

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHOÍRIÚ AN DLÍ

(LRC 18-1985)

REPORT ON THE LIABILITY IN TORT OF
MENTALLY DISABLED PERSONS

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The Law Reform Commission,
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

202

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THE LAW REFORM COMMISSION**REPORT ON THE LIABILITY IN TORT OF
MENTALLY DISABLED PERSONS****CHAPTER 1 INTRODUCTION**

In this Report we examine the present law concerning the liability in tort of mentally disabled¹ persons, and related matters, and make proposals for reform. The subject raises difficult issues of legal policy. Our aim in the Report is to accommodate in as sensitive a manner as possible the goals of establishing just and humane criteria of legal responsibility with those of protecting the legitimate interests and expectations of the members of society in general and of the victims of injury caused by mentally disabled persons.

There have been few reported decisions in this country dealing with the subject of the liability in tort of mentally disabled persons. This paucity is reflected in other jurisdictions. It would be wrong, however, to conclude that the subject is not an important one. The question raises significant issues of justice and social policy and we consider it desirable that the subject be analysed now, dispassionately, by a law reform agency, rather than to postpone development of the law until some aspect of the subject comes before a court. A global approach to the subject is essential for effective law reform, in our view.

In Chapter 2, we set out the main features of the present law in common law jurisdictions. In Chapter 3 we briefly examine the approaches of some jurisdictions with civil law systems. In Chapter 4, we analyse the policy issues and we make proposals for reform of the law. These proposals represent our final views on the subject. A summary of our proposals is set out in Chapter 5.

¹ Throughout the Report, save where otherwise indicated, references to mentally disabled persons extend to those who are mentally ill or mentally retarded.

CHAPTER 2 THE PRESENT LAW

The law relating to the liability in tort of mentally disabled persons¹ is difficult to state with any degree of confidence. In part this is attributable to the paucity of reported decisions, not only in Ireland but throughout the common law jurisdictions. In part, the uncertainty is merely an aspect of a more general lack of precision regarding the scope of the actions for trespass to the person, to goods and to land in the modern Irish law of torts.

It is against this background that we must examine the decisions having a bearing on the question of the liability of the mentally disabled.

An early case expressly considering the issue, albeit tangentially, is Weaver v Ward.² Two soldiers were skirmishing in a military exercise. The defendant "by chance and misadventure and against his will in discharging his piece"³ wounded the plaintiff. The defendant demurred. Judgment was given to the plaintiff. The report states:

"for though it were granted, that if men tilt or turney

¹ See Salmond & Heuston, 412-413, McMahon & Binchy, 72-73, 154, Fridman, Mental Incompetency, Part II, 80 L.Q. Rev. 84, at 84-96 (1964), Picher, The Tortious Liability of the Insane in Canada, 13 O.H.L.J. 193 (1975).

² Hob. dl34, 80 E.R. 284 (K.B. 1616). See also Cross v Andrews, Cro. Eliz. 622, 78 E.R. 863 (1598), a decision "which lie[s] on the border line between tort and contract, involving the rigid common law liability of ... an inn-keeper": Hornblower, Insanity and the Law of Negligence, 5 Colum. L. Rev. 278, at 279 (1905). Cf. Wilkinson, Mental Incompetency as a Defence to Tort Liability, 17 Rocky Mtn. L. Rev. 38, at 40 (1944), Cook, Mental Deficiency in Relation to Tort, 21 Colum. L. Rev. 333, at 333 (1921), Ague, The Liability of Insane Persons in Tort Actions, 60 Dickinson L. Rev. 211, at 213 (1956).

³ "... casualiter & per infortunium & contra voluntatem suam": id., at 134 and 284, respectively.

in the presence of the King, or if two masters of defence 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 if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification, prout ei bene licuit), except it may be judged utterly without his fault.

As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with circumstances, so as it had appeared to the Court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt."⁴

As may be seen, the reference to the liability of mentally disabled persons is obiter,⁵ but the passage has given rise to much discussion. Bohlen captures the uncertainty of later scholars:

"In modern ears this language rings strangely, for it seems extraordinary that it should be so strongly suggested that a defendant should be excused for a trespass, if it be shown to be 'utterly without his fault', and that, at the same time, a lunatic, as such incapable of fault, either of intention or lack of care, should be said to be liable."⁶

⁴ Hob., at 134 80 E.R., at 284.

⁵ In Slattery v Haley, 52 O.L.R. 95, at 100 (1922), Middleton, J. described this passage from Weaver v Ward as "pure dictum".

⁶ Bohlen, Liability in Tort of Infants and Insane Persons, 23 Mich. L. Rev. 9, at 16 (1924). See also Cook, supra, at 335-336, Aque, The Liability of Insane Persons in Tort Actions, 60 Dickinson L. Rev. 211, at 212, 214 (1956), Picher, supra, at 203-204.

Bohlen explains the dichotomy by arguing that Weaver v Ward is best understood as a transitional decision in the move from treating trespass as a tort of strict liability towards regarding it as one involving the requirement of fault on the part of the defendant. He counsels that, at the time Weaver v Ward was decided,

"it must be remembered the law was still in transition. The old concept was still a living force, with its implication that it was the objective character of the act that was material. The new idea that even in trespass there can only be liability if the defendant is proved in fault was as yet in its infancy. It is, therefore, not so surprising to find courts at that time looking to the quality of the act as act and not at the capacity of the actor to be guilty of fault."⁷

The move from strict liability towards fault in trespass is a complicated, contentious and uncertain aspect of the history of tort law.⁸ Even today, common law jurisdictions take widely differing approaches. In the United States,⁹ the distinction between directly and indirectly caused injury has been effectively replaced by a distinction based on intention and negligence. England has gone some way down the same road: precisely how far is a matter of

⁷ Bohlen, supra, at 17. Cf. Robins, Liability in Tort of Mental Incompetents, [1963] Special Lectures of the Law Society of Upper Canada 77, at 80:

"[Weaver v Ward] should be read only in the light of the legal constituents of the trespass form of action in the 17th century, and in the light of Stanley v Powell, [1891] 1 Q.B. 86 and more recent cases which redefine the basis of liability in tort. There may be good reasons for imposing liability upon the mentally disabled for their tortious conduct, but Weaver v Ward is not one of them."

⁸ See Trindade, Some Curiousities of Negligent Trespass, 20 I.C.L.Q. 706 (1971), Bates, Accident, Trespass and the Burden of Proof, 11 Ir. Jur. (n.s.) 88 (1976).

⁹ See Prosser & Keeton, 30-31.

debate.¹⁰ New Zealand¹¹ has also favoured this approach. Australia¹² and Canada¹³ have held back. In these two countries fault continues to play an important role in determining liability. A defendant will not be liable in trespass if he or she neither possessed the requisite intention nor was negligent; but, where the plaintiff proves that the defendant made an unpermitted direct contact with his or her body, goods, house or land, the onus shifts onto the defendant to show that in fact he or she did not have the requisite intention and was not negligent.

In Ireland, the position is not entirely clear. In Electricity Supply Board v Hastings & Co. Ltd.,¹⁴ O'Keefe, P. accepted the proposition that in proceedings for trespass to goods, a trespass, to be actionable, "must be either wilful or negligent". The judge considered that the English cases of National Coal Board v Evans & Co. (Cardiff) Ltd.,¹⁵ and Fowler v Lanning¹⁶ "appear to support the proposition sufficiently for me to accept it as being correct".¹⁷

In Fowler v Lanning,¹⁸ Diplock, J. had summarised the law as he understood it:

¹⁰ Salmond & Heuston, 6, 114, 127-129, Winfield & Jolowicz, 117-119.

¹¹ Beals v Hayward, [1960] N.Z.L.R. 131 (Sup. Ct., McGregor, J., 1959).

¹² Cf. Fleming, 21, Venning v Chin, 10 S.A.S.R. 299 (Full Ct., 1974).

¹³ Bell Canada v Cope (Sarnia) Ltd., 11 C.C.L.T. 170 (Ont. High Ct., Linden, J., 1980), (aff'd, 119 D.L.R. (3d) 254, 15 C.C.L.T. 190 (Ont. C.A., 1981), Beale v Beale, 24 C.C.L.T. 101 (N.S. Sup. Ct. Tr. Div., Grant, J., 1982).

¹⁴ [1965] Ir. Jur. Rep. 51.

¹⁵ [1951] 2 K.B. 861, critically analysed by Hall Williams, Note, 15 Modern L. Rev. 79 (1952).

¹⁶ [1959] 1 Q.B. 426.

¹⁷ [1965] Ir. Jur. Rep., at 54.

¹⁸ Supra, fn. 16.

- "(1) Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part
- (4) The onus of proving negligence, where the trespass is not intentional, lies upon the plaintiff, whether the action be framed in trespass or in negligence. This has been unquestioned law in highway cases ever since Holmes v Mather,¹⁹ and there is no reason in principle, nor any suggestion in the decided authorities, why it should be any different in other cases. It is, indeed, but an illustration of the rule that he who affirms must prove, which lies at the root of our law of evidence."

It seems that in Electricity Supply Board v Hastings & Co. Ltd., O'Keefe, J. supported the first only of these propositions.²⁰ Thus, the question of onus of proof remains open in Ireland.²¹ Certainly no case has yet

¹⁹ L.R. 10 Ex. 261 (1873).

²⁰ The fact that National Coal Board v Evans & Co. (Cardiff) Ltd. clearly supports the first of these two propositions but does not attempt to address the other, enforces this interpretation. Cf. Todd, Note: Insanity as a Defence in a Civil Action of Assault and Battery, 15 Modern L. Rev. 486, at 490 (1952).

²¹ A narrow argument could perhaps be made that Donohue v Coyle [1953-1954] Ir. Jur. Rep. 30 (Circuit Ct., Judge Sheehy, 1954) is an authority in favour of requiring the plaintiff to prove intention or negligence on the part of the defendant in proceedings for trespass to the person. Judge Sheehy considered that he "must follow" the decision of Morriss v Marsden [1952] 1 All E.R. 925 (Q. B. Div., Stable, J.). There, Stable, J. held (at 928) that "an intention to do the thing complained of must be alleged and proved". For criticism of Stable, J.'s approach to the question of the onus of proof, see Todd, supra. Since neither Morris v Marsden nor Donohue v Coyle addressed the wider issues relating to the onus of proof outside the context of the issue of insanity, it would seem unwise to place any great weight on Donohue v Coyle as an authority in respect of the general issue of the onus of proof in proceedings for trespass to the person (or to goods or land).

expressly rejected the general principle that, in trespass actions, proof of direct injury caused by the defendant shifts the onus onto the defendant to prove lack of intention and of negligence on his or her part.

