such as schizophrenia which may lead the sufferer to be violent on more than one occasion will be regarded as having a mental disease. Yet it must be assumed according to this continuing danger test, that those whose schizophrenia is controlled by medication, such that the symptoms are less likely

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[60] *R v Quick* [1973] QB 910.

[61] *R v Falconer* (1990) 171 CLR 30, 75.

[62] *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 412.

to occur, will not be regarded as having a disease of the mind. This seems an illogical situation, as the existence or otherwise of the mental illness is predicated on whether or not it is diagnosed and controlled. The result is that the same illness may be variously categorised as a 'mental disease' and 'not a mental disease'.

The first prong of the M'Naghten Rules – the defendant did not know the nature and quality of his act – can also lead to arbitrary distinctions. This is because it would appear that whether a defendant is suffering delusions is unimportant, but the content of the particular delusion is determinative. If the defendant thinks she is stamping on an insect but is in fact stamping on a person's head, then the delusion may imply that the defendant did not know the nature and quality of the conduct she was engaged in. But if the content of the defendant's delusion is that she is sent from God to reform all the evils in the world, starting with promiscuous behaviour, then the defendant, in acting on this delusion, is regarded as being aware of the nature and quality of her conduct. Thus the judge must pick and choose between different sorts of delusions.[63]

6.4.2 Uneasy relationship with science

Another concern relating to criminal law's response to mental illness is its relationship with the health and social sciences.[64] It is not mental illness per se that is relevant to the

[63] Norrie, above n 12, 179-180.

[64] The relationship between the two has been described by Donald Bersoff, 'The Differing Conceptions of Culpability in Law and Psychology' (2004) 11 *Widener Law Review* 83, 87 as 'a highly neurotic, conflict-ridden ambivalent affair (I stress affair because it is certainly no marriage).'; Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (1981) 3.

criminal law, but the symptoms that may arise from mental illness. Some commentators have suggested that conceptual confusion arises when legal and medical concepts are forced to come together in a test like insanity.[65] That is, the expression 'disease of the mind' has medical overtones but it is used to help make legal judgments.

Because the ultimate issue for determination in criminal law is criminal responsibility, and because insanity is a legal rather than a medical test,[66] public policy considerations rather than clinical science have the greatest weight in informing a determination of guilt or innocence.[67] It is argued that law should not be driven by doctors or scientists, and that the issues raised by scientific and legal concepts are simply different.[68]

Thus criminal law is not concerned with the actual existence or otherwise of mental illness, but with whether the defendant is able to be classified into a particular legal category. The definition and use of the expression disease of the mind is not an exact science, but a 'workable definition'.[69] It has been described as 'a crude but effective

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[65] Ralph Slovenko, 'The Mental Disability Requirement in the Insanity Defence' (1999) 17 *Behavioural Science and Law* 165; Steven Yanoulidis, 'Mental Illness, Rationality, and Criminal Responsibility (Tropes of Insanity and Related Defences)' (2003) 25 *Sydney Law Rev*iew 189, 220.

[66] Commonwealth, *Parliamentary Debates* House of Representatives 1 March 1995 1331 (Duncan Kerr, Minister for Justice).

[67] Fairall and Yeo, above n 19, 255; Phillip Areeda, 'Always a Borrower: Law and Other Disciplines' [1988] *Duke Law Journal* 1029, 1039.

[68] See eg Peter Dahl, 'Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials' (1985) 73 *California Law Review* 411. He raises concerns that too much reliance on psychiatric evidence will 'ruin' or change the nature of law and legal concerns. And Dixon J in *R v Porter* (1933) 55 CLR 182, 187 states that 'It is quite a different object to that which the medical profession has in view or other departments of the law have in view in defining insanity for the purpose of the custody of a person's property, capacity to make a will and the like.'

[69] Commonwealth, *Parliamentary Debates* House of Representatives 1 March 1995 1331 (Duncan Kerr, Minister for Justice). Yet it must be asked, to what extent such definition really is workable, given the high rate of people in the prison system who have a mental illness. Boyd-Caine and Chappell, above n 53.

policy tool for maintaining a balance between social protection and humanitarian concern for those lacking mental capacity'.[70] It has also been suggested that in using expressions such as 'disease of the mind' which have medical undertones, the law has done itself a disservice and has concealed the fact that the inquiry is essentially of a legal and moral nature.[71] This is why some scholars have recommended that the defence eliminate the use of expressions such as disease of the mind, and instead focus on the symptoms experienced by the person and the causal connections between such symptoms and the criminal offence.[72]

Yet, the defence does incorporate terms which involve medical concepts and proving such concepts requires medical evidence. So that while science does not solve the normative problems to which law is directed, it assists in solving these problems. And law cannot ignore scientific knowledge.[73]

The law and medicine interplay goes in both directions. Medicine helps law in making its determinations, but these legal decisions in turn have clinical consequences. This has led to conflict with the medical profession, which argues that the defence of mental illness has no relevance to modern day psychology or psychiatry.[74] The fact that the defence allows people to be committed into a psychiatric hospital is therefore of concern.

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[70] Fairall and Yeo, above n 19, 261.

[71] Yanoulidis, above n 66, 189.

[72] Norrie, above n 12, 358-60; McSherry, 'Recent Legislation' above n 19, 13.

[73] G. Smith, 'The Province and Function of Law, Science and Medicine: Leeways of Choice and Patterns of Discourse', (1987) 10 *University of New South Wales Law Journal* 103, 112.

[74] Norrie, above n 12, 348.

This conceptual confusion, which is also evident in the defence of diminished responsibility,[75] has led to some critics suggesting that the insanity defence:

> symbolises the gap between the aspiration of a theoretically positivist and objective common law legal system (in which behaviour is allegedly animated by free will and is judged and assessed on a conscious level), and the reality of an indeterminate, subjective, psychological, physiological, environmental and sociological factors and is frequently driven by unconscious factors).[76]

6.5 Why the Limitations?

6.5.1 Myth of Free Will

It is clear that although the criminal law does turn its mind to defendants who have a mental illness there are considerable problems in the way in which it does this.

One suggestion as to the real reason behind the inadequacies in criminal law's response to these defendants is that law and medicine are predicated on different assumptions. That is, as a matter of scientific reality the concept of human beings as rational and free is simply incorrect and that human behaviour, like the behaviour of all other animals, is

[75] Victorian Law Reform Commission, *Defences to Homicide: Final Report* 2004, Chapter 5 'People with Mentally Impaired Functioning Who Kill' 242.

[76] Michael Perlin, 'Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence' (1989-9) 40 *Case Western Reserve Law Review* 599, 619.

based on a combination of genetic factors and life experiences.[77] The tension between the purportedly free-will-based legal system and the purportedly deterministically-driven scientific system, has led to the incoherence evident in the law relating to those suffering from mental illness.[78]

Moreover, even without scientific evidence, the fact that the majority of those who are the subject of punishment in our criminal justice system are poor, from minorities, and from abusive and disadvantaged backgrounds may suggest that the notion that people freely choose their behaviour and are therefore justly blamed, is in many cases unjustified.[79]

If free will is so contrary to scientific understanding of the basis and workings of human behaviour, there must be some reason for the law's insistence on basing its precepts upon it. It is argued that the reason is simply that free will helps to protect the public – this being one of the ultimate aims of the criminal justice system. As the High Court explained in *Fardon v Attorney-General for the State of Queensland*:[80]

> The law may not serve its purpose, however, should it embrace the doctrines of determinism. Should the law extend its rule of immunity from its sanctions to all

[77] Bersoff, above n 65, 84; A. A. Sappington, 'Recent Psychological Approaches to the Free Will Versus Determinism Issue' (1990) 108(1) *Psychological Bulletin* 19; Amy Fisher and Brent Slife, 'Modern and Postmodern Approaches to the Free Will/Determinism Dilemma in Psychotherapy' (2000) 40 (1) *Journal of Humanistic Psychology* 80.

[78] Michael Perlin, 'Unpacking the Myths' above n 77, 623-4.

[79] Michele Cotton, 'A Foolish Consistency: Keeping Determinism Out of the Criminal Law' 15 *Boston University Public International Law Journal* 1, 42; Norrie, above n 12, 31.

[80] (2004) 223 CLR 575.

> those persons for whose deviant conduct there may be some psychiatric explanation, the processes of the law would break down and society would be forced to find other substitutes for its protection. The law must proceed upon the assumption that man, generally, has a qualified freedom of will, and that any individual who has a substantial capacity for choice should be subject to its sanctions. At least, we must proceed upon that assumption until there have been devised more symmetrical solutions to the many faceted problems of society's treatment of persons charged with commission of crimes.[81]

That is, the importance of a belief in the existence of free will is in the notion of blame, on which criminal responsibility rests, and which itself rests on the idea of free will. If there is no real concept of free choice, blame cannot be attributed and punishment cannot be justly imposed on anyone. If punishment is not imposed there will be less reason to obey the laws. Any rejection of free will necessarily requires a complete reordering of the legal system and of our more general understanding of responsibility.[82] These changes will only happen when medicine is better at explaining and curing certain problems than is the concept of free will.[83]

The argument about assumptions about human nature and free will at the heart of the inadequacies of the criminal law's treatment of those suffering from mental illness has less relevance to tortious negligence. This is because criminal law is quite clearly

[81] Ibid, endorsing Chief Judge Haynsworth in *United States v Chandler* (4th Cir. 1968) 393 F.2d 920, 929.

[82] Cotton, above n 80, 38-9.

[83] Ibid, 45.

concerned with culpability and punishment, whereas negligence law focuses to a greater extent on the consequences of acts rather than on the person who has performed them. As noted in chapter 2, in tort a person may be morally blameless yet liable in negligence. Thus this analysis offers less insight into tort law's response to defendants who have a mental illness than it might otherwise.

6.5.2 Scientific Inaccuracy

Apart from there being a gap or conceptual difficulties with notions such as disease of the mind, or even more broadly with the defence of mental illness, the medical profession has raised more practical concerns about the defence of insanity. The main criticism is its focus on cognitive aspects of mental functioning – the requirement that the defendant's mental condition reduces the ability to understand both what she was doing and that what she was doing was wrong.[84] From a scientific point of view, human rationality and behaviour is far more complex than this statement would allow. It is based on several interrelated factors including emotional, cognitive and intellectual capacities which are affected by various biological, neurological and environmental systems.[85]

For example, the common law defence of insanity does not take into account the actual capacity of a defendant to act or refrain from acting. This is in sharp contrast with the medical understanding of mental disease, which recognises that there are some conditions which enable sufferers to understand the nature, morality and legality of their acts but

[84] Boland, above n 49, 15. Victorian Law Reform Commission, above n 75, 203.

[85] Laura Reider, 'Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories' (1998-9) 46 *UCLA Law Review* 289, 327-9.

nevertheless prevent them from exercising their free volition as to whether or not to should perform that act.[86] For example, individuals suffering from a psychotic episode may well be able to understand what they are doing and that what they are doing is wrong (thereby satisfying the cognitive test of the M'Naghten rules) and yet be so driven by a particular delusion that they are unable to stop themselves from committing the criminal offence.[87]

In response to this apparent deficiency in the M'Naghten Rules, it has been suggested that they were not in fact intended to be exhaustive of the grounds for insanity; that they were confined to cognitive defects simply because the rules were in answer to specific questions posed to the judges of the Queens Bench. The judges were asked primarily about delusions and were not asked to consider whether volitional defects could constitute a form of insanity and therefore no comment was made regarding such issues.[88]

[86] Fairall and Yeo, above n 19, 259.

[87] Victorian Law Reform Commission, above n 75, 207. See also discussion of such cases in Byers, above n 91, 457. This concern that the emphasis on cognition is to misunderstand the nature of mental illness is not a recent phenomenon. In 1864 the English Association of Medical Officers of Asylums for the Insane submitted a resolution to the Royal Commission on Capital Punishment condemning the right/wrong test on the grounds that in many cases of those who are undoubtedly insane, the person does in fact possess the power to distinguish between right and wrong. See Shea, above n 9, 353.

[88] See for example Shea, above n 9, 352-3. He says that questions 1-4 posed to the Queens Bench were specifically about delusions, whereas the fifth question concerned a procedural matter that arose in M'Naghten's case. He posits that this has led psychiatrists giving evidence on conditions other than those resulting in delusions were 'forced to massage psychiatric symptoms unrelated to delusions and, indeed, force whole psychiatric syndromes into language that was designed for delusions alone.' See also Fairall and Yeo, above n 19, 259; Simon Verdun-Jones, 'The Evolution of the Defences of Insanity and Automatism in Canada from 1843-1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country' (1979-80) 14 *University of British Columbia Law Review* 1, 5; Boland, above n 49, 5.

Yet in *Sodeman v R*[89] the Privy Council, hearing an appeal from the High Court rejected the argument 'that the *M'Naghten's* rules are not an exhaustive statement of the law with regard to insanity, and that they should be supplemented with the notion of irresistible impulse produced by disease.'[90] It would seem that the M'Naghten rules are to be considered comprehensive in terms of common law insanity.[91]

This has meant that in cases where the defendant did not suffer delusions but nonetheless was suffering from a mental illness, medical experts have been forced to 'massage' these non delusional psychiatric symptoms into the language of delusions.[92]

The case of the defendant with psychopathy or anti-social personality disorder also raises problems. The balance of psychiatric opinion supports the view that personality disorder is something distinct from mental illness[93] and that current medical knowledge has not advanced to the stage where it can offer a means of treatment for such people if they are uncooperative. Yet some Australian jurisdictions provide that the defence of mental illness does encompass such conditions.[94] Thus, while from a clinical perspective involuntary commitment may be ineffective, the criminal law may nevertheless require that such people be committed into a psychiatric hospital.

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[89] [1936] 2 All ER 1138.

[90] Ibid, 1140.

[91] *Bratty v Attorney-General (Northern Island)* [1963] AC 386; [1961] 3 All ER 523.

[92] Shea, above n 9, 353 and Peter Shea 'Limitations of Psychiatric Evidence' (1999) June *Psychiatry* 8, 11.

[93] CR Williams, 'Development and Change in Insanity and Related Defences' (2000) 24 *Melbourne University Law Review* 711, 729, 731; McSherry, 'Recent Legislation' above n 19, 11.

[94] *Criminal Code Act 1995* (Cth) s7.3(8).

Further, when deciding cases of automatism, epilepsy has been categorised as 'insane' automatism, when the medical understanding of the illness is as a physical condition.[95]

Despite these problems raised by the scientific community, Australian jurisdictions oppose the introduction of a definition of mental impairment based solely on diagnostic criteria such as the *DSM-IV* largely because of the constantly changing nature of medical knowledge about mental illness.[96]

This decision indicates a clear preference for the value of consistency over that of accuracy. It prefers to rely on out of date and therefore potentially incorrect information than to base its definition on a changing standard. That is, by acknowledging that the medical understanding of mental illness constantly changes and by rejecting a standard based on medical diagnostic criteria precisely for this reason, the criminal law accepts that its decisions and standards may conceivably be contrary to medical reality. This brings into question the common law's ability to adapt to changing times, knowledge and attitudes.