So far as the specific question of the liability of mentally disabled persons in tort is concerned, it appears that even in the middle of the nineteenth century, the view prevailed that the mentally disabled would generally be answerable in trespass in spite of their moral non-culpability. Thus, in a note to the case of Borradaile v Hunter,²² Sergeant Manning stated that:

"[i]f an insane person kills a man, he is not criminally liable; but if he slaughters his neighbour's sheep, he is liable in damages, to the owner

Upon indictments and other proceedings of a criminal nature, the intention with which the party accused committed the act proved against him, is the sole test of his amenability to criminal justice. But in an action of trespass and other civil proceedings, if the act be one which the law prohibits, the damage sustained by the party injured, and not the intention of the party who does the injury, is the only proper subject of inquiry, with the exception perhaps of the few cases in which vindictive damages are allowed to be given"

The same approach was favoured, *obiter*, by Kelly, C.B. (dissenting) in Mordaunt v Mordaunt,²³ an English divorce case in 1870

"It is true that a judgment of dissolution may operate as a punishment, but so also may any verdict or judgment in a civil action, whether for a wrong as a libel, or an assault, or to recover landed estate, as in ejectment, or to recover a debt or damages in an action of assumpsit or trover. Yet, in all or any of

²² 5 Man. & G. 639, at 669, note (9) 134 E.R. 715, at 728-729 (1843).

²³ L.R. 2 P.&D. 109, at 142 (1870). See also Haycraft v Creasy, 2 East 92, at 104, 102 E.R. 303, at 308 (*per* Lord Kenyon, C.J. 1801).

these cases insanity is no defence and no bar to the suit, and no ground for a stay of proceedings. It is enough that the defendant has done a wrong, or given a right of action to the plaintiff for any of the causes above enumerated"

In later cases, however, a different approach was favoured. In Emmens v Pottle,²⁴ in 1885, a libel action, Lord Esher responded to counsel's assertion that "[e]ven a lunatic may be liable for a libel"²⁵ with the reply: "That depends upon whether he is sane enough to know what he is doing".²⁶

The same judge is reported as having observed in Hanbury v Hanbury,²⁷ a divorce case, seven years later, that:

"... wherever a person did an act which is either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequence of the act which he was doing that was an act for which he could be civilly or criminally responsible to the law."

This century has witnessed a reversion to a stricter standard in the English cases. In White v White,²⁸ in 1949 - another divorce case²⁹ - Denning, L.J. said:

²⁴ 16 Q.B.D. 354 (1885).

²⁵ Citing Mordaunt v Mordaunt, L.R. 2 P. & D. 109, at 142 (per Kelly, C.B., dissenting, 1870).

²⁶ 16 Q.B.D., at 356.

²⁷ 8 T.L.R. 559, at 560 (1892).

²⁸ [1950] P. 39, at 58-59 (C.A., 1949).

²⁹ The reason why divorce cases raised the issue of mental capacity so frequently was that some of the grounds for divorce - notably cruelty - required the courts to specify the degree of mental responsibility necessary to come within these grounds. See Cretney, 130-133, Neville Brown, 26 M.L.R. 625 (1963).

"In the case of torts such as trespass and assault, it is settled that a person of unsound mind is responsible for wrongful conduct committed by him before he was known by the injured person to be of unsound mind, even though it has since become apparent that such conduct was influenced by mental disease which was unrecognised at the time: and this is so, even if the mental disease was such that he did not know what he was doing or that what he was doing was wrong: because the civil courts are concerned, not to punish him, but to give redress to the person he has injured

I am aware that these rules of law have been criticised by some jurists who would make liability in tort depend on blameworthiness, but I venture to think that this criticism is somewhat out of date. Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom should the risk fall I can understand, of course, that where a specific intent is a necessary ingredient of the wrong, a man may not be responsible, if he was suffering at the time from a disease which made him incapable of forming that intent, e.g. Director of Public Prosecutions v Beard.³⁰ But the cases which I have cited³¹ show that assault and trespass, to which I should add negligence, do not fall within that exception."³²

The central modern English case on the subject is Morriss v Marsden,³³ a judgment of Stable, J. in 1952. The defendant attacked the plaintiff, the manager of an hotel where the defendant was a guest, striking him on the head with a blunt

³⁰ [1920] A.C. 479.

³¹ Weaver v Ward, Hob. 134, 80 E.R. (1616), Mordaunt v Mordaunt, L.R. 2 P. & D. 103 (1870) Williams v Hays, 42 Am. St. R. 743 (1892), Taggard v Innes, 12 Upp. Can. 77 (1862), Donaghy v Brennan, 19 N.Z.L.R. 219 (1901).

³² For criticism of Denning, L.J.'s approach, see Fridman, Mental Incompetency - II, 80 L. Q. Rev. 84 at 86 (1964).

³³ [1952] 1 All E.R. 925 (Q. B. Div. Stable, J.), criticised by Todd, Note: Insanity as a Defence in a Civil Action of Assault and Battery, 15 Modern L. Rev. 486 (1952), and noted with approval by Anon., Note, 68 L. Q. Rev. 300 (1952).

instrument. The plaintiff sued for damages for assault and battery.³⁴

Stable, J. found that the defendant was not in a condition of automatism or trance at the time of the attack, but that his mind directed the blows he struck and that at the relevant time he was "a catatonic (sic) schizophrenic and a certifiable lunatic who knew the nature and quality of his act, but whose incapacity of reason arising from the disease of his mind was of so grave a character that he did not know that what he was doing was wrong".³⁵

Stable, J. rejected the argument that the M'Naghten Rules should determine civil liability. He pointed to the obvious fact that they would represent an inappropriate criterion for testamentary or contractual capacity. Nor did he interpret the decision of White v White³⁶ as supporting their application as the test for cruelty in divorce proceedings.

In a passage that merits extensive quotation, Stable, J. disposed of the question of the tortious liability of the mentally disabled as follows:

"I do not think I need discuss the question referred to in argument - whether the trend of our law is in the direction of culpability or compensation. Conflicting views on that matter have been expressed in various judgments: see White v White [1949] 2 All E.R. at 350-352 per Denning, L.J. as contrasted with Read v J. Lyons & Co. Ltd., per Lord Macmillan [1946] 2 All E.R. 476 and per Lord Simonds (ibid., 481-482). I think it is sufficient if I examine the essential facts which must be proved to establish the cause of action on

³⁴ The plaintiff also sued the defendant's mother for negligence in that, knowing of her son's insanity and propensity to commit unprovoked acts of violence, she reserved a room for him at the hotel without warning the manager of his condition. Stable, J. rejected this action on the basis that there was "no evidence to support" it: id., at 928.

³⁵ [1952] 1 All E.R., at 926-927.

³⁶ [1950] P. 39 (C.A., 1949).

which the plaintiff relies. Counsel for the plaintiff says in effect that where the action is an action of trespass in the highly technical sense, no averment either of negligence or intention is essential to support it. Counsel for the defendant, on the contrary, argues that, whatever the position may have been 150 or two hundred years ago, the whole trend of modern decisions is that in an action, whether it be founded on trespass or on case, negligence or intention must be averred. I cannot think that, if a person of unsound mind converts my property under a delusion that he is entitled to do it or that it was not property at all, that affords a defence. I can bring an action against him for the recovery of my property, or, if it has been converted and destroyed, for its value. Against that it may be said: 'There all you are seeking is restitution, either the return of your property or the equivalent. In this case what is being asked for is damages, which is compensation and involves in a sense some punitive element.' On the whole, I accept the view that an intention - i.e. a voluntary act,³⁷ the mind prompting and directing the act which is relied on, as in this case, as the tortious act - must be averred and proved. For example, I think 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. I agree that there is much force in the contention that, in those cases where it has been held that an intention must be averred and proved, the act in itself was a legitimate piece of behaviour e.g., in Stanley v Powell³⁸ where a man shooting pheasants shot the beater and Holmes v Mather³⁹ where the defendant was being driven in his carriage along a highway when the horse bolted. Those cases may well be different from the present matter where the act complained of was a trespass, as direct an act of violence as possible.

³⁷ Todd, Note: Insanity as a Defence in a Civil Action of Assault and Battery, 15 Modern L. Rev. 486, at 489-490 (1952) criticises this passage for confusing the distinction between voluntariness and intention. When the entire sentence is closely examined, however, this criticism does not appear justified.

³⁸ [1891] 1 Q.B. 86.

³⁹ L.R. 10 Exch. 261 (1875).

The injuries were not the indirect result of a legitimate activity gone wrong, but were the direct result of illegal behaviour, which was wrongful from the beginning and could not conceivably be anything else. The distinction may be succinctly stated as being between conduct tortious in its very essence and conduct innocent in itself, but becoming tortious by the addition of some ingredient such as intention, heedlessness, or malice. But though the argument is extremely attractive, I must hold that an intention to do the thing complained of must be alleged and proved.

The latest authority on this question is National Coal Board v J.E. Evans & Co. (Cardiff), Ltd.³⁹ It may be said that in that case the Court of Appeal were dealing with an act that was perfectly innocent and legitimate in itself and only became actionable, if at all, because inadvertently it resulted in injury to the plaintiff's property. It is possible that, if that court had been confronted, as I am, with an activity of a wholly different character, viz., a violent assault and battery on a harmless man, they would have held that a different principle applied and that such considerations as intention and conception of right and wrong were wholly immaterial, the act of trespass being all that was required to support the cause of action. The matter is by no means free from doubt, but I think I ought to apply that decision, which is in accordance with my own view of the law though it is not directly in point. It appears that Denning, L.J. does not agree with that aspect of the law: see White v White⁴⁰. It is a matter of controversy. There is no authority directly in point, but I venture to think the weight of the dicta on the subject and the trend of authority point to the conclusion I have reached.

The next matter to consider is whether, granted that the defendant knew the nature and quality of his act, it is a defence in this action that, owing to mental infirmity, he was incapable of knowing that his act was wrong. If the basis of liability be that it depends, not on the injury to the victim, but on the culpability of the wrongdoer, there is considerable force in the argument that it is, but I have come to the conclusion that knowledge of wrongdoing is an immaterial averment, and that, where there is the capacity to know the

⁴⁰ [1951] 2 K.B. 861.

nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased. I am fortified in that view by the decision in Astle v Astle.⁴¹ That was a divorce case, in which cruelty was alleged, and Henn Collins, J., allowed the answer to be amended by inserting the plea that the respondent was of unsound mind and did not know the nature and quality of the act he was committing, but nothing was said about inserting in the amended pleading the other branch of the M'Naghten rules, that he did not know that what he was doing was wrong. In the result, Henn Collins, J., allowed the decree on the ground that cruelty during a lucid interval had been proved. He held that acts otherwise amounting to cruelty, if done by a person of unsound mind who did not know the nature and quality of what he was doing did not constitute a matrimonial offence."⁴²

Stable, J.'s judgment in Morriss v Marsden has been the subject of considerable discussion.⁴³ It has been criticised for not distinguishing with sufficient clarity between volition and intention⁴⁴ and for "reading more into

⁴¹ [1939] P. 415.

⁴² [1952] 1 All E.R., at 927-928.

⁴³ See Todd, Note, 15 Modern L. Rev. 486 (1952), Todd, The Liability of Lunatics in the Law of Tort, 26 Austr. L. J. 299 (1952), Fridman, Mental Incompetency, Part II, 80 L. Q. Rev. 84, at 87ff. (1964), Picher, The Tortious Liability of the Insane in Canada, 13 O.H.L.J. 193, at 212-213 (1975), Robins, Liability in Tort of Mental Incompetents, [1963] Special Lectures of the Law Society of Upper Canada 77, at 83-84.

⁴⁴ Todd, Note, 15 Modern L. Rev. 486 (1952), Fridman, supra, at 87-88.

the Astle decision than is actually there".⁴⁵

The only reported Irish decision dealing directly with the question of the tortious liability of mentally incapacitated persons is the Circuit Court case of Donohue v Coyle⁴⁶ in 1954. The facts (as summarised in the report)⁴⁷ were as follows. Early one morning, the plaintiff, a farmer, discovered the defendant in his hayshed. The defendant, who was on top of the hay, addressed the plaintiff by name and threatened to burn down the hay shed and the plaintiff's house. He then came down from the hay and went to attack the plaintiff who retreated into his house.

The defendant continued to shout out threats. He threw stones at the windows of the house, breaking some of them. The plaintiff came out of the house to try to drive the defendant off. A running fight lasting about five or ten minutes ensued with the defendant emerging as victor. He knocked the plaintiff down and kicked him in the head and face.

Later that morning the defendant was certified as being insane. The same doctor had examined the defendant on the previous night and had been of opinion that he was not then

⁴⁵ Picher, supra, at 213. Picher argues (at 212-213) that in Astle the court was not confronted with the situation where a person knows the nature and quality of his acts but does not know that what he is doing is wrong; "[t]hus the relationship of the two states of mind was not discussed in Astle, and it is unlikely that Collins, J., directed his mind to the problem". Id., at 213. Picher also points to a passage from Henn Collins, J.'s judgment ("If there be a degree of insanity which affords an answer to a matrimonial suit, how is it to be safely measured except by the test applied in all other courts?") and argues that, since Collins, J. had been referring to the M'Naghten case immediately prior to this passage, "it is possible that in referring to other courts he was including criminal courts and was thus adopting the entire M'Naghten test though his words had only mentioned half of it".

⁴⁶ [1953-1954] Ir. Jur. Rep. 30 (Circuit Ct., Judge Sheehy, 1954).

⁴⁷ Id., at 31.

certifiable. The doctor had given him a sedative and the defendant had spent the night in the house of a relative. He had awoken at 3 a.m. and behaved in an extremely violent manner. He threw the furniture around and broke a considerable amount of it. After some time he left the house and the next place in which he was seen was the plaintiff's hay shed.

The plaintiff sued the defendant for assault and battery. In his direct evidence the defendant stated that, while he remembered being in the plaintiff's hay shed, he had no recollection whatever of what took place afterwards. He said that his mind was a complete blank as to this. Later in his evidence, however, he admitted remembering some of the details of the attack.

In his defence, the defendant pleaded (*inter alia*) that if he did the wrongful acts complained of "he was, at the time of the commission of the said wrongful acts, suffering from such a disease of the mind that he had no genuine intention of doing the said wrongful acts".

Counsel for the plaintiff contended that it was no defence that the defendant had no genuine intention of assaulting the plaintiff. He argued that "[a] lunatic is liable for his torts unless his insanity is of such a grave degree that he is reduced to a state of automatism. If he knows what he is doing he is liable, even if he does not know that what he is doing is wrong".⁴⁸ He cited *Morriss v Marsden*,⁴⁹ which had been decided two years previously, in support of his argument.

Counsel for the defendant contended that the defendant had no intention of doing the wrongful acts which injured the plaintiff. There was evidence that his mind was a complete blank for the duration of the relevant period. Counsel cited in support *Hanbury v Hanbury*⁵⁰ and a passage from Halsbury's *Laws of England*:⁵¹

48 *Id.*

49 [1952] 1 All E.R. 925.

50 8 T.L.R. 559 (1892). See *supra*, p. 8.

51 2nd ed., vol. 19, p. 403, quoted [1953-1954] Ir. Jur. Rep., at 31.

"But it is conceived that insanity would now be held to be a defence to an action of tort if it could be proved that the person committing the wrong was not competent by reason of mental infirmity to understand the nature and consequences of the act which he was doing."

Judge Sheehy disposed of the case in two sentences:

"In my view the defendant is liable in this case. In the circumstances I feel that I must follow the recent English decision of Morriss v Marsden."⁵²

This laconic judgment throws no light on how the Judge came to the conclusion that he "must follow" a decision of a trial judge in another jurisdiction. Perhaps he considered Stable, J.'s approach to have a compelling attraction from the standpoint of policy.

So far as the contributory negligence of mentally disabled persons is concerned, it was observed by Walsh, J., in Kingston v Kingston,⁵³ in 1965, that "the question of the standard of care required of [them] is still open" There does not appear to be any Irish authority dealing with the negligence of mentally disabled persons.

In view of the paucity of Irish case law on the subject, it is desirable to examine the developments in the law of other common law jurisdictions.

New Zealand

There have been two important decisions in New Zealand on the subject of the tortious liability of one mentally

⁵² [1953-1954] Ir. Jur. Rep., at 31.

⁵³ 102 I.L.T.R. 65, at 67 (Sup. Ct., 1965). See also Duffy v Fahy, [1960] Ir. Jur. Rep. 69, at 75 (Sup. Ct., per Lavery, J.), O'Sullivan v Dwyer, [1971] I.R. 275, at 286 (Sup. Ct., per Walsh, J.), Carroll v Clare Co. Co., [1975] I.R. 221, at 226-227 (Sup. Ct., per Kenny, J.).

disabled. In Donaghy v Brennan,⁵⁴ in 1900, it was held that liability in tort for assault and battery should attach to an insane man who shot another person. The judge when directing the jury made it clear that for insanity to exist the defendant must have been labouring under disease of the mind to such an extent as to render him incapable of understanding the nature and quality of the act and of knowing that such act was wrong. In spite of a jury finding that the defendant was indeed insane, according to this definition, Connolly, J. imposed liability. The judge applied the dictum in Weaver v Ward,⁵⁵ which he described as "the leading case which has been in existence for 250 years and apparently not questioned until very recently".⁵⁶ Although Connolly, J. quoted Lord Esher's dictum in Hanbury v Hanbury⁵⁷ he appeared to attach little weight to it. The United States decision of Williams v Hays,⁵⁸ in general accord with the Weaver dictum, found much favour with the judge.

The Court of Appeal affirmed. Stout, C.J. delivering the judgment of the Court, criticised the language of Lord Esher's judgment in Hanbury v Hanbury⁵⁹ for "not sufficiently discriminat[ing] between criminal and civil responsibility".⁶⁰ Stout, J. noted that the judgment of Lord Esher:

"stops short, however, of saying that an insane person is not civilly liable for those wrongs in which intention or malice has not been proved. If it said so it would have been in conflict with the dicta of

⁵⁴ 19 N.Z.L.R. 289 (1900), noted briefly, with approval, by Pollock, 18 L. Q. Rev. 30 (1902).

⁵⁵ Supra.

⁵⁶ 19 N.Z.L.R., at 293.

⁵⁷ 8 T.L.R. 559.

⁵⁸ 143 N.Y. 442, 38 N.E. 449 (1894), qualified in 157 N.Y. 541, 52 N.E. 589 (1899).

⁵⁹ Supra.

⁶⁰ 19 N.Z.L.R., at 302.

many eminent judges and the various text-books⁶¹ on wrongs."⁶²

Although not stating the position in absolutely clear terms, it appears that both Connolly, J.⁶³ and the Court of Appeal⁶⁴ accepted that insanity could render innocuous conduct otherwise tortious where proof of malice or of a specific⁶⁵ intent was required for the commission of a particular tort.

In Beals v Hayward,⁶⁶ in 1959, McGregor, J. distinguished between intention and volition, and held that mental incompetency might vitiate the voluntary nature of the act. The plaintiff, a trespassing child, lost his eye when struck by a pellet from a starting pistol fired by the defendant, an elderly recluse, on whose land the plaintiff was trespassing. The jury held that the defendant's act in discharging the gun was not an intentional assault; that at the time of the incident the defendant was not labouring under disease of the mind to such an extent as to render him incapable of understanding the nature and quality of his act; but that he was labouring under disease of the mind to such an extent as to render him incapable of knowing that his act was wrong. On this finding McGregor, J. held that the defendant was not liable.

⁶¹ The Court of Appeal quoted passages from the works of some of these authors, including Bacon and Hale.

⁶² 19 N.Z.L.R., at 302.

⁶³ Cf. 19 N.Z.L.R., at 294.

⁶⁴ Cf. id., at 299.

⁶⁵ Neither Connolly, J. nor Stout, C.J. used this term, although Connolly, J. (at 294) referred to "deliberate" intent. If Stout, C.J., in referring (at 299) simply to "intent", meant to imply that the tort of trespass to the person did not involve intent (or negligence) then Donaghy v Brennan would be difficult to reconcile with Stanley v Powell [1891] 1 Q.B. 86, which was not cited by the Court. Cf. Slattery v Haley, 52 O.L.R. 95, at 100 (per Middleton, J., 1922), Cook, Mental Deficiency in Relation to Tort, 21 Colum. L. Rev. 333, at 336 (1921). Picher, supra, at 207.