These problems associated with the criminal law's treatment of the defendant who has a mental illness, particularly in relation to the defence of insanity, have led to several different suggestions for reform. For example, abolish the test altogether and rely instead

[95] *R v Sullivan* [1983] 2 All ER 673; [1983] 3 WLR 123; See chapter 1.

[96] Victorian Law Reform Commission above n 76, 209.

on mens rea,[97] adopt the product test, which simply asks whether the unlawful act was the product of a mental disease or defect,[98] follow the approach adopted by several Australian jurisdictions of keeping M'Naghten as the base and adding a volitional component,[99] replace M'Naghten with a test which focuses not on the existence or otherwise of mental disease but on the existence or otherwise or particular symptoms.[100]

This thesis is concerned with investigating tort law's response to defendants who have a mental illness. It will therefore not consider the merits of these suggested alternative tests. It is sufficient to note that there is much debate and criticism levelled at the way in which the criminal law has dealt with defendants who have a mental illness. This brief explanation of the difficulties encountered with the defence of insanity in criminal law suggests that the criminal law rules can be criticised but there is no easy solution to these problems.

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[97] See the discussion on this in Michael Perlin, 'Unpacking the Myths' above n 77, 670-673; Slobogin, above n 9 suggests abolishing insanity and substituting the subjective justification and excuses instead.

[98] *Durham v United States* [1954] 214 F 2d 862, 874 (DCCA). Otherwise known as the Durham test. Shea, above n 9 recommends this approach as it most closely accords with psychiatry. Yet this was criticised for giving too much authority to psychiatrists. See eg Boland, above n 49, 171.

[99] Eg the Code States and the Model Criminal Code.

[100] Shea, above n 9, 358-60; McSherry, 'Recent Legislation', above n 19, 13; See also test proposed by Burger J in *Blocker v United States* 288 F.2d 853, 857 (D.C. Cir. 1961) 'the defendant is not to be found guilty as charged unless it is established beyond a reasonable doubt that when he committed the act, first, that he understood and appreciated that the act was a violation of law, and second, that he had the capacity to exercise his will and to choose not to do it. If, because of some abnormal mental condition, either of these elements are lacking, he cannot be found guilty' cited in Cotton, above n 80, fn42; Author Unknown, 'Criminal Law: The Defendant's "Capacity" – Toward a Reformed Test of Criminal Insanity' (1962) 2 *Duke Law Journal* 277; Reider, above n 86, suggesting that a defence of insanity must incorporate cognitive, emotional and controlling elements; Stephen Morse has recommended a guilty but partially responsible verdict for all crimes so as to stop distorting current doctrine and to punish more fairly; Stephen Morse, 'Diminished Rationality, Diminished Responsibility' [2003] *Ohio State Journal of Criminal Law* 2899; The defendant should not be held criminally responsible if, 'in the circumstances surrounding his unlawful act, his mental or emotional processes or behavioural controls were functioning in such a manner that he should be justly acquitted' Abraham Halpern, 'Unclosetting the Conscience of the Jury - A Justly Acquitted Doctrine' (1980) 52 *Psychiatric Quarterly* 144, 154-5.

6.5.3 Sanism

An explanation for the problems discussed in this chapter which may have more application to the law of negligence is that provided by Michael Perlin. Michael Perlin has published extensively on issues surrounding mental illness in a variety of legal areas – crime and mental health law in particular. Perlin argues that the many problems associated with the law's response to those suffering from mental illness in these and other areas of law are due to society's irrational prejudice, fear and misunderstanding of all things relating to mental illness.[101] Perlin terms this bias 'sanism' and notes that it is:

> of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.[102]

Perlin argues that like other 'isms', sanism is based predominantly on 'stereotype, myth, superstition, and deindividualization'.[103] In other words, there is no rational explanation for the anomalous, insensitive or disadvantageous treatment afforded to those suffering from mental illness. It is simply a matter of deeply entrenched yet inaccurate

[101] Perlin, 'Unpacking the Myths' above n 77; Michael Perlin, '"She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense"', (2003) 10 *William and Mary Journal of Women and the Law* 1; Michael Perlin, '"Things Have Changed:" Looking At Non-Institutional Mental Disability Law Through the Sanism Filter (2003) 22 *New York Law School Journal of International & Comparative Law* 165; Michael Perlin, 'On "Sanism"' (1992) 46 *Southern Methodist University Law Review* 373; Michael Perlin, "Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "US" and "Them", (1998) 31 *Loyola Louisiana Law Review* 775; Michael Perlin, '"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment' (1997) 82 *Iowa Law Review* 1375; Michael Perlin, 'Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning' (1990) 69 *Nebraska Law Review* 3.

[102] Perlin, '"Things Have Changed"' above n 102, 166.

[103] Ibid 166.

assumptions - stigma. He argues that sanism is particularly powerful because it is 'largely invisible, generally socially acceptable and intimately tied to notions of 'ordinary common sense'.[104] It is so pervasive and so entrenched, says Perlin, that most are unaware of its existence at all.

Perlin claims that the insanity defence is dominated by a series of myths which are largely rooted in theology and medieval superstition.[105] He regards them as myths because they are discredited by empirical research and do not reflect or adequately respond to new scientific discoveries.[106] Instead these myths on which the law has developed are reactions to 'unconscious decision-making, defense mechanisms, primitive need, and basal instincts'.[107] For example, in relation to the defence of insanity, some of the myths Perlin identifies are:

> that the insanity defense is an abused, over-pleaded and over-accepted loophole used as a last-gasp plea solely in grisly murder cases to thwart the death penalty; that most successful pleaders are not truly mentally ill; that most acquittals follow sharply contested "battles of the experts"; and that most successful pleaders are sent for short stays to civil hospitals.[108]

[104] Perlin, "She Breaks Just like a Little Girl" above n 102, 31.

[105] Perlin, 'Psychodynamics' above n 102, 7.

[106] See footnotes 200-245 in Perlin, 'Unpacking the Myths' above n 77, 643, 648-655.

[107] Perlin, 'Unpacking the Myths' above n 77, 643.

[108] Ibid, 707.

These views are themselves a result of a complex of sources. They include an historically negative view of psychiatry and psychiatric evidence,[109] and an awareness that they are frequently wrong in their predictions of future dangerousness, a negative stereotype of those suffering from mental illness as outlined in chapter 1 and a tendency to link mental illness and criminality, the vagueness of the mental health concept and its imprecise relationship to criminal behaviour.[110] Interestingly, empirical evidence indicates that mental illness is not necessarily related to dangerousness, and that although predictions of dangerousness are accurate in only about one third of times they tend to err on the side of over-prediction.[111] That is, people with mental illness are less dangerous than we think.

Nevertheless, as a result of these strongly held views, the public subconsciously engages in reasoning processes that confirm these beliefs and ignore data that reject these notions.[112] That is, 'we tend to make intuitive predictions by selecting an outcome most similar to a pre-existing stereotype and express extreme confidence in such predictions, even where we are given scanty, outdated, or unreliable information about an unknown'.[113] Thus our attitudes to mental illness and to those suffering from mental illness is a form of self fulfilling prophecy.[114]

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[109] Thomas Sullivan, 'The Culpability, or *Mens Rea*, "Defense" in Arkansas' (2000) 53 *Arkansas Law Review* 805.

[110] Perlin, 'Unpacking the Myths' above n 77, 728.

[111] Byers, above n 91, 498-9. Fairall and Yeo, above n 19, 285. Michael Perlin, 'Unpacking the Myths' above n 77, 693-696; David De Matteo and John Edens, 'The Role and Relevance of the Psychopathy Checklist-Revised in Court' (2006) 12 *Psychology, Public Policy & Law* 214.

[112] Perlin, above n 102, 12-20.

[113] Ibid, 15.

[114] Ibid, 30; Perlin, 'On "Sanism"' above n 102, 378.

6.5.4 Conclusion

This chapter has considered the way in which criminal law responds to the defendant who is suffering from a mental illness. It has been noted that the law in this regard fails in many respects and for several different reasons. The most interesting suggestion for the purposes of this thesis is the claim that these limitations are a result of subconscious prejudice.

It has further been suggested that if this sanism exists in the law of crime, mental health, clinical practice, legal education and trusts and estates,[115] it is likely that all areas that come into contact with those suffering from mental illness will be similarly affected.[116] In light of this suggestion, it is revealing to examine in detail the reasons for judgment in the Australian case law on defendants who have a mental illness to negligence actions. This will be the focus of the following chapter.

[115] Pamela Champine, 'A Sanist Will?' (2003) 25 *New York Law School Law Review* 547.

[116] Perlin, '"Things Have Changed"' above n 102, 171.

CHAPTER 7 - Mental Illness and Negligence

7.1 Introduction

This thesis now turns to the few decisions which have actually addressed the issue of the defendant with a mental illness to an action of tortious negligence. In examining these cases, it is necessary to keep in mind the issues raised in the preceding chapters. Chapter 1 argued that there is and always has been a pervasive negative attitude towards those who suffer from a mental illness. It also noted that this stigma is not necessarily predicated on the symptoms of mental illness as those symptoms are often experienced by others in society who are not subject to the same prejudice, namely children. Chapter 2 noted that the particular requirements of negligence law – a falling short of a standard of care, is theoretically objective and static. Yet this is not entirely the case in practice, suggesting that the test of negligence could in theory allow for some recognition of the particular characteristics experienced by defendants with mental illness. As discussed in chapter 4 this is the approach which has been taken to defendants who are children.

Chapter 3 argued that the philosophical underpinnings of tort law do not assist in explaining how the law of negligence should best respond to a defendant who is suffering from a mental illness, or to any offender who has reduced mental abilities. Chapter 5 noted that none of the theories which specifically address the issue of negligence law's treatment of those with a mental illness adequately explain why the law refuses to

particularise the standard for people suffering from a mental illness, particularly in light of the sensitivity shown to other defendants with reduced mental abilities. Underlying this concern is the uneasiness felt when holding a person responsible and subjecting them to an unattainable standard.

Finally, chapter 6 gave a brief overview and critique of the criminal law's response to the defendant with a mental illness. Of particular interest was the criticism that criminal law is inadequate and unfair in its response to mental illness. These inadequacies may assist in understanding tort law's response to defendants suffering from a mental illness. Specifically, the argument that the shortfalls in the criminal law are a result of an invisible, unintentional and deeply entrenched prejudice against those with mental illness – 'sanism', may have some resonance in the area of torts. In fact, the leading proponent of the existence and effect of sanism suggests that the criminal law is not unique in this attitude to mental illness and that it is most likely that all aspects of law that have dealings with people who have a mental illness are in some way affected by sanism. Perlin writes:[1]

> If I am right about sanism's pervasiveness and its pernicious power, it should inevitably poison trusts and estates law just as it poisons involuntary civil commitment law or the right of institutionalised persons to sexual autonomy. If we stereotype persons with mental disabilities, "slot" them, stereotype them, deny them their social worth, emphasise their "differentness", distort their behaviour

[1] Michael Perlin, '"Things Have Changed:" Looking At Non-Institutional Mental Disability Law Through the Sanism Filter (2003) 22 *New York Law School Journal of International & Comparative Law* 165, 171.

> and trivialise their humanity, which is what we do in every area of mental disability law that I have taught, written about, or represented clients in – then it strains the credulity to suggest that we *do not* do this in cases involving such areas of the law as trusts and estates.[2]

The purpose of this chapter is to consider whether the apparently anomalous and inadequately justified treatment of people with mental illness in negligence law, can be attributed to this notion of sanism. This chapter argues that Perlin is correct about the pervasiveness of sanism at least as it applies to tortious negligence. That is, the real reason for the insensitive or hardline position negligence law takes to those with a mental illness but not to child defendants, is due to the unintended, but pervasive sanist tendencies of law makers in this area.

7.2 The Law Overseas

The law on the liability in negligence of people who have a mental illness is not as clear as, and far more controversial than, the law of negligence as it relates to children. Not only has there been no superior court decision on the issue in any common law jurisdiction, but very few such cases come before the courts at all.[3] This may be due to the futility of the plaintiff bringing an action unless the defendant is either covered by insurance or has independent means of providing compensation if found liable. It may be

[2] Ibid, 175.

[3] For an overview of the case law in common law jurisdictions until 1985 see The Irish Law Reform Commission, *Report on the Liability in Tort of Mentally Disabled Persons* (1985) 2-42.

that, contrary to popular belief, those suffering from a mental illness do not often engage in negligently faulty and damage causing behaviour. Or it may be that the cost of litigation dissuades people (and insurance companies) from either suing on or defending such actions.

What is clear is that there is no uniformity in judgments across common law jurisdictions. Courts in the United States and Canada approach the issue differently to each other although the result may be the same. The United Kingdom has infrequently dealt with the issue at all. Australia appears to take the same approach as the United States in some regards but not in others, but with only two cases on point, it is difficult to make definitive statements on the issue.

There is also little consistency in the commentary about what the current state of the law is in relation to defendants with a mental illness. Some scholars claim that 'the rule that mentally disabled adults are liable is currently so entrenched in case law that modern courts often apply the rule without discussion of its rationales',[4] whereas others argue that the law has reached no consensus on the issue.[5] A brief overview of the law in these jurisdictions is useful before considering in detail the way in which Australian courts have responded to defendants who are suffering from a mental illness.

[4] Harry Korrell, 'The Liability of Mentally Disabled Tort Defendants' (1995) 19 *Law and Psychology Review* 1, 13.

[5] John Fleming, *The Law of Torts* (9th ed, 1998) 126; William Castro, 'The Tort Liability of Insane Persons for Negligence: A Critique' (1971-2) 39 *Tennessee Law Review* 705.

7.2.1 United States

The general rule in the United States is that the defendant's mental illness is not a factor to be considered when determining liability in negligence.[6] Section 283B of the American Law Institute's *Restatement of Law (Second) of Torts* (1965) provides:

> Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.

However an exception to this rule was developed in the 1970 case *Breunig v American Family Insurance Co*,[7] where the Wisconsin Supreme Court found that if a mental illness can be said to have caused the defendant to be suddenly incapacitated, no liability will ensue.[8] Initially this would appear to be much the same approach as has been taken in relation to defendants who are struck with a sudden incapacity due to a physical illness such as epilepsy or sleep walking.[9] In such cases, the rule is that:

> The conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor.

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[6] The American Law Institute, *Restatement of the Law (Second) Torts* (1965) 283B.

[7] 45 Wis.2d 536, 173 N.W. 2d 619 (1970).

[8] *Breunig v American Family Insurance Co* 45 Wis.2d 536, 173 N.W. 2d 619 (1970), 544.

[9] The American Law Institute, *Restatement of Law (Third) Torts* (2005) Proposed Final Draft, 11(b).

However the test for those suffering a sudden incapacitation due to mental illness is much more difficult to satisfy than that which is applicable to the physically ill.

In *Breunig* the defendant suffered a delusion which had her believe that God had taken over the steering wheel of her car. She was also under the impression that if she pressed the accelerator down hard she would fly, because Batman can fly. Her manner of driving caused her to collide with and cause injury to the plaintiff.[10] After the accident the defendant was admitted into a psychiatric ward of a hospital.