⁶⁶ [1960] N.Z.L.J. 131.

McGregor, J. said:

"It might well be that while a person had the mental faculties to appreciate the nature and quality of an act of discharging a firearm, nevertheless the act of discharge might not arise from the exercise of the will; in other words, the act might not amount to an act of volition which would render such act an assault. In some cases, while the nature and quality might well be appreciated, physical or mental disability might be such as to negate any intention on the part of the actor. Perception and volition are entirely different mental processes. And, even if the firing was a volitional act, there might have been no intention to fire at or in the direction of the plaintiff."⁶⁷

Australia

Three important decisions on the subject have been reported in Australia. In White v Pile⁶⁸ the plaintiff, a married woman, was attacked by the defendant, a 25-year-old unmarried man, who was at the time certified as being insane. At the time of the attack the defendant was on short-time release from a mental hospital, where he had been diagnosed as suffering from schizophrenia.

During the attack, which consisted of grappling forcibly with the plaintiff, the defendant repeatedly told her that she was his wife. The Acting Superintendent of the mental hospital testified that the defendant was subject to sudden, passing delusions, including delusions that he was married or engaged. The defendant also had a history of sudden violent acts, apparently of a reasonably minor nature.

The Acting Superintendent testified that, at the time of the attack, the defendant's reasoning powers had been "discarded for the time being". The "integrated self" had been broken up:

⁶⁷ Id., at 144.

⁶⁸ 68 W.N. (N.S.W.) 176 (1950).

"The normal Pile, or in fact, the man Pile was not there. He was not in evidence at the time."⁶⁹

The doctor could not say just how much awareness the "unhealthy Pile - that fragmentary personality" (as the doctor described him) had of what he was doing at the time.

The medical evidence on some key aspects bearing on the liability question was not entirely clear. Asked whether a schizophrenic like the defendant, as he knew him, having regard to the history of the assault, would know that he was doing wrong, the Acting Superintendent replied: "No, he would not have any full appreciation of what he was doing". He did not know whether the defendant had been aware of the fact that he was claiming that the plaintiff was his wife. In answer to further questions, the doctor said that the defendant's "entity" was broken up at the time of the attack. How much of the "entity" was in charge he could not say; but he did not think the defendant was aware of anything "real" at that stage. He considered that no psychiatrist could answer this question. He thought that while the defendant was acting as he did towards the plaintiff, he was not aware that she was not his wife. The defendant was "almost certainly not aware of that".

On the evidence O'Sullivan, D.C.J. found that, at the time of committing the attack, the defendant either did not know what he was doing or did not know that he was doing wrong, so as to bring the case within the M'Naghten Rules, as applied in criminal law.

Turning to the legal implications of this finding, O'Sullivan, D.C.J. stated:

"To maintain an action for injury to the person the injurious act must either be wilful, or the result of

⁶⁹ Cf. id., at 177:

"'Sometimes', the doctor said 'he would do something violent - kick. Ask him why he kicked, and he could not tell me. He may give some incoherent statement, and a few minutes later give no statement at all'."

negligence, Holmes v Mather;⁷⁰ Stanley v Powell;⁷¹ and see Halsbury 2nd ed., vol. 33, p.30.

On these authorities, therefore, some element of intent, actual or imputed, is necessary to establish this tort. If that be so then it would follow that a person whose act was completely involuntary, e.g. an epileptic in convulsion or a somnambulist walking in his sleep, would not be answerable for injuries caused to another person whilst in that condition. On this reasoning a lunatic whose condition was such as to deprive him of all powers of volition would escape liability for a tort committed by him whilst in that state."⁷²

O'Sullivan, D.C.J. found support for this approach in the dicta of Lord Esher in Hanbury v Hanbury⁷³ and Emmens v Pottle.⁷⁴ He also considered that the opinion of the majority⁷⁵ in White v White⁷⁶ supported his approach. He noted Denning, L.J.'s differing view in White v White, and referred to several earlier authorities⁷⁷ to the same effect. O'Sullivan, D.C.J. added:

"Notwithstanding the New Zealand case and the American decisions to which I have been referred it seems to me that the general current of opinion in more recent

⁷⁰ 10 Ex. 261 (1875).

⁷¹ [1891] 1 Q.B. 86.

⁷² 68 W.N. (N.S.W.) at 178.

⁷³ 8 T.L.R. 559, at 569 (1892).

⁷⁴ 16 Q.B.D. 354, at 356 (1885).

⁷⁵ Bucknill and Asquith, L.JJ.

⁷⁶ [1950] P. 39, at 52 (per Asquith, L.J.).

⁷⁷ Weaver v Ward, Hob. 134, 80 E.R. 284 (1616), Mordaunt v Mordaunt, L.R. 2 P. & D. 103, at 142 (1870), Williams v Hays, *supra*, Taggard v Innes, 12 U.C.C.P. 77 (1862), Donaghy v Brennan, 19 N.Z.L.R. 289 (1900).

times favours immunity in this class of action⁷⁸ where the mental disease is such, at any rate, as to bring the case within rules analogous to the M'Naghten Rules as applied to the criminal jurisdiction."⁷⁹

O'Sullivan, D.C.J. concluded:

"To my mind (and I say it with respect for those who have held the opposition opinion) it is more in accord with reason and the common sense of the thing to allow immunity from the civil consequences of the tort of assault committed by an insane person where the nature and degree of his insanity are such as would establish a defence if the assault were the subject of a criminal charge.

For these reasons the verdict in this case should in my opinion be for the defendant."⁸⁰

Todd is a severe critic of the decision:

"It is respectfully submitted that 'reason and the commonsense of the thing' are not usually in the common law. As Lord Porter has recently observed in the House of Lords (Best v Samuel Fox & Co., [1952] 2 All E.R. 394, at p. 395), 'The common law is an historical development rather than a logical whole' Moreover O'Sullivan, D.C.J. seems to have assumed that the M'Naghten Rules are the criteria of legal responsibility in civil as well as criminal proceedings. There is neither any authority nor logical reason for such an assumption. White v Pile

⁷⁸ This is perhaps a difficult conclusion to reach in view of the fact that all the cases directly considering the issue took the opposite view. It is doubtful whether observations on the scope of the defence of insanity in divorce proceedings for cruelty could be interpreted as a "general current of opinion" on the separate question of the tortious liability of the mentally disabled.

⁷⁹ 68 W.N. (N.S.W.) at 179.

⁸⁰ 68 W.N. (N.S.W.) at 180.

must, therefore, be regarded as a most doubtful authority."⁸¹

In Adamson v Motor Vehicle Insurance Trust,⁸² a decision of the Supreme Court of Western Australia in 1957, the plaintiff was injured by a car driven by the defendant. The defendant was under a delusion that his workmates were going to kill him, and he had stolen the car that afternoon, with a view to fleeing from the State. The accident took place when the defendant had ignored the directions of a traffic policeman at a crossing.

Wolfe, S.P.J. imposed liability. He considered that there was "much to be said in support of the theory that a lunatic should be responsible for his tortious acts". The "ancient rule of liability, based on the good of the community", had "much to commend it", in his view. Wolfe, S.P.J. could find no authority which would temper the view held by the earlier writers that insanity was not a defence. While there were instances where the law had developed defences in specific cases, he considered that "the rule of convenience would still seem to be the rational approach in a case like the present"

Wolfe, S.P.J. accepted that his finding "[le]ft untouched" cases where an act is committed in a state of amnesia when the actor is entirely disorientated. But he expressed the view that "[if] the law is to be logical it ought to fix the actor with liability even in these cases".

Wolfe, S.P.J.'s judgment is of particular interest because it considers the propriety of applying the M'Naghten Rules or rules drawn from divorce cases as a test for liability in tort. So far as the former were concerned, he observed that:

"[t]he M'Naghten Rules are unsatisfactory in themselves and furnish a compromise by the criminal law in dealing with alleged offenders who are insane. They are a

⁸¹ Todd, The Liability of Lunatics in the Law of Tort, 26 Austr. L. J. 299, at 301 (1952). See, however, Picher, supra, at 212.

⁸² 58 W.A.L.R. 56 (W.A. Sup. Ct., 1957).

compromise in the sense that the social conscience does not seem readily to have accepted the theories of medical men as to the de facto area of responsibility of a person whose mind was subject to some aberration, mental diseases were in earlier times very imperfectly understood

There is no warrant for applying the M'Naghten Rules in determining responsibility in tort"

Equally, he said, there was no authority for applying the M'Naghten Rules in the law of divorce and then using the rules formulated in divorce as a yardstick to determine liability in tort:

"The law of divorce is a modern statutory development. When the law enacted that an act of adultery, or an act of adultery coupled with cruelty furnished grounds for divorce, it was enacting a social law probably without regard to the so-called wrongdoer's intention. It was enacting a law which should determine by the act itself when a marriage was to be dissolved."

Canada⁸³

There have been several decisions on the subject of the liability of the mentally disabled in Canada.

Taggart v Innes,⁸⁴ in 1862, appears to be the earliest reported decision. There the plaintiff sued for battery, claiming that the defendant had "beaten, bruised and ill-treated him". The defendant pleaded insanity, but Chief Justice Draper, allowing the plaintiff's demurrer, held that a tortfeasor could not plead incapacity of mind as a defence to the action.

⁸³ See Picher, The Tortious Liability of the Insane in Canada, 13 O.H.L.J. 193 (1975), Robins, Liability in Tort of Mental Incompetents, [1963] Special Lectures of the Law Society of Upper Canada 77, Sharpe, Mental State as Affecting Liability in Tort, 23 Chitty's L.J. 46 (1975).

⁸⁴ 12 U.C.C.P. 77 (1982). For critical analysis, see Picher, supra, at 205-206.

Taggart v Innes was mentioned with approval in Stanley v Hayes,⁸⁵ in 1904. In that case, the defendant burned down the plaintiff's barn. Liability was imposed. The case is interesting because the actual holding is somewhat narrower than may at first appear. Boyd, C. referred to Weaver v Ward⁸⁶ and the New Zealand case of Donaghy v Brennan,⁸⁷ decided four years previously. He thought that "the correct result of the common law"⁸⁸ had been stated by Gray, C.J. in the Massachusetts decision of Movain v Devlin,⁸⁹ which, like Williams v Hays,⁹⁰ had imposed liability on a mentally ill person even though incapable of criminal intent.

Boyd, C. continued:

"Upon the evidence in this case I am of opinion that the circumstantial evidence is very cogent to bring the act of destruction in the burning of the barn and its contents home to the defendant. I am not fully assured that he was incompetent at the time to know, and in some measure to appreciate, what he was doing. His own people did not regard him as dangerous or even as unfit to attend to ordinary matters of business. There is evidence, not exactly contemporaneous, but pretty close, that he could make a good deal in horses. His actions on the morning in question show some apprehension that he had been doing wrong in going away from the barn by a different route from the one taken in reaching it, and by a more devious course. While

⁸⁵ 8 Ont. L. R. 81 (Boyd, C., 1904).

⁸⁶ Hob. 134, 80 E.R. 284 (1616). Boyd, C. noted (at 81) that "[t]hrough not cited, the rule laid down in [Weaver v Ward] was followed to its fullest extent by Draper, C.J., in Taggard v Innes" See, however, Picher, supra, at 205.

⁸⁷ 19 N.Z.L.R. 289 (1900). Boyd, C. also quoted from Mr Sergeant Manning's note, 5 Man. & Gr. at 669, 134 E.R., at 728-279 (1843).

⁸⁸ 8 Ont. L. R., at 82.

⁸⁹ 132 Mass. 87 (1882).

⁹⁰ 143 N.Y. 442, 38 N.E. 449 (1894), qualified in 157 N.Y. 541, 52 N.E. 589 (1899).

not morally responsible, it may be, to the extent of the ordinary man, I cannot say that he was utterly unconscious that he was doing wrong; so that altogether my judgment is that he must be held liable at least to the extent of the damage done, taken at rather a low than a high estimate."⁹¹

This analysis would strongly suggest that, in spite of his broadly expressed approval for authorities favouring a general imposition of liability, Boyd, C. preferred to limit liability to cases where there was at least some consciousness of the wrongfulness of the act.⁹² Whether Boyd, C. was referring to moral or legal wrongfulness is not clear from his judgment. Either interpretation appears to be supported in separate passages from the judgment.

⁹¹ 8 Ont. L. R., at 83.

⁹² Cf. Fridman, Mental Incompetency, Part II, 80 L.Q. Rev. 84, at 88 (1964). Contra Linden, 38, who interprets the decision as favouring the imposition of liability where the defendant was aware of the nature and quality of the act, "an his lack of knowledge of wrongdoing was immaterial". Contra, also, Robins, Liability in Tort of Mental Incompetents, [1963] Special Lectures of the Law Society of Upper Canada 77, at 81:

"The Chancellor ... gave no weight to the fact that the defendant to some extent appreciated the significance of his act ... [T]he court took the position that the defendant was subject to strict liability for tortious conduct."

Picher, supra, at 208 lays virtually no emphasis on the limitation of liability articulated by Boyd, C. Sharpe, supra, at 49 considers that:

"the judicial tone of [Stanley v Hayes and Taggart v Innes, 12 U.C.C.P. 77 (1862)] appears to make no allowance whatsoever for the mental state of the defendant in dealing with the harm occasioned by insane individuals."

It is of interest that the Australian case of White v Pile, 68 W.N. (N.S.W.) 176 (1950), discussed supra, pp. 19-23, which restricted liability within the scope of the M'Naghten Rules, did not cite Stanley v Hayes, although it cited other Canadian decisions.

In Wilson v Zeron⁹³ a mentally ill elderly man attacked and killed his supervisor using a piece of iron which the supervisor had left within his reach. The jury held that on account of his mental illness, he was incapable of appreciating the nature and consequences of his act. Greene, J. addressed the question of liability as follows:

"This has been considered by Middleton, J.A. in Slattery v Haley.⁹⁴ The effect of that decision (confirmed later by the Court of Appeal) is that where the lunacy of the defendant is of such an extreme type as to preclude any genuine intention to do the act complained of, there is no voluntary act and therefore no liability.

Following that authority, the action must fail."⁹⁵

The Court of Appeal affirmed on another ground.⁹⁶

Picher⁹⁷ has pointed out that the invocation of Slattery as authority for the holding in Wilson v Zeron is difficult to reconcile with the fact that, in Slattery, Middleton, J.A. specifically restricted his statement to causes where the act "is not wilful and intentional but merely negligent".⁹⁸

In the British Columbia case of Tindale v Tindale,⁹⁹ in 1949, a mother suffering under insane delusions attacked her daughter with an axe. Liability was imposed, the court holding that the defendant had not discharged the onus of proving that she had not known what she was doing or that what she was doing was wrong. In the Manitoba decision of

⁹³ [1941] O.W.N. 353, aff'd [1942] O.W.N. 195.

⁹⁴ [1923] 3 D.L.R. 156.

⁹⁵ [1941] O.W.N., at 354.

⁹⁶ [1942] O.W.N. 195 (C.A.).

⁹⁷ Picher, supra, at 209.

⁹⁸ [1923] 3 D.L.R. 156, at 160.

⁹⁹ [1950] 1 W.W.R. 941, [1950] 4 D.L.R. 363 (B.C. Sup. Ct., Macfarlane, J. 1949).

Phillips v Soloway,¹⁰⁰ however, Williams, C.J.Q.B. adopted the reasoning in Morriss v Marsden and rejected the approach favoured in the Australian decision of White v Pile. He considered that it made:

"no difference whether the defendant was or was not capable of knowing that his act was wrong knowledge or wrongdoing is an immaterial averment, and where there is the capacity to know the nature and quality of the act that is sufficient although the mind directing the hand that did the wrong was diseased."¹⁰¹

Similarly, in the Ontario case of Squittieri v de Santis,¹⁰² in 1976, Galligan, J. said of a defendant who had killed the plaintiff's husband:

"it appears to be clear on the authorities that regardless of whether or not a person because of insanity did not know that his act was wrong, if he intended to kill and appreciated the nature and quality of his acts, the defence of insanity is not available to him."¹⁰³

In Lawson v Wellesley Hospital,¹⁰⁴ the plaintiff, a patient at the defendant hospital, alleged that she had been struck violently by another patient. Her action against the hospital was met by the defence that since the hospital was a psychiatric facility no action lay against it, by reason of section 59 of the Mental Health Act¹⁰⁵ which provided as follows:

"No action lies against any psychiatric facility or any officer, employee or servant thereof for a tort of any patient."

¹⁰⁰ 6 D.L.R. (2d) 570 (Man. Q.B., Williams, J. 1956).

¹⁰¹ Id., at 579.

¹⁰² 15 O.R. (2d) 416 (High Ct., 1976).

¹⁰³ Id., at 417.

¹⁰⁴ 76 D.L.R. (3d) 638 (Sup. Ct. Can., 1977).

¹⁰⁵ Rev. Stat. Ont. 1970, c. 269.

The person who carried out the attack was mentally ill.

The trial judge held¹⁰⁶ that section 59 should be interpreted as meaning that where a plaintiff's cause of action against a psychiatric facility results from some wrongful act on the part of a patient causing damage to another, then even though the patient might not be legally liable for the act, the action against the facility is absolutely barred. On this interpretation of the section, the mental capacity of the particular patient who carried out the attack was not relevant to the outcome of the case.

The Ontario Court of Appeal reversed.¹⁰⁷ It took the view that if the person who carried out the attack was incapable of committing a tort, on account of mental illness, section 59 was not applicable. Accordingly, since the issue of the capacity of the person who carried out the attack was relevant to the determination of the liability of the hospital, the Court of Appeal held that the action should proceed to trial. Dubin, J.A. addressed the question of incapacity to commit a tort as a result of mental illness. He thought it:

"now well established that if a mentally ill person is by reason of his illness incapable of the intent to assault a person, he is not liable in an action founded upon that assault."¹⁰⁸

He accepted the principle that:

"it is an essential element of the tort of assault that there be a voluntary act, the mind prompting and directing the act which is complained of."¹⁰⁹

¹⁰⁶ 44 D.L.R. (3d) 24, at 28 (Phelan, County Ct., J., 1974).

¹⁰⁷ 61 D.L.R. (3d) 445 (Ont. C.A. 1975).

¹⁰⁸ *Id.*, at 450.

¹⁰⁹ *Id.*

In view of the observations in Cook v Lewis,¹¹⁰ the onus of showing that the act was involuntary "appears to be on the person who makes that assertion".¹¹¹

On further appeal,¹¹² the Supreme Court of Canada, affirming the Ontario Court of Appeal, declined to consider what level of voluntariness or appreciation is involved before finding that a mentally disturbed patient can be liable for a battery or an assault. Laskin, C.J.C. considered it "preferable to await a case in which it calls for decision, one in which there is an action against a mentally ill person".¹¹³

In Beale v Beale,¹¹⁴ in 1982, a man who had attacked his divorced wife with a knife sought to be relieved of liability to her for assault and battery on the basis (inter alia) of temporary mental illness and disability. In the course of the attack he had stabbed her sixteen times and himself at least once. The man argued that his mental condition at the time of the attack rendered him incapable of forming the necessary intent and that he was incapable of appreciating the nature and quality of the act or of any act of assault or battery. Grant, J., of the Nova Scotia Supreme Court, Trial Division, held that the defendant had failed to satisfy the onus on him to establish this defence.

¹¹⁰ [1952] 1 D.L.R. 1.

¹¹¹ 61 D.L.R. (3d), at 452. Dubin, J.A. took issue with a passage from Halsbury's Laws of England (3rd ed.), p. 134, para. 236, to the effect that "[p]ersons suffering from mental disorder are not liable for their tortious acts where, by reason of their mental infirmity, they are unable to understand the nature and consequences of their acts or, where intention is an element of the tort, they are unable to form the necessary intention". Dubin, J.A. thought it "more accurate to state that where a person, by reason of mental illness, is incapable of appreciating the nature or quality of his acts, such person has committed no tort since the intention, which is an essential element of the cause of action, is missing". 61 D.L.R. (3d), at 452.

¹¹² 76 D.L.R. (3d) 688.

¹¹³ Id., at 693.

¹⁴ 24 C.C.L.T. 101 (1982).

The medical evidence indicated that the defendant was "a rather rigid, obsessive compulsive personality with paranoid trends who had a reactive depression"¹¹⁵ and who was of a suicidal disposition.