The Court articulated a two part test to bring a defendant under a sudden incapacitation exception to the general rule of liability for those with mental illness. First, in relation to driving a car, defendants' mental disorder must either:

> Affect their ability to understand and appreciate their duty to drive with ordinary care; or
>
> Affect their ability to control their car in an ordinarily prudent manner.

This first limb of the *Breunig* test does not require defendants to be lacking control physically. It may be satisfied when their delusions have prevented them from understanding and appreciating their duty to drive with ordinary care.[11]

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[10] The psychiatrist who examined her and testified in court found that she had experienced a 'schizophrenic reaction, paranoid type, acute'; *Breunig v American Family Insurance Co* 45 Wis.2d 536, 539 173 N.W. 2d 619 (1970), 622.

[11] *Ramey v Knorr* 130 124 P.3d 314 (Wash. App, 2005), 683.

The second limb of the test provides that defendants must not have had notice or forewarning of the possibility of suddenly experiencing such incapacity.[12] This second requirement makes the sudden incapacity test very difficult to satisfy. This is largely because absence of forewarning has been interpreted objectively rather than subjectively. That is, courts are not concerned with whether or not the defendant was aware of the possibility of becoming incapacitated, but whether a reasonable person would have realised that something was amiss and that mental illness and its effects was a possibility.[13]

The problem with this approach is that people with delusions, particularly when such delusions are due to psychosis almost never believe that something is wrong with them.[14] Therefore while a reasonable person observing from the outside may interpret a person's behaviour as indicating potential illness, the person experiencing this illness has no appreciation of the fact. The forewarning test may therefore make sense in a test for sudden physical illness, where defendants' mental acuity is intact, but it appears meaningless when applied to the situation of mental incapacity.[15] It must be concluded that either the requirement for objective forewarning shows a lack of understanding of or

[12] *Breunig v American Family Insurance Co* 45 Wis.2d 536, 173 N.W. 2d 619 (1970), 541.

[13] *Jankee v Clark County*, (2000) WI 64. 235 Wis. 2d, 700 (2000), 736.

[14] See, eg Michael Gelder, Richard Mayou and John Geddes, *Psychiatry* (3rd ed 2005) 11; See also expert evidence referred to in *Ramey v Knorr* 130 Wn. App. 672; 124 P.3d 314 (2005), 681: Chapter 1.

[15] In England and Australia courts have inquired into the defendant's ability to appreciate the likelihood of losing control in the case of physical illness. See, eg *Waugh v James K Allan Ltd* [1964] SC (HL) 102; *Smith v Lord* [1962] SASR 88; In *Dowsing v Goodwin* (1997) 27 MVR 43 the defendant suffered from diabetes and was held liable because although her hypoglycaemic attack came on suddenly she was aware of the need to constantly monitor herself and to have constant snacks.

appreciation for the nature and effects that mental illness has on those who suffer from them, or it was designed so as to make the exception virtually inoperative.

As well as showing a lack of understanding of or lack of accommodation for mental illness, this part of the sudden incapacity test seems quite illogical. It is a nonsensical situation that the same person may have her liberty denied by being involuntarily committed to a psychiatric hospital, at the advice of mental health professionals and administrative agencies, but at the same time be required to have the mental acuity of a reasonable person who is not suffering from a severe mental illness. That is, the very same person, at the very same time, is deemed to be completely incapable of living in society by one area of law, yet is expected to be completely capable by another area of law. Yet even more remarkably, this requirement to think and respond like a person without mental illness is one of the elements of a test which only applies to those with a mental illness. It is difficult to understand how a defendant can be held negligent for not acting in a particular way, if that defendant was unable to appreciate the he or she was required to act in a particular way.

Not only are defendants with mental illness unlikely to meet the forewarning element of the *Breunig* test, precisely because of their mental illness, but this is also the case because the concept of forewarning has been given a broad interpretation by the American courts. People are said to have forewarning if they are being or have been in the past, treated for mental illness.[16] That is, those who are aware that they suffer from a mental illness, but

[16] *Jankee v Clark County*, 2000 WI 64. 235 Wis. 2d, 700 (2000); *Stuyvesant Associates v John Doe* 221 N.J. Super. 340, 534 A.2d 448 (1987); *Johnson v Lambotte*, 147 Colo. 203, 204, 363 P.2d 165 (1961); See

are taking medication for their illness, will likely be found to have forewarning of the possibility of experiencing a sudden mental incapacity. The defendant in *Breunig* was regarded as forewarned of the possibility of mental incapacity because, according to those around her, she had experienced some delusions in the past, even though she had never been treated for mental illness. Likewise, in *Ramey v Knorr*[17] the court found that the defendant had sufficient forewarning of the possibility of becoming incapacitated due to a mental illness because she had experienced a period of delusions several years prior to the accident. Thus it would seem that any symptoms of mental illness, whether treated or not, and whether recognised by the defendant or not, constitute adequate notice for the purposes of the *Breunig* test.

Thus the way the exception to the general rule on liability of defendants with a mental illness has been adopted in the United States renders the exception virtually meaningless. It is only likely to apply if a defendant is suddenly stricken, for the first time, with a psychotic episode of some sort.[18]

It appears that the courts are trying to create a test for defendants with mental illness, similar to the sudden incapacity test for physical illnesses such as epilepsy. The problem is however that the way in which a psychotic episode from mental illness manifests is different from the way that a fit from a physical illness like epilepsy manifests. For this

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Breunig v American Family Insurance Co 45 Wis.2d 536, 173 N.W. 2d 619 (1970), 543 court's intepretation of the finding in *Johnson v Lambotte.*

[17] 130 Wn. App. 672; 124 P.3d 314 (2005).

[18] Pamela Picher, 'The Tortious Liability of the Insane in Canada … With a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative' (1975) 13 *Osgoode Hall Law Journal* 193, 221.

reason, in order for the tests to make any sense, or to really indicate an intention to respond meaningfully to the realities of mental illness, the requirements for a test responding to mental illness must be developed with mental illness in mind, just as the test for a sudden incapacity due to physical illness has been developed with those illnesses in mind.[19]

Yet the courts have taken quite the opposite approach. Those experiencing sudden physical incapacity are not forced to meet as demanding standards as those suffering sudden mental incapacity. As noted above, the sudden incapacity rule for the physically ill requires the individual defendant to have foreseen the possibility of incapacitating illness, but in the case of those with mental illness it is not their subjective understanding but the knowledge of others which determines adequate forewarning.

The inconsistency in treatment of the mentally and physically ill in the United States is not confined to the narrow incapacity exception, but also to the general rule of liability in negligence. According to the American *Restatement of the Law (Second) Torts* (1965) 283C a defendant who is physically disabled is required to act the way a reasonable person with that disability would behave. This test is similar to the one applied to children discussed in chapter 4. It is a modified objective standard in the sense that the individual defendant's behaviour is judged against an external standard, but the standard takes into account particular qualities associated with this group of people. As noted

[19] And given the fact that in the United States (and also in Australia) one in five people suffer from some manner of mental illness in their lifetime, it is possible that the sudden incapacity exception would be unavailable to twenty-five percent of the population; See chapter 1.

above, the people who are suffering from a mental illness are not afforded this level of sensitivity in relation to their sudden incapacity. They are required to act the way a reasonable person without a mental illness would have acted.

Thus the United States' approach to defendants with a mental illness may be regarded as insensitive and inconsistent with the approach taken to the physically ill.

7.2.2 Canada

The general approach of the courts in Canada is not quite as clear as it is in the United States but it is possible that they adopt a more lenient approach to the issue. Canadian courts have found that the mental illness suffered by defendants is relevant to determining whether defendants have taken reasonable care, and to whether they should ultimately be found liable in negligence.[20] In particular, it has been held that in negligence, as oppose to intentional torts such as trespass:

> There is no liability where the defendant is able to establish that he or she did not understand and appreciate the duty upon them to take care or if they did understand and appreciate that duty were prevented by the particular disability from discharging it.[21]

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[20] *Buckley v Smith Transport Ltd.*, [1946] O.R. 798; *Hutchings v Nevin* (1992), 9 O.R. (3rd) 776, *Attorney General of Canada v Connolly* [1989] 64 DLR (4th) 84; *Fiala v MacDonald* (2001) 201 DLR (4th) 680; *Slattery v Haley* [1923] 3 DLR 156.

[21] *Hutchings v Nevin* (1992), O.R. (3rd) 776, 786. This is a restatement of the test from *Buckley v Smith Transport Ltd.*, [1946] O.R. 798, 805-6.

Yet the most recent case on the issue has articulated a test that appears to be quite similar to the United States test of sudden mental incapacitation.

In *Fiala v MacDonald*,[22] the defendant who was suffering from a mental illness attacked a woman in her car, causing her to press her foot on the accelerator and to slam into the plaintiff's car, injuring her and her daughter. The defendant's behaviour was caused by a severe manic episode associated with his previously undiagnosed bipolar disorder. He was later certified under the relevant mental health legislation[23] and admitted into hospital as a psychiatric patient.

The Alberta Court of Appeal systematically addressed and rejected the major arguments in favour of holding those with mental illness to a standard they are unable to meet.[24] The court found that to hold a person with a mental illness liable in negligence, when their mental illness denies them the ability to act otherwise, would be to impose strict liability on such people. In light of the fact that tort law is not merely concerned with compensation but incorporates notions of fault, the Court found such liability without

[22] *Fiala v MacDonald* (2001) 201 DLR (4th) 680.

[23] *Mental Health Act*, SA 1988, c. M-13.1.

[24] These will be dealt with in more detail below. Picher above n 18, 225 cites 7 arguments that are often put in favour of the imposition of liability on those who have a mental illness:

1. When one of two innocent parties is injured the one who caused the damage must bear the loss;
2. Imposing liability will make the guardians of the insane exercise more care in controlling the actions of the insane;
3. In the absence of liability tortfeasors will feign insanity;
4. The purpose of tort law is compensation;
5. It is unfair to the victim not to be compensated when the insane person can pay;
6. Granting immunity to the insane would introduce into the civil law the chaos surrounding the insanity plea in criminal law; and
7. It is too difficult to draw a line between mental deficiency and mere variations of temperament and ability (low intelligence, clumsiness) which tort liability cannot practically consider in imposing liability.

fault to be unacceptable. The Court noted that to impose liability on people who are suffering from a mental illness is unjustifiably inconsistent with the approach taken to children and physically ill defendants. Finally, the Court rejected the argument that practical difficulties and broader policy concerns are so overwhelming as to justify ignoring the defendant's mental illness when determining liability.

However this decision was made and these reasons were given in the context of a defendant who had not had prior notice of his mental illness. This appears to have had some impact on the decision of the Court, as it distinguished precedent in which the defendant did have prior warning of mental illness.[25] Therefore the final test provided by the court looks similar to the sudden incapacitation test articulated by the United States courts. The court in *Fiala* found that:

> In order to be relieved of tort liability when a defendant is afflicted suddenly and without warning with a mental illness, the defendant must show either of the following on a balance of probabilities:
>
> (1) As a result of his or her mental illness, the defendant had no capacity to understand or appreciate the duty of care owed at the relevant time: or
>
> (2) As a result of the mental illness, the defendant was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care.[26]

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[25] *Wenden v Trikha* [1991] 116 AR 81.

[26] *Fiala v MacDonald* (2001) 201 DLR (4th) 680, [49].

Thus the rule as articulated in *Fiala* applies only to those defendants who are 'suddenly afflicted without warning' with a mental illness.

There are two questions largely unanswered in the Canadian approach to defendants who are suffering from a mental illness. The first is how the 'suddenly and without warning' aspect of the *Fiala* test will be interpreted. In particular, will it be as narrowly interpreted as is the case in the United States, thereby making it virtually impossible for it to apply? Second, how will Canadian courts respond to a defendant with mental illness who is not considered by the courts to have been afflicted suddenly and without warning?

Although the court in *Fiala* distinguished precedent in which the defendant with a mental illness had forewarning of his mental illness, it is difficult to explain how the reasons provided by the court – the detailed critique of the arguments in favour of imposing liability on those with mental illness, could not equally apply to defendants who do not come under the category of 'afflicted suddenly and without warning'. This is particularly so given the weight of Canadian authority leans towards excusing defendants with mental illness from liability if they do not appreciate their duty to take care, or are not able to do so, regardless of whether this inability developed suddenly or not.[27]

Thus although the Canadian and United States' tests appear quite similar, it would seem that the Canadian approach and in particular the court's tone and recognition of the

[27] *Buckley v Smith Transport Ltd.*, [1946] O.R. 798; *Hutchings v Nevin* (1992), 9 O.R. (3rd) 776, *Attorney General of Canada v Connolly* [1989] 64 DLR (4th) 84; *Fiala v MacDonald* (2001) 201 DLR (4th) 680; *Slattery v Haley* [1923] 3 DLR 156.

concerns raised in imposing liability on people with a mental illness, is still open to more lenient treatment of those suffering from a mental illness than is that case in the United States.[28]

7.3 The Law in Australia

In Australia there have been two cases which have canvassed the issue of defendants in negligence who have a mental illness – *Adamson v Motor Vehicle Insurance Trust*[29] and *Carrier v Bonham*.[30] In both of these cases the defendant had been suffering from a mental illness at the time of injuring the plaintiff, and in both cases the court found the defendant liable in negligence. Both of these cases display elements of fear and misunderstanding of mental illness and those who suffer such illnesses. In other words, they indicate that the sanist overtones which Perlin identified in the criminal law appear also to be prevalent in the Australian cases relating to those with mental illness in negligence law.

[28] In England there is no reported case in which a person suffering from a mental illness has been sued in negligence. The issue of an actor who has a mental illness has arisen however in other civil cases such as the intentional torts of battery and assault – *Morris v Marsden* [1952] 1 All ER 925; divorce and libel where some courts were more willing to accept mental illness as an excuse along the lines provided by the criminal law ie if the defendant did not know the nature and quality of his/her action. See eg *Mordaunt v Mordaunt* L.R. 2 P.&D. 109, 142 (1870); *Emmens v Pottle* 16 Q.B.D. 354 (1885); *Hanbury v Hanbury* 8 T.L.R. 559, 560 (1892). Later courts became less lenient on this issue. See *White v White* [1949] 2 All ER 339.

[29] (1957) 58 WALR 56.

[30] [2002] 1 Qd R 474.

7.3.1 Adamson v Motor Vehicle Insurance Trust

In *Adamson v Motor Vehicle Insurance Trust*[31] a schizophrenic man drove through a pointsman's signal, colliding with and causing injury to the plaintiff.[32] Evidence suggested that the driver knew he was driving through a pointsman's signal, knew that he had caused injury to the plaintiff and knew that such behaviour was wrong. However he was experiencing delusions and hallucinations at the time of engaging in this behaviour which led him to believe that his work colleagues were involved in a plot to kill him and that a desperate escape was his only option for survival.[33]

Wolff SPJ of the Supreme Court of Western Australia considered whether this evidence of the driver's mental illness was sufficient to deny liability in negligence. His Honour noted that if the evidence were raised in a criminal court it may be sufficient to excuse the defendant from criminal responsibility under the defence of insanity.[34] Yet his Honour did not accept the proposition that a similar defence should apply in the realm of tort law.[35] His Honour identified three reasons for this decision.