Grant, J. noted that the defendant had prepared for the attack, by hiding a knife in a convenient place. He said:

"Probably he intended to kill both the plaintiff and himself. The medical evidence does not, in my opinion, deal with his capability of forming the intent, nor of his understanding of the nature and quality of his act, nor if the act was wrong. Undoubtedly, he was in a state of mental unrest and instability or torment. However, I find that the medical evidence does not meet the requirements of the tests for proof of insanity in a civil suit."¹¹⁶

We must now consider two important Canadian decisions dealing with the liability in negligence of mentally disabled persons. In Slattery v Haley,¹¹⁷ in 1922, the discussion of the issue was obiter but influential in view of the detailed discussion by Middleton, J. of the relevant authorities. The defendant when driving his car suddenly became unconscious and lost control of the vehicle, which collided with and killed a young boy on the path. The boy's family took proceedings under the fatal accidents legislation. Precisely what brought about the defendant's state of unconsciousness never became clear: possibly it was "a fit or a stroke".¹¹⁸ The defendant had had no previous symptoms or warning of the attack.

Middleton, J. held that the defendant was not liable for the death of the boy, and the Court of Appeal dismissed the appeal.¹¹⁹ Middleton, J. said:

¹¹⁵ Id., at 104.

¹¹⁶ Id., at 108-109.

¹¹⁷ 52 O.L.R. 95 (1922).

¹¹⁸ Id., at 96.

¹¹⁹ Id., at 102. The report contains no account of any judgments having been delivered in the Court of Appeal.

"I think that it may now be regarded as settled law that to create liability for an act which is not wilful and intentional but merely negligent it must be shown to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done, as a conscious being. Failing this the occurrence is 'a mere accident', 'a pure accident', or, as it is often, but not accurately, put, 'an inevitable accident'.

When a tort is committed by a lunatic, he is unquestionably liable in many circumstances, but under other circumstances the lunacy may show that the essential *mens rea* is absent; but, when the lunacy of the defendant is of so extreme a type as to preclude any genuine intention to do the act complained of, there is no voluntary act at all, and therefore no liability.¹²⁰¹²¹

The second decision on the subject is Buckley & Toronto Transport Commission v Smith Transport Ltd.¹²² The driver of a tractor and trailer, employed by the defendant company, drove past a stop sign into a street directly into the path of a street car. At the last moment the driver pulled the steering wheel violently to the right but this did not prevent the collision. The conductor of the street car was injured. There was no dispute that the driver's actions were the cause of the accident; but the defendant sought to avoid liability, pleading unavoidable accident, on the basis that the driver, "suddenly and without warning, had become insane and was labouring under an insane delusion that the transport unit was under some sort of remote electrical control manipulated from the head office of his employer in the city of Toronto, as a result of which he was unable to control the speed of the vehicle or stop it".¹²³

A medical examination disclosed that the driver was suffering from syphilis of the brain. He died within a month.

¹²⁰ Citing Salmond on Torts, 5th ed., 74-75 (1920).

¹²¹ 52 O.L.R., at 99.

¹²² [1946] O.R. 798 (C.A.).

¹²³ Id., at 800.

Liability was imposed by the trial judge, on the basis that the delusion was not present at the actual time of the accident. The Court of Appeal reversed. On the factual question, Roach, J.A. said:

"Here Taylor [the driver] was suffering from the ravages of a disease which, within less than a month, had caused the complete paralysis of his brain. From the time of the collision to his death his physical condition deteriorated rapidly and the ravages of the disease became increasingly manifest. He was not a raving maniac immediately after the collision. His conduct in the split second immediately preceding the impact, in my opinion, is more consistent with this theory than any other, namely, that, notwithstanding the delusion, he still had some sense of self-preservation, and when at the last moment he saw the fence looming up before him, either his diseased mind prompted him, in the agony of that situation, to make a frenzied effort to avoid colliding with that fence, or, having been a driver of trucks and transports for a number of years, he almost automatically turned the steering wheel. Perhaps it was a combination of such an automatic movement and one prompted to some degree by his diseased mind. Certainly he was not contemplating suicide. I should think that there are many persons presently confined in insane asylums who, while suffering from multifarious delusions, still have some sense of self-preservation. Therefore, I would not conclude that his conduct at the last moment before the impact indicated that at that moment, or at any moment prior to it, he had escaped from the insane delusion under which he had previously been labouring."¹²⁴

On the legal implications of these facts, Roach, J.A. quoted part of the passage from Middleton, J.'s judgment in Slattery v Haley¹²⁵ which has already been set out;¹²⁶ he continued:

"Although that latter statement is only obiter in that case, it is supported by English decisions and texts to

¹²⁴ [1946] O.R., at 804-805.

¹²⁵ 52 O.L.R. 95, at 99.

¹²⁶ Supra, p. 32.

which that learned judge refers, and I subscribe to it. In my opinion the question of liability must in every case depend upon the degree of insanity.

Supposing a man who was labouring under the insane delusion that his wife was unfaithful to him, but who was otherwise mentally normal, due to the manner in which he operated a motor vehicle on the highway injured some other person on the highway, no one would suggest that he would not be liable in damages simply because of the fact that he had that one particular insane delusion. Then, add to that one delusion the further delusion that his next-door neighbour was conspiring against him to burn down his house, would he still be liable? I entertain no doubt that he might be liable. He might still be a man who, to use the language of Cockburn, C.J.¹²⁷ . . . , would be 'in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life'. In particular, notwithstanding those delusions, he might still understand and appreciate the duty which rested on him to take care. That surely must be the test in all cases where negligence is the basis of the action. If that understanding and appreciation exists in the mind of the individual, and delusions do not otherwise interfere with his ability to take care, he is liable for the breach of that duty. It is always a question of fact to be determined on the evidence, and the burden of proving that a person was without that appreciation and understanding and/or ability is always on those who allege it. Therefore, the question here, to my mind, is not limited to the bare inquiry whether or not Taylor at the time of the collision was labouring under this particular delusion, but whether or not he understood and appreciated the duty upon him to take care, and whether he was disabled, as a result of any delusion, from discharging that duty.

The delusion or delusions may manifest the fact that due to mental disease the individual's mind has become so deteriorated or dilapidated or disorganized that he has neither the ability to understand the duty nor the power to discharge it. If I have correctly stated the law, as I think I have, then the question is: What was the extent of Taylor's insanity? Did he understand

¹²⁷ In Banks v Goodfellow, L.R. 5 Q.B. 549, at 550 (1870).

the duty to take care, and was he, by reason of mental disease, unable to discharge that duty?"¹²⁸

Roach, J.A. reviewed the evidence on this question, which was to the effect that the driver in interviews with a police constable and a doctor had consistently attributed the cause of the accident to remote electrical control.

He concluded that at the time of the collision, the driver's mind was "so ravaged by disease that it should be held, as a matter of reasonable inference, that he did not understand the duty which rested upon him to take care, and further that if it could be said that he did understand and appreciate that duty, the particular delusion prevented him from discharging it. Therefore no liability for the damage which he caused could attach to him".¹²⁹

The United States of America¹³⁰

In the United States, the courts and legislatures have, as a

¹²⁸ [1946] O.R., at 805-806.

¹²⁹ [1946] O.R., at 807.

¹³⁰ See Ellis, Tort Responsibility of Mentally Disabled Persons, 4 Amer. Bar Found. Research J. 1079 (1981), Casto, Comment, The Tort Liability of Insane Persons for Negligence: A Critique, 30 Tenn. L. Rev. 705 (1972), Curran, Tort Liability of the Mentally Ill and the Mentally Deficient, 21 Ohio St. L. J. 52 (1960), Bohlen, Liability of Infants and Insane Persons, 23 Mich. L. Rev. 9 (1924), Hornblower, Insanity and the Law of Negligence, 5 Colum. L. Rev. 278 (1905), Wilkinson, Mental Incompetence as a Defense to Tort Liability, 17 Rocky Mtn. L. Rev. 38 (1944), Alexander & Szasz, Mental Illness as an Excuse for Civil Wrongs, 43 Notre Dame L. 24 (1967), Weisiger, Tort Liability of Minors and Incompetents, [1951] U. Ill. L. F. 227, Ague, The Liability of Insane Persons in Tort Actions, 60 Dickinson L. Rev. 211 (1956), Cook, Mental Deficiency in Relation to Tort, 21 Colum. L. Rev. 333 (1921), Green, Public Policies Underlying the Law of Mental Incompetency, 38 Mich. L. Rev. 1189 (1940), Splane, Note: Tort Liability of the Mentally Ill in Negligence Actions, 93 Yale L. J. 153 (1983).

rule, given only very limited leeway to the defence of mental incapacity. Many of the decisions merely state the conclusion, that liability should be imposed; others reiterate policy rationales first articulated a century ago.

In rare cases a more penetrating analysis of the issues is provided.

In the United States, as we have seen,¹³¹ a distinction is made between torts based on intention and torts based on negligence. So far as the former are concerned, the general trend is to impose liability where the defendant had the requisite intention, even though he or she may have been suffering from mental disability. Thus, in one of the leading decisions, McGuire v Almy,¹³² where a nurse was attacked by her patient, it was stated that:

"... where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it."

Courts have generally held that insanity may prevent the existence of a specific kind of intent or of malice required for the commission of certain specific torts.¹³³

¹³¹ Supra, p. 4.

¹³² 297 Mass. 323, 8 N.E. 2d 760 (Sup. Jud. Ct., 1937). See also Mullen v Bruce, 168 Cal. App. 2d 494, 335 P. 2d 945 (1959), analysed by Curran, Tort Liability of the Mentally Ill and Mentally Deficient, 21 Ohio St. L. J. 52, at 55-56 (1960).

¹³³ See Aque, The Liability of Insane Persons in Tort Actions, 60 Dickinson L.Rev. 211, at 218-219 (1956); cf. Curran, supra, at 58, Schumann v Crofoot, 43 Or. App. 53, 602 P. 2d 298 (1979).

The approach of the courts to the question of the liability of the mentally disabled in negligence proceedings has been more varied. Unfortunately, the leading case on the subject for many years, Williams v Hays,¹³⁴ did not provide very clear guidance on the issue, since "both [its] reasoning and principle were obscured by numerous appeals, reversals and retrials".¹³⁵

Briefly, the case concerned the question of the liability of a sea captain who had taken quinine in response to a threatened attack of malaria, and who thereupon became temporarily insane, leading to the loss of his ship and her cargo.