First, there was no authority for doing so.[36] Surprisingly, the Australian case *White v Pile*[37] which specifically dealt with this issue formed no part of his Honour's decision.

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[31] (1957) 58 WALR 56.

[32] This driver had disappeared by the time of the trial so his insurance company became the defendant in the action.

[33] *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, 59.

[34] Although it is not so clear that this in fact would be the case.

[35] *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, 60.

[36] Ibid 63.

[37] (1950) 68 WN NSW 176.

White v Pile found that some manner of insanity defence was appropriate to tort law, at least in relation to the tort of trespass to the person. His Honour distinguished on the facts the Canadian case *Buckley and Toronto Transportation Company v Smith Transport Limited*[38] which as noted above incorporated some elements of a M'Naghten style defence into tortious negligence. The court in *Buckley* stated that:

> [T]he question of liability must in every case depend upon the degree of insanity… Did he understand the duty to take care, and was he, by reason of mental disease, unable to discharge that duty.[39]

It is unclear how a difference in facts reduces the significance of the principle on which the case stood.

Wolff SPJ did refer to several divorce cases in which questions about the effect of one of the party's mental illness were answered by reference to the M'Naghten Rules.[40] Yet he did not choose to rely on these cases as authority for importing an insanity defence of some sort into the civil law. Although it may not be wise to base questions as to negligence on decisions about trespass or divorce, the issue as stated in *Adamson* centred on the appropriateness of importing a criminal test into civil law and the reasons for rejecting this option did not turn on anything specific to negligence law. Thus contrary to

[38] (1964) 4 DLR 721.

[39] *Buckley v Smith Transport Ltd.* [1946] O.R. 798, 805-6.

[40] *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, 63-65.

Wolff SPJ's findings, there was in fact authority (albeit limited) for the proposition that a defence of insanity could be incorporated into civil law.

Wolff SPJ also found that a defence of insanity should not become part of the civil law because the aims of criminal law are different to the aims of the civil law (punishment as opposed to compensation). As noted in chapter 3 this is a simplistic, narrow, and most likely inaccurate way in which to view the aims and purposes of tort law. Moreover, even if tort law were concerned primarily with compensation, it only compensates for losses which are caused as a result of wrongdoing. Thus regarding tort law as a system of compensation nonetheless requires a determination of what constitutes wrongdoing. As discussed in chapter 3, this is not a question that can be answered by referring to tort law as a compensation scheme. By its very nature, it incorporates some notion of fault.

Finally, Wolff SPJ did not support a civil insanity test because he noted that the criminal defence of insanity, as represented by the M'Naghten Rules are themselves unsatisfactory.[41] Similar arguments have been raised in other cases deciding the tortious liability of those who have a mental illness. It has been suggested that granting immunity to those with mental illness would introduce into the civil law the chaos surrounding the insanity plea in criminal law and it is too difficult to draw a line between mental deficiency and mere variations of temperament and ability. This 'it's too hard' argument is discussed in more detail below.

[41] Ibid, 66. Some commentators have argued that although this may be the case, some say it is surely better to have an inadequate test than no test at all. See Castro above n 5, 714.

The confusion surrounding mental illness in the criminal law is more supposed than real. It has been suggested that there is around 90% agreement among professionals in insanity defence cases in the United States.[42] This suggests, as Perlin notes, that if one were to understand the 'confusion' surrounding those with mental illness in criminal law as a result of sanist attitudes by judges and society in general, then such confusion could more easily be overcome so that the real issues of concern could be the focus of attention.

These two arguments against the civil law incorporating an insanity defence may be adequate reason for the civil law not to adopt the exact same defence as it applies in the criminal law, but they are not persuasive reasons for denying some manner of test, or some manner of sensitivity to the realities of mental illness altogether.

The decision in *Adamson* is also problematic because the Court's reasoning is not clearly specified, suggesting that the decision was made on the basis of preconceived notions than on reasoned argument. Wolff SPJ recognised that the law relating to the liability in negligence of defendants who are suffering from a mental illness has not been satisfactorily decided.[43] As noted above his Honour rejected using other areas of law to inform negligence of the appropriate direction to take on this issue. And the one case Wolff SPJ cited which is directly on point as it deals with an action for negligence rather than trespass – *Buckley and Toronto Transportation Company v Smith Transport*

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[42] Michael Perlin, '"Everything's a Little Upside Down, As a Matter of Fact The Wheels Have Stopped": The Fraudulence of the Incompetency Evaluation Process' (2004) 4 *Houston Journal of Health Law & Policy* 239, 244.

[43] *Adamson v Motor Vehicle Trust* (1957) 58 WALR 56, 60.

Limited,[44] excused the defendant who had a mental illness for his otherwise negligent behaviour. Yet despite the lack of argument pointing towards holding those with mental illness liable in negligence, Wolff SPJ concluded that 'there is much to be said in support of the theory that a lunatic should be responsible for his tortious acts'.[45] His Honour made vague reference to the 'good of the community',[46] but did not further outline to what this was intended to refer.

His Honour's decision appears largely to be based on a 'rule of convenience'[47] as articulated in the 1894 New York Court of Appeals case *Williams v Hayes*.[48] In that case, the court found the defendant liable for the damage which he caused, despite being found 'insane' at the time. The court offered three policy reasons for this decision. They are:

1. Where one of two innocent persons must bear a loss, the loss must fall on him who did the act.
2. Public policy, which requires the rule in order to induce his relatives to keep the lunatic under restraint; and also in order to prevent tortfeasors feigning insanity.
3. The lunatic must bear the loss occasioned by his torts as he bears his other misfortunes.[49]

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[44] (1964) 4 DLR 721.

[45] *Adamson v Motor Vehicle Trust* (1957) 58 WALR 56, 67.

[46] Ibid.

[47] Ibid, 68.

[48] 42 Am. S.R. 743.

[49] *Adamson v Motor Vehicle Trust* (1957) 58 WALR 56, 62-3.

These reasons, particularly the first, appear to have been influential in his Honour's decision in *Adamson*, although he provided no explanation or analysis as to why this was the case. His Honour's quote from Lord Denning's dissenting judgment in *White v White* that 'the criterion for liability in tort is not so much culpability but on whom the risk should fall'[50] indicates that the basis for his acceptance of the first policy argument in *Williams v Hayes* is that his Honour regards tort largely as a compensation scheme in which notions of fault are unimportant.[51] As noted above, this is to disregard the fact that tort only compensates for another person's wrongs – a concept which necessarily entails notions of fault. Recognising that a party is innocent (at least in a moral sense) yet requiring this party to pay compensation flies in the face of this system and imposes a form of strict liability on the innocent defendant.[52]

Although the fault based system of negligence which exists in common law jurisdictions does adopt some strict liability practices, such situations are very limited. They tend to arise when one party engages in particularly dangerous behaviour,[53] takes risks in order to further ones own interests and has ways of distributing their loss, as in the case of employers vicariously liable for the negligence actions of their employees,[54] or in order to

[50] *White v White* [1949] 2 All ER 339, 351.

[51] Yet as noted in chapter 3, negligence cannot be regarded simply as a mechanism for compensation, and attitudes such as those expressed by Lord Denning are vastly in the minority.

[52] Picher, above n 18, 255.

[53] Although note that the rule in *Rylands v Fletcher* has now been incorporated into the general law of negligence so that this no longer forms a serparate form of action. See, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

[54] See *Hollis v Vabu* (2001) 207 CLR 21.

indicate the high value that society places on a particular concept – such as property.[55] The case of those with mental illness engaging in ordinary daily activities does not fall into any of these accepted strict liability categories – as people suffering from a mental illness do not create their own illness, they are not more likely to be more wealthy than those they injure and do not have a way of distributing their costs,[56] and it would be very surprising for a new category imposing strict liability to arise with very little discussion or debate.

Moreover, it must be asked why the faultless or innocent defendants who have a mental illness are required to pay for the damage they cause when this is not required by negligence law more generally. As noted in chapter 4 children are not liable to compensate for the damage they cause unless they are found to have fallen short of the standard required of them. That is, unless they are at fault. They are not required to provide compensation if they are found innocent.[57] Further, if this policy were in fact the underlying principle of negligence law, or even a guiding principle of negligence law, it would render the concept of duty of care completely redundant. Modern negligence is not based solely on causation, as this argument would suggest. Neither Wolff SPJ, nor the court in *Williams v Hayes* explain why defendants who are suffering from a mental illness should be treated differently to other defendants in negligence. Nevertheless, the

[55] See Peter Cane, *The Anatomy of Tort Law* (1997) 45-49.

[56] Castro, above n 5, 716. See chapter 8 in relation to defendants who are suffering from a mental illness who do have some means of distributing their loss via insurance.

[57] Elizabeth Goldstein, 'Asking the Impossible: The Negligence Liability of Those Who Have a Mental Illness' (1995-6) 12 *Journal of Contemporary Health Law & Policy* 67, 75.

policy of two innocents appears to have been the most influential reason for Wolff SPJ's decision in *Adamson*.[58]

Although Wolff SPJ indicated his preference for this first policy reason provided by *Williams v Hayes* it is nonetheless necessary to make comment on the other two policy arguments provided, given that they form a part of the judgment in *Adamson*. The first is that imposing liability will make the guardians of those with mental illness exercise more care in controlling their actions. There is no evidence to show that making those with mental illness liable for behaviour they cannot understand or control will alter the actions of those caring for these people. It has been suggested instead that it would be more logical to impose relevant duties directly onto such caregivers rather than indirectly through the people for whom they are caring.[59]

Second *Williams v Hayes* displays the same fears and assumptions that are evident in the criminal law. That is, one of the arguments for imposing liability on defendants who have a mental illness is that in the absence of liability tortfeasors will feign mental illness. Again, there is no evidence whatsoever for this assumption. On the contrary, relying on criminal cases as guidance on this issue, it is clear that this fear is empirically incorrect. In the American criminal law context only between one and two percent of defendants

[58] This recognition that at times, and particularly in the case of a defendant suffering from a mental illness, negligence law's attempt to afford proper treatment to one party necessarily means it denying it to the other. This inability to balance the interests of plaintiff, defendant and wider society has been the basis for the argument that the current fault based system of tort should be replaced with a social insurance scheme. See, Picher, above n 18.

[59] Whittman J in *Fiala v MacDonald* (2001) 201 DLR (4th) 680; Picher, above n 18, 228.

raise the defence of insanity.[60] And of those most studies show that up to 90% of cases in which mental illness was an issue the experts agreed.[61] There is no evidence that there is any more feigning of mental illness than there is of any other form of illness. This appears to be simply a mistrust or lack of confidence in the abilities of mental health professionals and probably arises from isolated public disputes about the particular category into which the reduced mental functioning of the defendant falls**.** Even if it were possible to feign mental illness, our legal system proceeds on the principle that it is better to allow a few to avoid legal consequences than make the majority of innocents suffer.[62]

Apart from the lack of explanation for adopting the arguments in *Williams v Hayes* this case is not strong or even safe authority for Wolff SPJ to have relied upon. This is for two reasons. First, the decision has been criticised and discredited by several commentators due to inconsistencies within the judgment – claiming fault is irrelevant to liability then claiming that it is relevant.[63] One commentator suggests that the case is not based on any authority at all and although it may be 'filled with the drama of the sea …[it] is not very enlightening as to the law of the land'.[64]

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[60] Goldstein, above n 57, 75.

[61] Perlin, '"Everything's a Little Upside Down"' above n 42, 244.

[62] Picher, above n 18, 255; Castro, above n 5, 715; Robert Ague, 'The Liability of Insane Persons in Tort Actions' (1955-6) 60 *Dickenson Law Review* 211, 222.

[63] *Williams v Hayes* 451. Picher above n 18, 218-219 notes that Earl J's judgement in this case is inconsistent with regard its treatment of fault and could easily have been used to support a more lenient position with regards those who have a mental illness. See also, WMB Hornblower, 'Insanity and the Law of Negligence' (1905) 5 *Columbia Law Review* 278, 284-294; Francis Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924-5) 23 *Michigan Law Review* 9, 14, 23-27.

[64] WM Justus Wilkinson, 'Mental Incompetency as a Defense to Tort Liability' (1994-5) 17 *Rocky Mountain Law Review* 38, 42.

Second, it contains statements of law that are clearly inconsistent with Australian law. *Williams v Hayes* found that those with mental illness should be treated like children, and that both should be liable for their acts.[65] As noted in chapter 4, this is not now the law in relation to the tortious liability of children. In fact, this argument in *Williams v Hayes* – that children and those with mental illness should be treated the same, could just have easily been used to take into account the defendant's mental illness to bring it in line with the law on tortious liability of children. Relying on *Williams v Hayes* to inform Australian law may therefore be regarded as particularly weak if not unsafe authority.

Not only is the decision in *Adamson* inadequate due to the authority on which it rests, but also because it does not represent a detailed analysis of the issue of defendants who are suffering from a mental illness in negligence. Wolff SPJ considered whether an insanity defence along the lines of that operating in the criminal law should be applicable to excuse otherwise wrongful behaviour in negligence cases. His Honour did not consider whether a defendant's mental illness should affect determinations of liability in the first place. That is, *Adamson* focussed on whether a defence of insanity existed or could be created, but did not consider whether the standard of care can be adjusted to more accurately reflect the mental abilities of the defendant, the way it is adjusted to take into account the abilities of children.[66]

[65] *Williams v Hayes* 42 Am. S.R. 743, 749.

[66] *Carrier v Bonham* 2000 QDC 226 (Unreported, McGill DCJ, 4 August 2000) [55].

Thus *Adamson*, the first of two Australian cases which have examined whether defendants who are suffering from a mental illness should be liable in negligence, is poorly reasoned, provides an incomplete analysis of the issue and relies on inadequate authority. These are hallmarks of Perlin's sanism.

In addition, the tone of the judgment displays distrust and lack of understanding of the effects of mental illness. For example, Wolff SPJ found that the driver was insane at the time of the accident, yet accused him of lying when he provided a somewhat illogical or unreasonable excuse for not stopping the car after he saw that someone was injured on the road.[67] His Honour also noted a police officer's judgment that 'he could not see any circumstances would suggest that [the driver] was not in a fit condition to make a statement.'[68] Relying on the judgment of a police officer rather than on a doctor on matters of mental health is a strange if not dangerous practice and appears to lack appreciation for the fact that mental illness is a complex medical condition.

Finally, Wolff SPJ's analysis of the role of doctors in criminal law cases illustrates the distrust or concern the law has traditionally had with doctors, particularly in the area of psychiatry.[69] His Honour commented that 'a medical witness brings the facts of the case which is being tried within a medical theory of irresponsibility when the facts do not warrant it'.[70] In other words, when in comes to mental illness, medicine tells law

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[67] *Adamson v Motor Vehicle Trust* (1957) 58 WALR 56, 58.

[68] Ibid 59.

[69] See chapter 6.

[70] *Adamson v Motor Vehicle Trust* (1957) 58 WALR 56, 66.

something it does not want to hear. It tells law that from a medical perspective it is illogical and inappropriate to regard certain people as capable of responsibility, when the law desires to find responsibility in such cases. This desire to find responsibility may very well be due to long held fear and prejudice against those suffering from a mental illness. That is, sanism.

It would seem therefore that misunderstanding, fear and unintentional prejudice towards those with mental illness contributed to the *Adamson* decision.

7.3.2 Carrier v Bonham

The second and most recent decision canvassing the issue of defendants who are suffering from a mental illness in Australia is *Carrier v Bonham*.[71] In this case the defendant was a chronic schizophrenia sufferer who was a psychiatric patient at a Brisbane hospital. Whilst a patient there, he left the grounds of the hospital, walked to a nearby street and jumped in front of a bus in a suicide attempt. He suffered only mild injury as a result of his actions, but he caused psychological damage to the driver of the bus, who subsequently sued both him and the State of Queensland (as the body responsible for the hospital) for negligence.[72]

The District Court of Queensland found that the defendant was unable to appreciate either that what he was doing was wrong or that his actions may cause injury to another

[71] [2002] 1 Qd R 474.

[72] The plaintiff also sued for wilful injury (known as the principle in *Wilkinson v Downton*).

person.[73] McGill DCJ found that this evidence of the defendant's mental condition was relevant to determining liability in negligence. His Honour did not articulate a defence of mental illness similar to the criminal law defence but instead measured the defendant's behaviour against a standard altered to take into account his mental illness.[74] His Honour found that according to this standard the defendant was not liable in negligence.[75]

The Court of Appeal, in two separate judgments (but concurring orders) reversed the District Court's decision. It found that the defendant's mental illness was not relevant to liability in negligence and that the trial judge had erred in modifying the standard of care to make allowance for the defendant's mental illness. The Court of Appeal held that the correct test to apply in cases of negligence regardless of whether or not the defendant has a mental illness or not, is that of the 'ordinary reasonable person'. The defendant's actions had fallen short of this standard and he was therefore liable in negligence.

Authority

McPherson J delivered the primary judgment for the Court. His Honour noted that in those jurisdictions whose legal systems are derived from Roman law, those with mental illness– or those who are considered to be of 'unsound mind', are not legally liable for their wrongs. After his brief examination of the position in common law jurisdictions, his Honour concluded that the situation is different in such jurisdictions, and that defendants

[73] 2000 QDC 226 (Unreported, McGill DCJ, 4 August 2000) [77]-[78].

[74] Ibid [78].

[75] His Honour did however find that the defendant was liable to pay damages to the plaintiff under the principle of *Wilkinson v Downton*.

who are suffering from a mental illness are liable for their torts despite their illness.[76] McMurdo P came to the same conclusion having quoted at length from Denning LJ's dissenting judgment in *White v White*.[77]

Yet the cases to which McPherson J referred (other than *Adamson* which, as detailed above is questionable authority for several reasons) arose out of actions in trespass rather than negligence – the New Zealand Court of Appeal case *Donaghy v Brennan*[78] and the Queens Bench single judge decision *Morriss v Marsden*.[79] This is a relevant distinction given the differing foresight and therefore capacity requirements of the two torts. That is, defendants to battery or assault cases need not have appreciated that their behaviour was wrong or to have foreseen the possibility of adverse consequences as a result. The defendant needs simply to possess the mental acuity necessary to commit the act – the ability to form the intent to touch the plaintiff.[80]

The mental requirement for actions in negligence is quite different to trespass. It involves foresight of injury to others – not individual foresight, but the foresight which would most likely be possessed by the reasonable person. Those who do not respond to this foreseeable risk the way a reasonable person in that position would have responded will be liable for any resultant damage. Thus, although foreseeability and the falling

[76] *Carrier v Bonham* [2002] 1 Qd R 474, 485; *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56.

[77] [1942] 2 All ER 339.

[78] (1900) 19 NZLR 289.

[79] [1952] 1 All ER 925.

[80] The same point is made in *Attorney General of Canada v Connolly* [1989] 64 DLR (4th) 84; Given the broad definition of intent as noted in chapter 2, it is likely that the only behaviour which will be regarded as unintentional are those acts which are considered not to be directed by the defendant's conscious mind.

short of a standard is irrelevant to establishing liability in trespass (except to the extent that it indicates intent), they are essential criteria for actions in negligence. This difference led the Supreme Court of British Columbia in *Attorney General of Canada v Connolly*[81] to find defendants with mental illness liable in battery but not in negligence.

The difference between the legal requirements of negligence and trespass makes it necessary to use caution when using trespass cases to decide cases in negligence.[82]

In considering the way in which North American courts have dealt with the tortious liability of defendants who are suffering from a mental illness, McPherson J concluded that they are 'almost at one in holding [those with mental illness] liable for their tortious wrongs'.[83] While this may be true so far as it relates to cases in the United States, as outlined above this is not entirely correct in so far as it relates to Canadian authority.[84]

Further, the approach taken by the American courts has been subject to almost unanimous scholarly criticism.[85] The reasons for this criticism will be discussed in the course of this

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[81] [1989] 64 DLR (4th) 84.

[82] This argument is similar to the one made by Middleton J in *Slattery v Haley* [1923] 3 DLR 156, 160.

[83] *Carrier v Bonham* [2002] 1 Qd R 474, 485.

[84] See pp 193-197 of this chapter. *Buckley and Toronto Transportation Company v Smith Transport Limited* (1964) 4 DLR 721, *Attorney General of Canada v Connolly* [1989] 64 DLR (4th) 84, *Fiala v Cechmanek* (1999) 281 AR 248 and *Fiala v MacDonald* (2001) 201 DLR (4th) 680 all attached significance to the mental illness suffered by the defendant when determining liability in negligence.

[85] This is no doubt why the The American Law Institute's *Restatement of Law, (Second) Torts* (1965) 283B says that the rule that those with mental illness are liable for the actions has been around since 1616. See Picher, above n 18, 203; Goldstein, above n 57, 68, WGH Cook, 'Mental Deficiency in Relation to Tort' (1921) 21 *Columbia Law Review* 333, 335; Bohlen, above n 63, 14, Ague, above n 62, 212; Castro, above n 5; Ellis James, 'Tort Responsibility of Mentally Disabled Persons' (1981) *American Bar Foundation Research Journal* 1079, 1082.

chapter. For example, commentators have argued that the American approach of holding defendants who are suffering from a mental illness liable in negligence is based on flimsy authority – the English trespass case *Weaver v Ward*.[86] In that case the court commented by way of *obiter* that:

> if two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like, because felony must be done *animo felonico:* yet in trespass, which tends only to give damages according to hurt or loss, it is not so … and therefore no man shall be excused of trespass … except it be judged utterly without his fault.[87]

Other than the fact that there is little authority to guide courts in deciding questions of the tortious liability of those with mental illness, it is not entirely clear why courts have been so willing to rely on this centuries old *obiter*. Its inherent inconsistency is clear – on the one hand a lunatic may be liable in trespass because tort is concerned with compensation, but on the other hand fault plays an essential role in the tort.[88]

Second, not only is the statement merely *obiter*, but more importantly, the judge provided no authority in support of it. And the only argument the Court provided in favour of the suggestion that a lunatic is liable for his trespasses is that tort law is concerned with

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[86] 80 Eng Rep 284, Hob 134 (1616).

[87] *Weaver v Ward* (1616) Hob 134; 80 ER 284.

[88] Bohlen, above n 63, 16; Cook, above n 85, 335-6; Ague, above n 62, 212, 214; Picher, above n 18, 203-4.

compensation and not with fault. Yet as just noted, this argument is immediately discredited in the following sentence.

It has been suggested that it is not surprising to see courts in the 17th century focussing on the quality of the act and not of the actor because the concept of fault was only in its infancy at this time.[89] The development of the law since this time, particularly with regards to notions of fault, must be kept in mind when relying on a case such as *Weaver v Ward*.[90] Caution must also be taken when relying on this trespass case to inform decisions about negligence.

Thus the precedent on which decisions as to the liability in negligence of those with mental illness are based is weak at best. Relying on such inadequate authority may best be explained by reference to Perlin's sanism. That is, the subconscious and unintended belief that those with mental illness are to be treated differently because they are perceived as dangerous and evil and are therefore not to be excused, or 'let off' from the consequences of their behaviour.

It would therefore seem that the precedent on which the Court of Appeal in *Carrier* based its decision is not strong. There is the misinformed and incomplete *Adamson*, cases dealing with different areas of law, and inaccurate or at least incomplete representation of the law in other jurisdictions.

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[89] Bohlen, above n 63, 17.

[90] See chapter 2.

What is particularly interesting is that the Court did not consider how the cases on which it relied may have been influenced by the comparatively primitive medical understanding of mental illness that existed at the time. Nor did the Court consider the remarkable developments in knowledge regarding cause, diagnosis and cure of mental illness since then. More importantly, it did not take into account the role that negative social attitudes towards those with mental illness may have had in influencing the decisions in these cases.

Although it may be suggested that such attitudes have undoubtedly changed over the last century, the willingness to almost blindly refer to old precedent without acknowledging any such developments may suggest that some of the old prejudices – sanism – still remain.[91]

Mental illness and physical illness

McPherson J addressed but ultimately rejected the claim that those with mental illness should be treated in a similar way to those who have suffered a physical incapacity such as that which results from an epileptic fit.

His Honour found that the incapacity experienced by a person suffering from a mental illness, for example during a psychotic episode, is qualitatively different to the incapacity that results from a physical cause such as epilepsy. In these latter cases, no liability

[91] In relation to criminal courts relying on old precedent which is out of touch with modern psychiatric knowledge in the criminal sphere see, Joanmarie Davoli, 'Still Stuck in the Cuckoo's Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?' (2001-2) 69 *Tennessee Law Review* 987, 993-5.

attaches to conduct which occurs during this time because the defendant cannot be said to have acted voluntarily. That is, these cases of sudden physical incapacity are not concerned with the defendant's state of mind in the way that insanity is. Rather defendants are not liable because the actions they perform cannot properly be attributed to them.[92] McPherson J therefore found these cases to be irrelevant to the question of liability of those who have a mental illness.

McPherson J may be correct from a physiological point of view that the sudden lack of capacity which results from a psychiatric illness like schizophrenia or bipolar disorder is different to incapacity or lack of control as a result of a physical illness like epilepsy. In layman's terms, one of the differences is that sudden physical illness involves a complete lack of consciousness or voluntariness, whereas psychiatric illness results in the sufferer's action being directed and controlled by a confused, disordered or distorted consciousness.

Yet it remains difficult to explain (and the Court of Appeal does not attempt to do so) why the legal response to the two situations should be different. As argued in chapter 1, from a legal perspective and from the point of view of attributing responsibility to actors, it is capacity which is the determining factor. Therefore it is unclear why an inability to act rationally due to a complete lack of consciousness should be treated differently to an inability to act rationally due to a malfunctioning consciousness. Or is it that the law will excuse inability to act rationally due to physical impairment but not inability to act

[92] *Carrier v Bonham* [2002] 1 Qd R 474, 486.

rationally due to a mental dysfunction? The Court of Appeal does not provide adequate answers to these questions.

These possibilities are especially difficult to justify given the increasing scientific understanding of the overlap between the physical and mental, conscious and subconscious. For example, an expert witness in the Canadian negligence case *Fiala v Cechmanek*[93] explained that when people are experiencing manic episodes as a result of bipolar disorder, they are being driven by the disease and that this is due to a problem with the chemical neurotransmitters that are controlling them. They are being driven by a disease which requires that the unconscious part of them takes over so that 'much of the actual enactment of the behaviour is quite unconscious'.[94] A second expert witness in that case confirmed that in a manic episode the body acts 'based on commands from a diseased brain' and that the defendant in that case was 'no longer in control' because of a 'huge chemical imbalance'.[95]

The Court of Appeal did not approach the question of creating a sudden mental incapacity exception along the lines of the United States. However its finding that automatism is different to mental illness is perhaps an indication that it would not be minded to accept such an exception.

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[93] 281 AR 248.

[94] *Fiala v Cechmanek* (1999) 281 AR 248, [11].

[95] Ibid, [15]; Medical knowledge about cause, diagnosis and cure of mental illness has developed to such an extent that it is possible now to ask whether there is such a thing as 'mental illness' which can be distinguished from physical illness as there are increasing physical explanations for otherwise unexplained 'mental' phenomena. For example advancement in medical understanding of the causes of epilepsy has changed the concept of this illness from the purely mental to the purely physical. The same can be said for some mood disorders and psychotic illnesses. While there are still illnesses which are considered 'mental', it is arguable that in years to come even these illnesses will be recognised as being physical in nature.

Mental Illness and childhood

McPherson J addressed the suggestion that defendants who are suffering from a mental illness and child defendants should be treated similarly because their mental states are such that they both have reduced potential for foresight and prudence.[96] His Honour rejected this argument and identified two perceived differences between children and those with mental illness to justify treating the two groups differently for two reasons.

Childhood is normal, mental illness is not

The first relevant difference between children and those with mental illness as identified by McPherson J is that all people pass through childhood, whereas not all people experience a mental illness in their lifetime.[97] In other words, childhood can be categorised as normal, whereas mental illness cannot.

There appears to be no evidence or principle to suggest that the only reason to particularise the standard of care is if the defendant is experiencing a state, such as childhood, that everyone in their lifetime experiences. For example most people have been drunk in their lifetime – or tired – but these are not features which determine how

[96] This is particularly so given that the reduced level of understanding or mental ability of children as compared to adults was undoubtedly one of the reasons that the High Court in *McHale v Watson* held that attenuating the standard of care for children was appropriate. The trial court's approach to this issue was that the similarity between children and those with mental illness in potentially possessing a lower level of capacity than the average person, makes it anomalous to take into account the capacity reducing factor in children (development) but to ignore it in those with mental illness (illness or abnormality of mind). *Carrier v Bonham* 2000 QDC 226 (Unreported, McGill DCJ, 4 August 2000) [59].

[97] *Carrier v Bonham* [2002] 1 Qd R 474, 487.

the standard of care is set.[98] Moreover, courts in some jurisdictions have particularised the standard in the case of professionals so that a doctor is held to the standard of a doctor rather than a 'normal' person when engaging in medical activities even though it is not 'normal' to be a doctor and not everyone is a doctor in their lifetime. In fact, with one in five people experiencing a mental illness in their lifetime, having a mental illness is a much more normal occurrence than is being a doctor.[99]

No Objective Standard Available to Mental Illness

The second reason McPherson J found justified the difference in treatment of children and those with mental illness was that no appropriate standard could be devised for those with mental illness in the same way that it is for children. McMurdo P came to a similar conclusion.[100]

The premise to this argument is that there is no such thing as a 'normal' condition for someone of 'unsound mind'.[101] While this may be so, it is equally true that there is no 'normal' condition for someone of 'unsound body' or for somebody who is experiencing 'childhood'.[102] But this is not what the law of negligence requires of these defendants.