In the New York Court of Appeals, Judge Earl said:

"The general rule is that an insane person is just as responsible for his torts as a sane person The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage There can be no distinction between torts of non-feasance and of misfeasance, [or] between acts of pure negligence and acts of trespass.¹³⁶ The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in this one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in this one case as the other; and I have found no case which makes the distinction

¹³⁴ 143 N.Y. 442, 38 N.E. 449 (1894), qualified in 157 N.Y. 541, 52 N.E. 589 (1899).

¹³⁵ Splane, Note: Tort Liability of the Mentally Ill in Negligence Actions, 93 Yale L. J. 153, at 154 (1983). See also Wilkinson, Mental Incompetency as a Defence to Tort Liability, 17 Rocky Mtn. L. Rev. 38, at 43 (1944): "... Williams v Hays is filled with the drama of the sea, but it is not very enlightening as to the law of the land".

¹³⁶ When Williams v Hays was decided, the transformation from torts based on trespass to torts based on intention had not yet been completed.

I sum up the result of my examination of the authorities as follows: this vessel was entrusted to the defendant and, if he caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible."¹³⁷

Judge Earl went on to say that:

"[i]f the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not be attributed to him as a fault. In reference to such a case we do not now express any opinion."¹³⁸

In the later New York case of Sforza v Green Bus Lines Inc.¹³⁹ in 1934, the question of liability in the event of a sudden onset of insanity was considered. The driver of a bus owned by the defendant company suddenly went insane when at the wheel; the bus crashed, injuring the plaintiff. Pette, J. of the Municipal Court of the City of New York, Borough of Queens, imposed liability. A contrasting decision is Breunig v American Family Insurance Co.¹⁴⁰ in 1970. The facts are similar: a motorist became suddenly insane, struck by acute, paranoid type, schizophrenic reaction. In this state she lost control of her car, which injured the plaintiff. Hallows, C.J. of the Supreme Court of Wisconsin, said:

¹³⁷ 143 N.Y., at 446, 451.

¹³⁸ Id.

¹³⁹ 150 Misc. 180 268 N.Y. 5.446 (1934), criticised by Curran, supra, at 62-63. See also Kuhn v Zobotsky, 9 Ohio St. 2d 129, 224 N.E. 2d 137 (1967), Turner v Caldwell, 36 Conn. Sup. 350, 421 A. 2d 876 (1980).

¹⁴⁰ 45 Wis. 2d 536, 173 N.W. 2d 619 (Wis. Sup. Ct., 1970), noted by Dubis, 54 Marq. L. Rev. 245 (1971).

"Not all types of insanity vitiate responsibility for a negligent tort. The question of liability in every case must depend upon the kind and nature of the insanity. The effect of the mental illness or mental hallucination must be such as to affect the person's ability to understand and appreciate the duty which rests upon him to drive his car with ordinary care, or, if the insanity does not affect such understanding and appreciation, it must affect his ability to control his car in an ordinarily prudent manner. And in addition, there must be an absence of notice or forewarning to the person that he may be suddenly subject to such a type of insanity or mental illness.

We think the statement that insanity is no defense is too broad when it is applied to a negligence case where the driver is suddenly overcome without forewarning by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances. These are rare cases indeed, but their rarity is no reason for overlooking their existence and the justification which is the basis of the whole doctrine of liability for negligence, i.e., that it is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident.

We need not reach the question of contributory negligence of an insane person or the question of comparative negligence as those problems are not now presented. All we hold is that a sudden mental incapacity equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting should be treated alike and not under the general rule of insanity."¹⁴¹

¹⁴¹ It is interesting to note that the court referred with approval to the Ontario decision of Buckley & Toronto Transport Commission v Smith Transport Ltd., [1946] O.R. 798, [1946] 4 D.L.R. 721, considered supra, pp. 32-35.

As Dubis, supra, at 248, observes, "the Canadian court, as opposed to the Wisconsin court in Breunig, considered the extent of the defendant's insanity rather than its foreseeability as being the decisive factor in determining liability". Casto, supra, at 721, attempts to reconcile the two approaches.

It is worth noting that in 1934 the Restatement of Torts, (in a caveat to section 283) originally took no position on the question "whether insane persons are required to conform to the standard of behavior which society demands of sane persons for the protection of the interests of lives". In 1948 this caveat was struck out.¹⁴² The Restatement (Second) of Torts, published in 1965, contains a section dealing specifically with insane persons. Section 283 provides that:

"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."¹⁴³

At the time when contributory negligence warranted a dismissal of the plaintiff's case the "overwhelming majority"¹⁴⁴ of decisions held that a mentally disabled plaintiff should not be held to the standard of the "reasonable man". In Reisbeck Drug Company v Wray¹⁴⁵ the Court stated:

".... a person who is so absolutely devoid of intelligence as to be unable to apprehend apparent danger and to avoid exposure to it cannot be said to be guilty of negligence. Knowledge and appreciation of peril are essential elements of contributory negligence, and evidence is admissible to show a plaintiff's mental condition to aid the jury in determining whether he understood and appreciated the danger."

The Restatement (Second) of Torts takes a more cautious approach, expressing no opinion on the question whether

¹⁴² See Ague, supra, at 225-226.

¹⁴³ For a critical analysis of the Restatement (Second)'s approach, see Casto, supra, at 713ff.

¹⁴⁴ Casto, supra, at 722 (citations omitted). Cf. Curran, supra, at 63-64, Flynn, Note, Contributory Negligence of Incompetents, 3 Washburn L. J. 215 (1964).

¹⁴⁵ 111 Ind. App. 467, at 475, 39 N.E. 2d 776, at 779 (1942).

insane persons must conform for their own protection to the standard of conduct which society demands of sane persons.¹⁴⁶

Whether a total exemption should apply to mentally disabled plaintiffs under apportionment legislation (known as "comparative negligence" in the United States) does not appear to have yet been determined.¹⁴⁷

The position regarding mentally retarded defendants and plaintiffs is not entirely clear.¹⁴⁸ There appears to be no case on the negligence of a mentally retarded adult¹⁴⁹ defendant whose condition does not also amount to insanity.¹⁵⁰ There are, however, several cases involving the question of the contributory negligence of mentally retarded adults. Various strategies have been adopted. One approach makes no allowance for the defendant's mental retardation and holds him or her to the standard of the ordinary, intelligent, reasonable person. The Restatement (Second) of Torts, section 464, Comment g, states:

"Mental deficiency which falls short of insanity does not excuse conduct which is otherwise contributory negligence."

Relying on this passage, Snead, J., in Wright v Tafe,¹⁵¹ held that an adult, mentally retarded plaintiff who was not insane should be "held to the same standard of care as a person of greater intellect". He considered that, if the

¹⁴⁶ Section 464, caveat. For criticism of this approach, see Casto, supra, at 721-722.

¹⁴⁷ Cf. Ellis, Tort Responsibility of Mentally Disabled Persons, [1981] Amer. Bar Found. Research J. 1079, at 1096.

¹⁴⁸ See Flynn, Note, Contributory Negligence of Incompetents 3 Washburn L. J. 215 (1964).

¹⁴⁹ Where the mentally retarded defendant is a child, the courts generally apply a subjective test, which refers to the particular child's mental development, as well as his or her age and experience.

¹⁵⁰ Prosser, Wade & Schwartz, 184, Posner, 244.

¹⁵¹ 208 Va. 291, 156 S.E. 2d 562 (1967).

rule were otherwise, "there would be a different standard for each level of intelligence, resulting in confusion and uncertainty in the law".

Another approach, which appears to have the support of the greatest number of decisions is to make allowance for the plaintiff's mental retardation if it has "prevented [him or her] from comprehending the danger and taking action to avoid it, but not otherwise".¹⁵² The third approach is to go further and make allowance even for the plaintiff's inability to exercise the judgment of a reasonable person.¹⁵³

As with mentally ill plaintiffs, the effect of apportionment legislation (introducing "comparative negligence") on the determination of the liability of mentally retarded plaintiffs has not yet become clear.

¹⁵² Cf. Prosser, Wade & Schwartz, 184.

¹⁵³ Id. The analysis of the issue by the courts favouring this approach is not always very clear: see, e.g., Lynch v Rosenthal, 396 S.W. 2d 272 (Mo. C.A., 1965).

CHAPTER 3 THE CIVIL LAW APPROACH

The civil law approach¹ to the liability of mentally disabled persons traces its origins to Roman law.² Following the statement that injury is a prerequisite to an Aquilian action, the Digest states:

"We interpret *injuria* as damage caused culpably even by one who did not intend the injury Hence the question whether there will be an aquilian action for damage by a lunatic; Pegasus denies it: 'What fault (*culpa*) can there be in one who is not in his senses?' Which is quite true. So the Aquilian action fails as it would if an animal had done the damage - or a tile had fallen. And the same must be said if a child does the damage."³

Some modern civil law jurisdictions have exempted the mentally disabled from delictual responsibility, either by explicit provisions or through the application of general principles.

The Civil Code of the Federal Republic of Germany provides, in section 827, that:

"[a] person who causes damage to another person where the former is unconscious or when he is suffering from a mental disturbance preventing the free exercise of his will, is not responsible for the damage. If he has brought himself into a temporary condition of this kind

¹ See Limpens, Kruithof & Meinertzhagen-Limpens, Liability for One's Own Act, ch. 2 of International Encyclopedia of Comparative Law, vol. XI, Part I, at 100ff., Surveyer, A Comparison of Delictual Responsibility in Law in the Countries Governed by a Code, 8 Tulane L. Rev. 53, at 58-59, 62-63 (1933), Ague, supra, at 211.

² Cf. Cook, supra, at 349, Picher, supra, at 221-222, Ague, supra, at 211.

³ This translation is from Thayer, Lex Aquilia (1929), Digest 1X, 2.5 at 1-2, quoted by Picher, supra, at 222.

by alcoholic drinks or similar means, he is responsible for any damage which he in this condition unlawfully causes in the same manner as if negligence were imputable to him; the responsibility does not arise if he has been brought into this condition without fault."

Section 829 provides that in one of the cases specified in sections 823 to 826, a person who is not responsible by reason of section 827⁴ for any damage caused by him:

"shall, nevertheless, where compensation cannot be obtained from a third party charged with the duty of supervision, make such compensation for the damage as is reasonable under the circumstances; in particular where, according to the relative positions of the parties, equity requires compensation, and he is not deprived of the means which he needs for his own reasonable maintenance and for the fulfilment of the obligations imposed upon him by law to furnish maintenance to others."