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[98] Allan Beever, *Rediscovering the Law of Negligence* (2007) 88 rejects the notion that the fact that childhood is 'normal' is adequate reason for altering the standard of care for child defendants. 'We all go through periods of depression and almost everyone gets drunk at least once, but these facts usually do not feature in setting the standard of care for depressed or drunk defendants.'

[99] See chapter 1.

[100] *Carrier v Bonham* [2002] 1 Qd R 474, 480.

[101] Ibid, 487.

[102] This argument is precisely how the High Court came to its decision in *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 VLR 218, 238. The majority found that 'one of the leading theorists in this area, suggests that the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally appears in a child somewhere

There may be a normal condition for someone who has only one leg or who is ten years old but this is not to deny that there will be a wide range of variance on either side of the norm.[103] In this way the 'normal' condition for someone who is suffering schizophrenia is akin to the 'normal' condition of a child. If this were not the case it would be impossible for psychiatrists, psychologists and other health professionals to make the diagnoses and provide the effective treatment in the way that they do.[104]

Further, it is unclear why the law will make allowance for judging a ten year old according to the standard of a ten year old, rather than putting the child into the general and unworkable category of 'childhood'. But it will not judge a command response schizophrenic against the average command response schizophrenic, but rather imposes the general and unworkable category of 'mentally ill' or 'person of unsound mind' in such cases. There is no attempt to provide reasons for this discrepancy. The law simply treats those with mental illness differently to other groups of people perhaps because of a subconscious misunderstanding and fear of, and lack of patience for those who have a mental illness.

Given this argument that there is no normal state for a person with a particular mental illness, McPherson J found that it is not possible to proscribe any manner of objective standard for those who have a mental illness. That is, the proposed standard of 'an

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between the ages of 11 and 14. But, again, even this is a generalisation. There is no guarantee that any particular child, at 14, is capable of giving informed consent nor that any particular 10 year old cannot'.

[103] Ibid.

[104] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)* (2000) for evidence of the 'normal' state for any particular mental illness.

ordinary reasonable person suffering from that mental illness' is rendered meaningless due to the inherently 'unreasonable' and 'irrational' nature of a person suffering from a mental illness. Therefore no reasonableness based standard could ever be appropriate in the case of those who have a mental illness. His Honour provided that as a reasonableness standard is the essence of negligence, and no attenuated standard could adequately cover mental illness, the only remaining option is to judge those with mental illness against the general standard of the ordinary person.[105] McMurdo P made a similar argument and came to a similar conclusion.[106]

This is a particularly interesting and concerning part of the court's judgment. First, the Court of Appeal found that people suffering from a mental illness may at times not have the capacity to act rationally. Yet the Court openly and unashamedly requires them to do so. Insisting that an irrational person is to act rationally would appear to be a nonsensical demand.

Second, the suggestion that a reasonableness standard cannot be applied to a person who is not reasonable appears to misconstrue the meaning of 'reasonable' in the expression 'reasonable person'. That expression does not require a particular static level of rationality or reasoned thought but rather it connotes ordinariness. This is why, in explaining the expression 'reasonable person', judges have used expressions such as 'the

[105] *Carrier v Bonham* [2002] 1 Qd R 474, 480.

[106] Ibid.

man on the Clapham omnibus'[107] or the 'hypothetical person on the hypothetical Bondi tram'.[108]

It is not inconsistent, in applying the standard of care to find that the reasonable or ordinary person in the defendant's position (say, that of a person suffering from a mental illness) is not actually reasonable. That is, if the defendant's behaviour is irrational but accords with what others in that situation might have done, then the defendant will be found to have satisfied the standard of care regardless of how 'unreasonable' some may feel the behaviour to have been.

There are commentators who disagree with this line of argument, and see the ordinary person standard as normative rather than sociological or descriptive.[109] They argue that the standard of care represents an ideal standard to which all should aspire, so that the question to which negligence is directed is what the defendant should have done to avoid a foreseeable risk. However it is here suggested that the question is not what a person in the defendant's situation *should* have done, but what a person in the defendant's position *would* have done.[110] The answer to this enquiry – what would the ordinary person have done – will be the basis for the court's decision as to what the defendant *should* have done. This is an important distinction, as it removes some opportunity from judges to impose their own beliefs as to what is considered acceptable behaviour in particular

[107] *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100 (CA), 109.

[108] *Papatonais v Australian Telecommunications Commission* (1985) 156 CLR 7, 36.

[109] Beever, above n 98, 84; Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003).

[110] Fleming James Jr, 'The Qualitites of the Reasonable Man in Negligence Cases' (1951) 16 *Missouri Law Review* 1, 5.

circumstances. In addition, this analysis accords with the law in Australia relating to the standard of care for children.[111]

Thus, it may very well be unreasonable in the minds of most people for a person to throw a sharp metal object at a tree next to which a vulnerable child is standing. If the person who has thrown the object is a twelve year old boy, it does not change the fact that, in isolation, the throwing of a sharp metal object at a tree when there are other children close by, is of itself unreasonable. However negligence law does not look at behaviour in isolation. Thus it may be found (and of course was found in *McHale v Watson*) that this 'unreasonable' behaviour is in fact reasonable behaviour to expect of a child of this age, given the generally reduced level of capacity to understand the cause and effect of behaviour and the inability to repress impulses at such an age.

Likewise, jumping in front of a bus in order to commit suicide may be considered quite unreasonable behaviour considering the possibility of injury to other people on the road. However, if the person who jumped in front of the bus is a chronic schizophrenic it may very well be reasonable behaviour (in the sense of ordinary or normal), considering the possibility of command hallucinations and delusions associated with the illness, coupled with the high rate of suicide and attempted suicide amongst such sufferers.[112] This again is not to say that to jump in front of a bus is in itself reasonable behaviour (in the sense of

[111] Windeyer J in *McHale v Watson* (1964) 111 CLR 384, 398 found that the defendant was old enough to appreciate the dangers associated with his behaviour but neverthless held that the standard should be altered.

[112] American Psychiatric Association, *DSM-IV-TR* above n 104 states at 304 that between 20% and 40% make at least one attempt at suicide over the course of the illness.

well thought out or rational), but in the circumstances of a person suffering chronic schizophrenia it may well be quite within the bounds of normalcy and in that sense reasonable to expect.[113]

Finally, there is no suggestion that the court actually enquired into whether or not it is possible to develop a modified objective standard for those who have a mental illness. The Court seems to have relied on basic notions of 'common sense' and gross oversimplifications and the conclusion that if a judge, without assistance cannot determine a standard, then no standard can be determined. Relying on common sense or common knowledge in relation to mental illness is particularly problematic because there is generally a great divide between scientific fact and general belief about the issue.[114] Perhaps the Court has done so because of in inherent distrust of psychiatry similar to that identified in the criminal sphere. As Perlin notes, the invisibility of psychiatry leads to a perceived inexactness in measurement and observation. This is so even though symptoms thought to be the result of a 'physical' ailment are often interpreted differently by different doctors.[115]

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[113] Beever, above n 98, 85 specifically rejects this view saying that such a standard is to judge the defendant according to third parties rather than trying to mediate between the interests of both parties. However this is in contrast to Australian law relating to professional standards, which are in fact based on the practice of the relevant professionals. See *Civil Liability Act 2002* (NSW) s 5O (1) A person practising a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

[114] Michael Perlin, 'Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning' (1990) 69 *Nebraska Law Review* 3, 28, 33; Perlin, M. 'On Sanism' (1992-3) 46 *Southern Methodist University Law Review* 373, 377.

[115] Michael Perlin, 'Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence' (1989-9) 40 *Case Western Reserve Law Review* 599, 679.

The Court of Appeal may be correct to find that a judge, without the assistance of medical advice, would have extreme difficulty in formulating an appropriate objective standard by which to judge an 'ordinary' person suffering from a mental illness. It is also true that judges may consider that such difficulty does not arise when judging the behaviour of a child. This is due to the fact that the average person (or more correctly, the average judge) has been a child before and therefore has a greater sense of understanding and acceptance of the behaviour of children as opposed to those with mental illness (assuming that most judges have not experienced a mental illness in their lifetime).[116] But judges do not make decisions without the aide of experts. If medical professionals are able to make judgments about the general nature and capacity of people suffering certain types of mental illness for diagnostic and treatment purposes, it is unclear why these generalisations can not form the basis of an attenuated objective standard, the same way that generalisations about childhood development and people in general form the basis of objective standards.

For example, using the criteria for a diagnosis of schizophrenia from *DSM-IV* and psychiatric evidence it could be assumed that the reasonable (in the sense of ordinary) person suffering schizophrenia would have a reduced ability to foresee the possible impact of his/her behaviour on other people, or be drawn to act as a result of the symptoms.[117] An expert witness in *Fiala v MacDonald* explained that when people are suffering manic episodes, they are:

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[116] John Fleming, *An Introduction to the Law of Torts*, (2nd ed, 1985) 26; Picher above n 18, 227; Beever, above n 98, 88.

[117] American Psychiatric Association, *DSM-IV-TR* above n 104, xxxiii warns against relying soley on its descriptions for forensic purposes and that additional information such as 'the individual's functional

> 'not on the same plain [sic] as you and I. They're, for lack of a better word, they're gone. They don't have our abilities anymore to really have – they're aware but it's not an awareness like you and I have where they can stop and be aware and know what's there and sort it out. It's noise and sound and everything is coming at them and plus a brain that is rushing at them can no longer filter or function in any way that we would recognize as being under any sort of voluntary control…'[118]

Moreover, as scientific advancement is continually uncovering the physical nature of so called 'mental illness', biological rather than purely clinical diagnoses and cures are becoming available.[119]

Further, there is no evidence to suggest that judges or juries will have any more difficulty in understanding the intricacies of mental illness than of any other area of knowledge which is needed to resolve a particular case, such as the correct way to build a bridge or to deliver a baby.[120]

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impairments and how these impairments affect the particular abilities in question.' However it also says that 'when used appropriately, diagnoses and diagnostic information can assist decision makers in their determinations.'

[118] *Fiala v MacDonald* (2001) 201 DLR (4th) 680, [16]. Evidence of this nature is readily accepted in criminal cases where the issue of automatism is relevant.

[119] See chapter 1.

[120] Goldstein, above n 57, 78.

Courts and tribunals already make judgments about the mental capacity of those with mental illness when deciding issues of guilt and innocence, efficacy of legal documents, appropriateness of involuntary commitment and appointment of others to manage one's affairs. It seems difficult therefore to sustain an argument that such determinations cannot be made adequately by courts.[121] The judgment may be difficult but it is not necessarily any more difficult than in relation to any other factual issue in any other lawsuit.

While judges and in some cases juries are the final arbiters about the reasonableness of any course of conduct, their decision as to how someone in the defendant's position would have acted in those instances outside general day to day living is based on evidence from or about people in the defendant's position. An independent engineer will provide information about what is reasonable behaviour for an engineer in the defendant's situation, and doctors will give evidence as to reasonableness in relation to medical practice.

[121] Admittedly, making judgments about capacity for the purposes of liability in negligence is different in certain regards from making such judgments for involuntary commitment or guardianship purposes, as the latter involve decisions about a person's likely capacity in the future whereas determinations for the purposes of negligence are retrospective.

The retrospective nature of these determinations makes the court's task both simpler and more difficult than determinations which are made under the various mental health and guardianship Acts. They are simpler because courts are not required to make estimations about a person's future mental state. They are more difficult because it is often the case that an expert did not have the opportunity to assess the defendant at the time when the question of capacity is relevant. The expert is required instead to give an informed estimate of the defendant's past capacity.

Although it is no doubt easier to make accurate determinations about present capacity than past or future capacity, if courts and tribunals are expected and able to make determinations about future capacity there seems no reason for them not to make determinations about past capacity.

It is possible that one of the reasons courts are willing to consider reduced mental abilities due to immature age but not due to mental illness is the difference in nature between mental illness and childhood. As outlined in chapter 1, capacity in childhood is relatively constant (or more correctly, it changes very gradually),[122] but mental capacity of a person with a mental illness may be quite intermittent. A person with bipolar disorder, for example, has far less mental capacity when experiencing a manic episode than at other times.[123] As noted in chapter 1 this intermittent nature of capacity of those with mental illness is recognised by provisions of the individual state mental health Acts. These pieces of legislation are concerned with the proper administration of those people who suffer from a mental illness and who may, as a result of such illness, be a danger to themselves or to others.

These Acts also recognise and are able to accommodate the intermittent nature of mental illness by providing for situations of both involuntary commitment[124] and informed consent by these patients.[125] This indicates that at different times, the same person may be incapable for example of forming rational thoughts or of appreciating the difference between reality and illusion to the extent that s/he is a danger to him/herself or others, such that a form of preventative detention may be justified, and sometimes may be capable of understanding and consenting to complex and intrusive medical treatment.

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[122] See *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 VLR 218.

[123] See expert evidence in *Fiala v MacDonald* (2001) 201 DLR (4th) 680, [15]-[16].

[124] See eg, *Mental Health Act 2007* (NSW) ss 12-45.

[125] See eg, *Mental Health Act 2007* (NSW) ss 91, 93.

The nature of the reduced capacity in those with mental illness may make mental illness more difficult for the lay person to understand than in children. But current medical knowledge about mental illness renders this concern unjustified. The 'it's too hard' argument adopted by the Court of Appeal (no standard can be created, no such thing as reasonableness) is unsustainable.

The approach adopted by the Court of Appeal appears to be based on misinformed assumptions about mental illness and those who have a mental illness, similar to those recognised in the criminal context by Perlin. In negligence cases, as well as in criminal cases, this has led to judgments that are substantially out of step with modern scientific knowledge and empirical evidence. In the criminal law it is in failing to adjust the relevant test to more appropriately fit with modern day understanding of mental illness. In tort law it is a failure even to avert to the topic because it is simply seen as too hard or just not worth the effort. It is not too hard, and perhaps of little more effort than any other area of the law.

Policy reasons

As well as these reasons centring on practicality, the court referred to broader policy reasons to support its argument that those with mental illness should be subject to the ordinary person standard in negligence law. For the most part, these reasons are not new.[126] Each of these reasons has been discredited, and in light of this fact, it is difficult

[126] See Picher, above n 18.

to understand why judges in the 21st century continue to rely on them, unless perhaps, as Perlin suggests it reveals an underlying distrust of and distaste for mental illness.

McPherson J expressed concern that lowering the standard of care to take into account mental incapacity will erode the objective standard to such an extent that it will no longer be of any significance. However such concerns have not stopped courts from taking into account physical disabilities which cause a sudden incapacity or immature age in determining the standard of care, so there is no reason why it should be problematic to apply a similar test to people with a mental illness.

It has also been argued that it is unfair to the victim not to be compensated if those with mental illness can pay. There a several responses to this. The first is that, by correlation, it would be unfair to make those with mental illness provide compensation if the victim is financially able to pay.[127] Second, the fairness or unfairness of a particular situation is not to be determined by the judge's sensitivities in the particular case. Judges are required to decide on the basis of the law. It is the law which sets the standard of justice as between plaintiff and defendant. In negligence law, it is only 'fair' to require defendants to pay for damage they have caused if such damage was caused as a result of their wrongful action – if they were at fault. Negligence law is not simply about reallocating recourses on a case by case basis according to the whim of judges. Although

[127] Ibid, 255.

it is no doubt one of the aims of negligence law, if it were the sole consideration, there are few who would find that it is a particularly adequate means of doing so.[128]

Finally, McPherson J found that if those with mental illness who live in society 'take advantage'[129] of their liberty, presumably by not acting like 'normal proper' people, there will be a reversion to the inhumane practice of institutionalisation.[130] Apart from implying that there is a glut of people suffering from a mental illness wreaking havoc in the community, a fact which no evidence supports, this argument greatly misunderstands the history of institutionalisation and deinstitutionalisation. As outlined in chapter 1 institutionalisation, which exploded in 18th century England, was a means of removing unwanted people from the streets. Medical knowledge simply did not know how to treat such people. As modern medicine, particularly psychiatry developed over the centuries, drugs were discovered to control the symptoms of some of the more troubling mental illnesses such as schizophrenia. This meant that such people no longer required treatment in a psychiatric hospital. In addition, the growing costs of maintaining specialist psychiatric hospitals (they were not as costly when their only practice was restraint) led to a push for deinstitutionalisation.[131]

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[128] See for example Richard Abel, 'A Critique of Torts' (1989-90) 37 *University of California Los Angeles Law Review* 785, 796; Harold Luntz and David Hambly, *Torts, Cases and Commentary* (5th ed, 2002) chapter 1.

[129] *Carrier v Bonham* [2002] 1 Qd R 474, 487.

[130] *Carrier v Bonham* [2002] 1 Qd R 474, 487-488. See also Stephanie Splane 'Tort Liability of the Mentally Ill in Negligence Actions' (1983) 93 *Yale Law Journal* 153, 163-165.

[131] Okianer Christian Dark, 'Tort Liability and the "Unquiet Mind": A Proposal to Incorporate Mental Disibilities into the Standard of Care' (2004) 30 *Marshall Law Review* 169, 185-6.

It is fanciful to suggest that a few actions for negligence will result in a complete regression of government policy when such policy is both expensive, unnecessary and inhumane.

In a similar sentiment, this argument was addressed in *Fiala v MacDonald*.[132] There Wittmann J found, that rather than fuelling a push for institutionalisation, on the contrary, that the discrepancy between law's treatment of mental and physical illness legitimised physical illnesses, thereby serving to reinforce negative stereotypes about mental ones.[133] His Honour saw the failure to lower the standard of care for those who are mentally incapacitated as the legal system assisting in undermining the legitimacy of such disorders. His Honour opined that greater public education and awareness of mental illness would allow the real risks associated with integrating those with mental illness into society to be distinguished from fears that are 'mired in ignorance'.[134]

The final reason the Court of Appeal found that taking the mental illness of the defendant into account when determining liability in negligence centred on what it saw as the underlying purpose or philosophy of tort law. The court took the view that negligence law is primarily a system of compensation. Yet, as noted above, it remains difficult to understand why the driving force behind negligence is said to be compensation in cases where the defendant has a mental illness, but not in cases where the defendant is a child or is suddenly incapacitated due to a physical illness.

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[132] (2001) 201 DLR 4th 680.

[133] Ibid, [33].

[134] Ibid, [36].

7.4 Conclusion

It must therefore be concluded that the law relating to the appropriate treatment of mental illness for the purposes of liability in negligence, is based both on unreliable or inadequate legal authority and misguided and uninformed policy considerations, derived as a result of out of date and inaccurate assumptions about mental illness and medical knowledge. Nonetheless, *Carrier v Bonham* confirms that in Australia, considerations of mental capacity arising from mental illness are not relevant to the determination of the standard of care in negligence. Unlike a child, where avoidability serves as an important precondition to liability, a person suffering from a mental illness must behave the same way as an ordinary person who does not suffer from a mental illness, thus exposing them to liability even when their limited cognitive abilities means that they lack the ordinary person's capacity to perceive or understand the relevant risk.[135] The law of negligence appears to be directed by fear and misunderstanding of mental illness.

[135] Moran, above n 109, 167. Moran sees this treatment of the mentally disabled (as oppose those who have a mental illness) as a disjuncture between legal and moral fault – a disjuncture which should not exist.

CHAPTER 8 - Where to Now?

8.1 Introduction

The preceding chapters have highlighted anomalies in the law of negligence at common law as it relates to defendants who are suffering from a mental illness. While based in theory on an objective standard of care, the test for negligence in practice is more flexible than such a test would imply. In particular, there is little dispute that the standard of care may be altered to take into account the specific capacities of children, and in some cases of the physically impaired. Yet when it comes to addressing the particular nature of mental illness, courts are less willing to implement this inherent legal flexibility. It has been the central theme of this thesis that the reason for these anomalies and for the law relating to defendants with a mental illness more generally is that law makers hold the same beliefs about those with a mental illness as does the rest of the population. That is, the law has been directed by a mistrust, fear and ignorance of mental illness.

It is not the central purpose of this thesis to provide recommendations for reform, nevertheless, this chapter provides several possible responses to the way in which the law of negligence deals with defendants who are suffering from a mental illness.

8.2 Proposals for reform

There are several ways in which to respond to the law's approach to defendants who are suffering from a mental illness. The first is to accept the law, reject any criticism about it and support the courts' reasons for their decisions in the relevant cases. This is to accept the interest in compensating the injured party and the notion that where both parties to an action may be regarded in some sense as innocent, it is fairer to make the party who caused the accident pay for any resulting damage. Alternatively, it is to characterise the reduced capacity which may result from mental illness and significantly different from a legal perspective to the reduced capacity which is a concomitant to childhood.

Similarly, it may be thought best to embrace the current law not because of a belief in its appropriateness or adequacy, nor due to general agreement with the courts' reasons, but rather because, given the scarcity of case law on the subject, it would seem that actions against defendants with a mental illness do not often arise. It may be argued that the apparent legal anomaly (children and those with mental illness), can be regarded as of little practical significance and therefore not worth the time and effort that this and other works have spent on the issue.

It is here argued that the infrequency of cases does not make the issue of legal treatment of those with reduced capacity due to mental illness any less significant for those who are affected. Further, it does not make it any less necessary for the legal treatment of such people to be consistent with the philosophical underpinnings of the particular area of law or for the law to be intellectually plausible. And it does not make it any less appropriate

for the legal treatment of such people to be fair and just in light of the medical realities of mental illness.

Another option is to recognise the apparent inconsistency in treatment of those with mental illness and children in modern negligence law and to revert to the rules of negligence propounded by some 19th Century scholars and judges. They argued that children and defendants with a mental illness should be treated in a like manner and that both should be liable to provide compensation for the damage suffered as a result of the accidents they caused.[1] Thus instead of concentrating on defendants with a mental illness, the focus of the inquiry as to inconsistency of principle and treatment of capacity would require the law relating to child defendants to be brought into line with the law relating to defendants with a mental illness. In light of the seemingly united support in all common law jurisdictions, both at the bench and in legal scholarship, for the law of negligence as it relates to children, it would seem unlikely that the anomaly will be resolved in this way.[2]

An option for reform at the opposite extreme is for courts to create a new particularised category for those suffering from a mental illness similar to the one that exists for children. This would not mean that defendants with a mental illness would automatically be immune from liability in negligence. The standard of care according to which such a defendant would be judged would be tailored in some way to better reflect the capacities

[1] See, eg *Williams v Hayes* 42 Am. S.R. 743; Susanna Blumenthal, 'The Default Legal Person' (2007) 54 *University of California Los Angeles Law Review* 1135, 1251-1252.

[2] See chapter 4 of this thesis.

of those suffering from mental illness the same way that the standard of care for children is tailored to better represent their abilities.

This proposal would likely be subject to two criticisms. First, while it may meet the test of fairness, humanity and logic from the perspective of those suffering from a mental illness, it would leave the injured plaintiff without compensation in a situation where the defendant may well be able to provide such compensation, perhaps by means of insurance. It has been argued that this situation is unfair to the injured plaintiff and draws the line between the plaintiff and defendant's interests too closely to the defendant thereby creating inequality and injustice between the two parties.[3]

Second, it has been argued from a doctrinal point of view that creating a standard specifically for defendants with a mental illness would be to compromise the objective test to such an extent that it becomes meaningless.[4] Yet as noted in chapter 7, these two arguments have not been used in relation to the altered standard of care for children, and it would seem simply to beg the question.

An offshoot of this suggestion of an altered standard of care for those with a mental illness is one which draws on the therapeutic and deterrent significance of tort liability. It

[3] Allan Beever, *Rediscovering the Law of Negligence* (2007) 81-82; Fleming James Jr, 'The Qualities of the Reasonable Man in Negligence Cases' (1951) 16 *Missouri Law Review* 1, 2; Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune' 41 *McGill Law Journal* 91, 112-3; Peter Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 81, 106; Arthur Ripstein, *Equality, Responsibility and the Law* (2001) 269-70; Alan Calnan, 'The Fault(s) in Negligence Law' (2007) 25 *Quinnipiac Law Review* 695, 726

[4] As noted in *Fiala v MacDonald* (2001) 201 DLR (4th) 680, [27] this was one of the main concerns of Tindal CJ in *Vaughan v Menlove* (1837) 3 Bing NC 468; (1837), 132 E.R. 490 (C.P.)

argues that if tort law is aimed at deterring unsafe behaviour, it must take into account the reality of accident causation and the way in which the standard of care may impact on therapeutic concerns. The argument is that imposing liability on those suffering from a mental illness will encourage them to seek treatment for their illness.[5] In this way the objective test encourages a higher rate of treatment for mental illness and thereby reduces risks in society.

Regardless of whether liability does in fact encourage people to seek treatment, or whether risks would be significantly reduced by those will a mental illness seeking treatment for their illness,[6] the question remains how to respond to those defendants who have sought treatment for their illness. The law currently responds to those who have sought treatment and those who have not in the same way. Therefore those who have acted responsibly by following the recommended treatment regime are given no extra credit for this behaviour.[7]

It has been argued that if tort law is to truly encourage those suffering from a mental illness to seek treatment, it must take into account the realities of treatment for such illnesses (side effects, increase in risks of accident in the short term, decreased cognitive abilities).[8] This may be achieved by differentiating defendants with a mental illness

[5] Daniel Shuman, 'Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care' (1992-93) 46 *Southern Methodist University Law Review* 409, 420.

[6] Grant Morris, 'Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurispurdence (1994) 47 *Southern Methodist University Law Review* 1837, 1850; See also chapter 3.

[7] Shuman, above n 5, 420.

[8] Ibid 423.

depending on whether or not they have sought treatment – or at least have made a good faith effort to seek treatment for their illness.[9] For those who have sought treatment for their illness prior to the injury causing behaviour, the standard of care should be altered so as to take into account the treatment the defendant has received.[10] That is, if seeking treatment is a reasonable response to signs of mental illness, then this response should be considered at the time of determining liability for a defendant's behaviour.[11] Those who, on the other hand, have not sought treatment for their known mental illness will be judged according to the ordinary objective standard.

The concern regarding this suggestion is that it is premised on the inadequately proven assumption that tort law does deter unsafe behaviour.[12] It also fails to recognise one of the hallmarks of mental illness – a lack of self awareness in relation to their illness which would inhibit a person's appreciation for the fact that they may need to seek treatment.[13] In this sense the therapeutic suggestion may in fact lead to a harsher response to those who have severe mental illness than those whose illness is somewhat milder. In addition, it would seem to treat unfairly those suffering from a mental illness for whom treatment

[9] Ibid 427.

[10] Ibid 424.

[11] Ibid 425.

[12] See chapter 3; Daniel Shuman, 'Psychology of Deterrence in Tort Law' (1993) 42 *Kansas Law Review* 115.

[13] See chapter 1.

has been ineffective,[14] and perhaps does not adequately take into account the importance of the compensation goal of tort law.[15]

A further response to the current law for defendants with a mental illness does not propose altering the law, so much as altering the way in which mental illness is categorised.[16] This proposal suggests that, in light of current medical knowledge, which recognises the physiological basis for the majority of mental illnesses,[17] those with a mental illness could easily be classified with those who have what are traditionally known as physical illnesses. This is because most illnesses which would be classified as mental or psychiatric are in fact caused as a result of a physical element such as chemical imbalance, lesions or the like. By reclassifying 'mental illness' in this way, there is no change to the existing law, its application as it relates to those suffering from a mental illness is more in line with medical knowledge, and those suffering from a mental illness are no longer burdened with a liability which seems intuitively unfair and anomalous.

Yet such an approach does not fit well with society's understanding of illness more generally, which, whether correctly or incorrectly, divides illnesses into mental and physical. In addition, although this test may circumvent the 'problem' of what to do with defendants suffering from a mental illness, it does so at the expense of furthering the

[14] Elizabeth Goldstein, 'Asking the Impossible: The Negligence Liability of Those who have a Mental Illness' (1995-96) 12 *Journal of Contemporary Health Law & Policy* 67, 89.

[15] Morris, above n 4, 1846-1849.

[16] Okianer Christian Dark, 'Tort Liability and the "Unquiet Mind": A Proposal to Incorporate Mental Disabilities into the Standard of Care' (2004) 30 *Marshall Law Review* 169.

[17] See chapter 1.

understanding and legitimacy of mental illness.[18] This option may solve the problem from a practical perspective, but not from a theoretical one.

Further, it may be suggested that neither of these accounts (reclassifying mental as physical, and altering the standard for defendants with a mental illness who have sought treatment) adequately addresses the need for and role of tort law in providing compensation to injured parties. As noted throughout this thesis the concern of where the appropriate balance between the interests of the plaintiff and defendant may be has been treated differently with children than it has with those suffering from a mental illness. Although the general rule is that children will be judged according to the standard of a reasonable child of a similar age, this rule does not apply when the child is engaged in activities which the court regards as 'adult' in nature. In these cases, the child defendant is subject to the objective standard of the reasonable adult person.[19]

It is necessary however to consider what may be behind judges' determinations of adult behaviour for these purposes. It has been suggested that the reason for creating different rules for children engaged in adult behaviour and those engaged in child behaviour is due to the theory of reasonable expectations.[20] For example, it is reasonable for a person driving on the road to assume that others driving on the road are adults with drivers licences. Therefore the fact that the driver in a particular situation happens to be a child in no way alters the reasonableness of the expectations of other road users. Reasonable

[18] See similar arguments in *Fiala v MacDonald* (2001) 201 DLR (4th) 680, [36].

[19] See chapter 4.

[20] David Seidelson, 'Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, The Mentally Impaired, and the Mentally Incompetent' (1981) 50 (1) *George Washington Law Review* 17.

expectations theory may also explain why courts have found that shooting in the context of a hunting expedition was not regarded as an adult activity.[21] That is, the plaintiff was aware of the defendant's age and it was therefore reasonable to expect the plaintiff to take special precautions when engaging with this child defendant.

However, as noted in chapter 4, the theory of reasonable expectations does not ultimately provide a comprehensive understanding of the law of negligence, and it is therefore unhelpful to analyse the law of child defendants accordingly.

It is perhaps a better suggestion that what is actually behind the law of child defendants is a greater consideration of insurance than is usually admitted in the courts. It would seem that those situations in which a child's activity has been deemed to be adult have a remarkable correlation with activities that are the subject of insurance.[22] This may explain why driving a car or engaging in employment activities have both been regarded as adult, but shooting has not. It may therefore be suggested that it is not in fact the principle that the child is engaging in an activity which, by its nature is adult, but rather, that she is engaging in an activity, for which ensuing damage is covered by insurance. The moral quandary then, regarding which of two innocents should bear the loss is not as acute as would be the case if insurance did not exist.

As noted in chapter 3 courts have historically taken a silent approach to issues of insurance in tort law. This refusal to openly consider the impact of insurance on courts'

[21] *Purtle v Shelton* 251 Ark 519, 474 SW2d 123 (1971).

[22] Fleming, *The Law of Torts* (9th ed 1998) 126.

decisions is consistent with the recognition of tort law as the legal embodiment of corrective justice. But, for the reasons stated in chapter 3 viewing tort law in this way does not comprehensively explain the actual practices of tort law, and therefore remain unable to direct entirely the way in which the law responds to insurance.

As there is at least some consequential or plaintiff directed element to tort law it seems necessary to recognise the impact that insurance has on the decisions of judges. However courts deciding cases of child defendants have not had to openly adopt this approach. They have created law which on the surface is steeped in principle but is perhaps influenced by considerations of insurance.

Two different sources have suggested a way in which the law of negligence can more closely align the law relating to defendants with mental illness with child defendants, and also to fairly balance the interests of defendant and plaintiff in a particular instance.

The first suggestion is that offered by the Irish Law Reform Commission.[23] The Commission proposed that the standard of care should remain objective and static for defendants with a mental illness, but they should have the benefit of a defence of mental illness along the lines of the M'Naghten rules of the criminal law. It explained the test as follows:

[23] Irish Law Reform Commission, *Report on the Liability in Tort of Mentally Disabled Persons* (1985).

> [T]he law [should] apply the objective test of "the reasonable person" when determining a person's negligence and contributory negligence unless that person establishes (a) that, at the time of the act in question, he or she was suffering from a serious mental disability which affected him or her in the performance of the act, and (b) that that disability was such as to have made him or her unable to behave according to the standard of care appropriate to the reasonable person. If both elements are established, the person should be held not to have been guilty of negligence or contributory negligence, as the case may be.[24]

The Commission noted that only a serious mental illness would negate the objective test and that this disability would have to have affected the defendant in the performance of the relevant act such that the court finds that the illness makes the person 'unable' to behave according to the ordinary standard. If this is the case, defendants will be entirely relieved of negligence rather than subjecting them to a reduced standard of care. Thus the Commission did not provide for an altered standard of care similar to that provided for children but rather, if the defendant is unable to perform according to the objective standard, then no standard at all applies in a similar way to the law in relation to those struck with a sudden incapacitating illness.

However, this general approach will not apply to the special situation of a defendant driving a motor vehicle, unless the defendant was unable to act voluntarily in the sense of

[24] Ibid, 69.

having the capacity to act freely.[25] This is because road accidents are a 'serious social problem' which warrants the finding of liability regardless of the mental state of the driver.

A variation to this approach of providing different tests for liability depending on the context in which the injury occurred was suggested by the trial judge in *Carrier v Bonham*. McGill DCJ noted that negligence law has undergone fairly recent developments due to the existence of compulsory insurance. His Honour found that in those areas where compulsory insurance schemes are the norm exceptionally high standards of care have been imposed on defendants, making it easier for plaintiffs to establish liability.[26] This development is no doubt due to the certainty of compensation for the plaintiff and the loss spreading benefits to the defendant, which insurance provides.

His Honour found this situation is problematic and unfair when the law, as altered to take into account the existence of insurance, extends to situations where the defendant is not insured. As a solution, his Honour proposed that liability of both children and those suffering from a mental illness should vary according to whether there is an insurance fund standing behind the defendant.[27] Thus, as a general rule, those suffering from a mental illness would be treated similarly to children in that their mental incapacity would

[25] Ibid, 70.

[26] For example in the areas of motor vehicle accidents and accidents occurring in the course of employment. See also Harold Luntz and David Hambly, *Torts, Cases and Commentary* (5th ed, 2002) 244; New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales, Final Report 1* (1984) [3.35], [3.95].

[27] *Carrier v Bonham* 2000 QDC 226 (Unreported, McGill DCJ, 4 August 2000) [73].

be taken into account when determining the standard of care applicable to them. The standard would be that which is to be reasonably expected of a person with the particular mental state of the defendant. For liability to attach in these cases the defendant must have at least a rudimentary understanding of cause and effect in relation to his/her actions in the sense that 'if something is done, someone else may suffer harm'.[28]

However, when the defendant with a mental illness is covered by insurance, her mental illness and resulting diminished capacity will not be taken into account when determining liability.[29] This approach provides compensation to plaintiffs even when there is no fault (in the everyday or moral sense) on the part of the defendant, but only in situations where the financial burden of this strict liability can be spread amongst wider sections of the community.

In openly acknowledging rather than denying the effect of insurance on liability and in attempting to develop the law accordingly, McGill DCJ's solution perhaps balances the right of the plaintiff to be compensated with the right of the defendant not to be held to an unattainable standard in a way which more realistically takes into account the relative positions of both parties.[30]

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[28] Ibid, [74].

[29] Ibid.

[30] Yet such a solution is in itself problematic, not only because it targets insurance companies (arguably unfairly) but because it could be said to undermine the integrity of negligence law by introducing elements not based in legal principle.

8.3 Conclusion

Although not the primary purpose of this thesis, this chapter has evaluated several ways in which the law of negligence could respond to the defendant who is suffering from a mental illness. This chapter does not provide an answer to the question, but merely provides some possible solutions and the suggestion that perhaps further evaluation into these proposals is required.

CONCLUSION

The purpose of this thesis was to consider how the law of negligence responds to the defendant suffering from a mental illness. Although there is a dearth of litigated cases on this issue, it must be appreciated that the infrequency of litigated cases does not necessarily reflect the extent to which the issue of potentially negligent behaviour of mentally ill actors arises. More importantly, the dearth of litigated cases does not give licence for the law to be unclear, unfair or unjustifiably inconsistent with the philosophical underpinnings or the general body of law. On a more practical level, with the ageing population and the increasing number of people in the community suffering from dementia, issues raised in this enquiry into defendants who are suffering from a mental illness will no doubt be of relevance to a greater number of defendants, as some of the symptoms which are relevant for legal purposes are similar in both types of illness.

The question of how negligence law responds to the mentally ill offender is particularly interesting in light of the marked difference in opinion on this issue between common law judges and tort academics. By and large Australian and other common law courts deciding negligence cases have been reluctant to take into account the mental illness suffered by defendants at the time in which they engaged in damaging behaviour. By and large those who have commented on this law have taken the opposite view. They have regarded this law as predicated on policy decisions which are themselves based on inadequate legal precedent and inaccurate assumptions about mental illness and those

with mental illness. In addition, they regard the policy considerations to be inconsistent with the policy considerations which have been cited in cases of child defendants where the defendant, although not suffering from a mental illness, has similar relevant characteristics in certain respects.

Chapter 1 comprised a brief discussion of the nature of mental illness and the history of government, medical and society response to it. It noted that it is not mental illness per se which is of interest to law, but some of the symptoms of some mental illnesses - in particular, reduced awareness, control and ability to engage in rational thought. It may be thought that the reason these symptoms are of such concern in negligence, as in other areas of law which are concerned with holding people responsible for their actions, is that most areas of law are predicated on the assumption that people possess certain general abilities which include basic levels of awareness, control and capacity for rational thought. This assumption underpins the perceived fairness of holding people responsible for their behaviour. Thus those who have lower levels of these abilities pose both philosophical and practical problems for law.

However it is suggested in this thesis that although mental illness may challenge general understandings of personal responsibility, this is not ultimately the reason for the law of negligence's response to defendants who have a mental illness. Rather, it was here suggested that the common law of negligence, much like other areas of law and society more generally, holds negative attitudes towards people with a mental illness. These attitudes, which are most likely fuelled by fear, ignorance and mistrust, appear to be the

bases for the decisions about the direction of negligence law as it relates to defendants with a mental illness.

In order to substantiate this claim, Chapter 2 outlined the structure of negligence law. Chapter 2 explained that people are liable in negligence when they fail to respond to a risk of harm in the way that ordinary reasonable people would have responded had they been in the same situation. This has been referred to as an objective test or an objective fault standard. This means that courts will not consider the individual characteristics of the particular defendant when determining the appropriateness of the defendant's behaviour. In theory, the only question to be asked in order to determine liability in negligence (assuming duty and causation) is whether the defendant behaved less appropriately than the ordinary person would have done if placed in similar circumstances.

Chapter 2 highlighted the various problems associated with this test. Not only is it unclear what or who the ordinary reasonable person is and what 'in the circumstances' may include, but more importantly for the purposes of this thesis, the test itself has been regarded as unfair and contrary to the history, development and nature of negligence law. This is because of the suggestion that in cases where a defendant is simply unable to respond the way an ordinary reasonable person would have responded the objective test of negligence seems to turn the determination of liability from one predicated on fault, into liability regardless of fault – strict liability.

Having engaged in a cursory examination of the basic rules of negligence and having become aware of the particular problem posed by defendants suffering from a mental illness, a more comprehensive analysis of the theoretical bases of negligence law was undertaken in order to gain a better appreciation for the common law's response to defendants suffering from mental illness.

Chapter 3 highlighted that there is no consensus among tort scholars as to the nature, aims and purposes of tort law and that as a result arguments based on one or other of the varying goals of tort may be raised in order to support any argument offered on the topic. Tort law has been said to be concerned with corrective justice, in which case the capacity of the defendant may be relevant to determining liability. It has also been viewed primarily as a means of compensation, in which case the defendant's capacity is relegated in importance below that of the plaintiff's suffering. When regarded primarily as a system of loss distribution capacity is most likely irrelevant, but if tort is a scheme aimed at deterrence there are arguments both in support of and contravening the relevance of capacity to liability.

It is difficult therefore to use tort theory as a definitive guide to the most appropriate response for negligence law to take towards defendants with a mental illness. The view which has been taken in this thesis is that tort law is a mix between all these competing philosophical underpinnings. The question therefore arises where the line between these interests – plaintiff or defendant, fault or compensation, security or freedom, should sit. Tort theory does not provide a clear answer.

The view adopted throughout this thesis was that the question about defendants with mental illness is in essence one about defendants with certain reduced capacities. It was considered instructive, for purposes of comparison, to examine another group of defendants who are generally regarded as having a reduced ability to think rationally, control impulses and maintain appropriate levels of awareness. Children, like those people suffering from a mental illness, have characteristics which differ to 'ordinary' healthy adults. And in fact negligence law historically responded to child and mentally ill defendants in a similar manner.

Chapter 4 revealed that courts in common law jurisdictions now believe that applying the objective ordinary person test to child defendants is inappropriate given the reduced level of capacity that children have compared to adults. Yet this rule is not universally applied. When child defendants are engaged in activities which may be regarded as 'adult', courts will hold them to the standard of the ordinary adult. This distinction was regarded as important as it raised the possibility of differentiating determinations of liability within the one group of defendants according to the class of activity the particular defendant was engaged in. This required further examination in order to assess whether these subtleties could be applied to defendants suffering from a mental illness.

One of the reasons offered for this exception to the general rule of liability in negligence for child defendants was that people who are engaging in transactions with children are generally aware of the potential for the child's reduced abilities and concomitant risky

behaviour. They may therefore be reasonably expected to alter their own behaviour to accord with their expectations of the child's behaviour. When it is not reasonable for a person to know that the person with whom they are transacting is a child – such as when a child is driving another car, the child driving the car must meet the expectations of those with whom she interacts on the road. And this means meeting the standard of the ordinary reasonable adult. While this explanation is convincing in some respects, for the reasons outlined in chapters 4 and 5 it is incomplete and ultimately unsatisfactory.

A second explanation for the law's response to child defendants, and the explanation which has been accepted in this thesis, is that those activities which have been regarded by courts as 'adult' are in fact those activities which are covered by insurance. It is suggested that courts have engaged in a policy decision to raise the interests of the plaintiff above that of the defendant when the loss suffered is easily spread amongst the insured, but not when the loss would be held solely by the child defendant. Thus the discussion in chapter 4 indicates that negligence law takes a child's age into account in determining liability, except nominally if the child is engaged in an activity which is adult in nature, but in reality when the child's behaviour is covered by insurance.

The discussion of child defendants in negligence cases therefore had two benefits. It explained in detail the way in which courts respond to a group of defendants regarded as less capable than ordinary adults, and it highlighted that there is a difference in legal response to a defendant's reduced capacity depending on whether this reduced capacity is due to childhood or mental illness. Chapter 5 was directed at determining whether or not

this is a valid difference. It did so by considering some of the theories which have attempted to explain the law in relation to defendants with a mental illness the either in isolation or in relation to child defendants. It concluded that none of these explanations adequately justify the difference in legal treatment of these two groups of defendants.

The enquiry to which this thesis has been directed had thus far revealed no definitive answers. It is apparent that the law purportedly does not take into account the reduced abilities of defendants when determining their liability in negligence. It has also been noted that courts do not consider the mental illness suffered by a defendant when determining liability. However the reduced abilities of child defendants will be taken into account in some circumstances. Yet tort scholarship revealed no principled reason why this difference in legal treatment of similar symptoms should exist.

Chapter 6 moved this enquiry beyond the bounds of tort law and into criminal law in order to gain insight into how and why negligence law responds to defendants with a mental illness in the way that it does. Criminal law has dealt extensively with such defendants. This brief examination revealed that although the law regulating criminal activity has attempted to deal with the particular dilemmas raised by mental illness, problems continue. Its responses are often arbitrary, inconsistent with current medical evidence and inconsistent with the purported aims of criminal law. The most important element of the discussion in chapter 6 was the suggested reasons for these inadequacies. In particular, it is possible that an unintended yet pervasive prejudice based on

misunderstanding and mistrust of all things related to mental illness (sanism) permeates the criminal law, much in the same way as it permeates society more generally.

The thesis then turned to the limited Australian case law relating to defendants with a mental illness. The discussion in chapter 7 suggested that the response of the law of negligence to defendants with a mental illness can be criticised for reasons similar to those in the criminal law context. That is, the judges' reasons for decisions in the Australian law of negligence are largely unsustainable and are perhaps illustrative of the fear, mistrust and ignorance which have been said to exist in the criminal law, as well as in society generally.

The final step in the process of analysing negligence law's response to defendants with a mental illness was to consider at a general level some of the various available options for reform.

This thesis does not provide a definitive answer on the way in which the law of negligence should respond to the defendant with mental illness. It simply notes that the anomalies which are apparent in the law are most likely fuelled by an unintentional yet negative attitude towards mental illness – an attitude which has been referred to as sanism.

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