A provision similar to section 829 is contained in Article 54 of the Swiss Federal Code of Obligations. Supplementary provisions for equitable compensation, of various types,⁵ are a feature of many civil law codes in relation to the liability of the mentally disabled.

In France a Law of 3 January 1968 clarified previous confusion regarding the liability of mentally disabled persons.⁶ As a result article 489-2 of the Civil Code provides that:

"A person who causes damage to another when suffering from mental disturbance is nevertheless bound to compensate."

⁴ Or section 828, which deals, among others with minors.

⁵ Cf. Limpens, Kruithof, Meinertzhagen-Limpens, *supra*, at 102-103.

⁶ *Id.*, at 100-101.

In Quebec there is no explicit provision dealing with the liability of the mentally ill. But Article 1053 of the Civil Code is more detailed than its French equivalent and "clearly excludes from responsibility those insane persons who are unable to distinguish right from wrong".⁷ Article 1053 provides that:

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

It should be noted that, in the civil law jurisdictions, the exemption of responsibility of the mentally disabled is accompanied by the imposition of liability on curators and others having the legal custody of mentally disabled persons.⁸ This liability varies from absolute liability to a presumption of negligence. The supplementary provisions for equitable compensation, already mentioned, operate against the background of a likelihood of liability being imposed, if not on the mentally disabled person himself or herself, at all events on those having charge of him or her.

⁷ Picher, *supra*, at 222.

⁸ See the Civil Code of the Federal Republic of Germany, section 832, Japanese Civil Code, article 714, and the French Civil Code, article 1384.

CHAPTER 4 PROPOSALS FOR REFORM OF THE LAW

As our study of the law in several jurisdictions has shown, there is no unanimity on what approach the law should take to the question of the liability in tort of mentally disabled persons. This is scarcely surprising. The concept of mental disability raises profound philosophical issues, which go to the heart of our understanding of human capacity and responsibility. Compounding this complexity, modern tort law is based on confused and at times conflicting norms, and the law in practice often is at variance with the goals which in theory tort law seeks to achieve. Furthermore, since the extent of compensation in tort proceedings is not proportionate to the subjective wrongfulness of the defendant's conduct, particular difficulties may result where the defendant is not fully responsible, as a moral agent, for his or her action.

In this Report, we cannot address the broad questions of policy concerning the functions of tort law in general, save to the extent that these questions impinge on the specific issue of the tortious liability of the mentally disabled. In our analysis of this issue, we consider it advisable to examine first the principal arguments that have been put forward by courts and commentators in favour of making no allowance for mental incapacity. These arguments may be summarized as follows:

- (a) basing liability on physical causation;
- (b) preventing sane defendants from feigning insanity;
- (c) encouraging vigilance among those having care of the mentally disabled;
- (d) convenience in the administration of the law;
- (e) giving due respect to individual autonomy;
- (f) encouraging the integration of formerly mentally disabled persons in society.

(a) Basing Liability on Physical Causation

It has been contended in several decisions¹ and by some commentators² that "where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it." In turn this rationale has been challenged.³ Bohlen's analysis is penetrating:

"This is so obviously a mere restatement of the old concept of liability without fault dressed up in a new form so as to appear modern and just, that it might be dismissed as adding nothing to the early English dicta, which after all merely stated the effect of this old concept. But curiously enough courts, not only in jurisdictions in which this old concept was disappearing, but even those in which it had completely disappeared, where the liability for harm directly done by one capable of fault was in question, continued to rely upon it and made no attempt to explain why it should apply only to harm directly done by the acts of infants and insane persons and should not be applied wherever similar harm is similarly done by the non-culpable acts of normal persons who are capable but not guilty of culpable intention or negligence. One is forced to wonder at the naïveté of a court which is satisfied with a restatement, no matter how adroitly camouflaged, of a principle which it has itself discarded as a ground for applying that very principle in even so limited a field as that of the liability of infants and insane persons."⁴

¹ Seals v Snow, 123 Kan. 88, at 90, 254 P. 348, at 349 (1927), Williams v Hays, 143 N.Y.S. 442, 42 Amer. St. Rep. 743, at 745 (per Earl, J., 1894), Beals v See, 10 Pa. 56, at 61 (per Gibson, C.J., 1848), Sforza v Green Bus Lines, Inc., (1934), Breunig v American Family Insurance Co., 45 Wis. 2d 536 at 542, 173 N.W. 2d 619, at 624 (1970). See also McIntyre v Sholty, 121 Ill. 660, 13 N.E. 239, at 240 (1887).

² E.g. Anon., Note, 68 L.Q. Rev. 300, at 302 (1952).

³ Cf. Cook, supra, at 337, Hornblower, supra, at 282-284, Casto, supra, at 715-716, Sharpe, supra, at 46, Ague, supra, at 221-222, Seidleson, Reasonable Expectations and Subjective Standards in Negligence Law, 50 Geo. Wash. L. Rev. 17, at 38 (1981).

⁴ Bohlen, supra, at 17-18.

Moreover, as Picher has pointed out, imposing strict liability on the mentally disabled may have few of the justifications conventionally ascribed to strict liability in other contexts:

"Where the modern law has recognized strict liability as in the escape of dangerous objects (Rylands v Fletcher⁵) or as in workmen's compensation acts or manufacturers' products liability, it is either out of the theory that those who willingly deal with dangerous objects must be utterly responsible for their effect, or the modern theory of letting the loss fall on the one who can best bear it. Certainly it is not out of the generalized, ancient theory that a man acts at his peril. Far from being able to bear losses, the insane usually need to preserve their funds in order to pay expensive bills for psychiatric care and treatment. Such a policy of strict liability also overlooks the possibility of the victim having sufficient funds of his own so as not to require compensation."⁶

We are of the view that this argument in favour of imposing liability on mentally disabled persons lacks any substance and merely states a conclusion. Accordingly, we do not give it any weight.

(b) Preventing Sane Defendants from Feigning Insanity

Several courts have expressed the view that imposition of liability on the mentally disabled is necessary to prevent sane defendants from feigning mental disability, "with a view of masking the malice and revenge of an evil heart".⁷ We appreciate the force of this argument. Obviously, a defendant who is faced with the prospect of having to pay a great deal of compensation in a tort action may well be tempted to evade liability by making fraudulent assertions

⁵ L.R. 3 H.L. 330 (1868).

⁶ Picher, supra, at 228. See also, to similar effect, Casto, supra, at 716-717.

⁷ McIntyre v Sholty, 121 Ill. 660, 13 N.E. 239, at 240 (1887). See also Breunig v American Family Insurance Co., 45 Wis. 2d 536, at 542, 173 N.W. 2d 619, at 624 (1970).

of fact. Since the question of the mental capacity of the defendant is a matter in relation to which the defendant's own evidence may have a great deal of significance, it is not impossible that sane defendants might be tempted to "act insane" to assist their prospects of being relieved of liability.

Nevertheless, we do not think that a great deal of weight should be attached to this argument. In contrast to the criminal law, where the successful defence of insanity has afforded a means of avoiding capital punishment or imprisonment for a long term (albeit at a price of compulsory detention in a mental hospital), tort proceedings do not involve a similar risk of interference with the defendant's liberty. So far as the payment of damages is concerned, in many instances the defendant will be insured and thus will have no real incentive to feign insanity.⁸ Moreover, however regrettable it may be, it remains true that a label of mental disability carries with it "a substantial stigma"⁹ in society. On this account, for the short term at least, there are likely to be social pressures on defendants discouraging them from pretending to be suffering from mental disability.

The experience of contract law suggests that the prospect of fraudulent assertions of mental disability in torts cases would not be great.¹⁰ In any event, it is most unlikely that a mere assertion of insanity would be sufficient proof

⁸ Cf. Ellis, supra, at 1087.

⁹ Id. See also McMahon & Binchy, 342, Sarbin & Macuso, Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness, 35 J. of Consulting & Clinical Psychol. 159, at 160 (1970), Farina et al., Mental Illness and the Impact of Believing Others Know About It, 77 J. of Abnormal Psychol. 1, at 1 (1971).

¹⁰ Cf. Ellis, supra, at 1087, Casto, supra, at 715, Sharpe, supra, at 47, Picher, supra, at 228-229, Ague, supra, at 222.

of the existence of this condition in most instances, without strong supporting medical evidence.¹¹

(c) Encouraging Vigilance Among Those Having Care of the Mentally Disabled

Several courts¹² have argued that imposition of liability on the mentally disabled may be justified as an incentive to make their guardians exercise more care in controlling their actions. The rationale appears to be that these guardians will generally have such an expectation to inherit from the estates of the mentally disabled persons in their charge that they will take "anxious care" not to have their inheritance depleted by a successful tort action.

This argument does not convince us for several reasons. First it seems doubtful whether its rationale is widely known among guardians¹³ or whether the conduct of the guardians would greatly change if no liability were imposed

¹¹ Cf. Seidelson, *supra*, at 39:

"Generally, judges and juries are deemed competent to distinguish between legitimate and spurious defenses. Is that any reason to doubt this competence with regard to an insanity defense? I think not. Rather clearly, the defendant's uncorroborated testimony intended to demonstrate his insanity probably will not be persuasive. Expert testimony will be a virtual pre-requisite to successful maintenance of the defense. There seems to be no basis for a unique concern either that the defendant will be able to deceive the expert or that the expert will cooperate with the defendant's desire to present perjurious testimony."

¹² Cf. e.g. Williams v Hays, *supra*, Seals v Snow, *supra*, Sforza v Green Buslines, Inc., *supra*, McGuire v Almy, 297 Mass. 323, 8 N.E. 2d 760, at 762 (1973), McIntyre v Sholty, 121 Ill. 660, 13 N.E. 239, at 240 (1887). See also the Restatement (Second) on Torts, section 283B, comment b(2).

¹³ Cf. Ague, *supra*, at 222.

on the mentally disabled.¹⁴ (This is particularly so where the guardian is related to the mentally ill person.)¹⁵

Secondly, the argument "presupposes a greater control over the acts of mentally disabled people than is exercised by any but the most draconian of caretakers".¹⁶ Thirdly, so far as the argument suggests that guardians have a function in ensuring that mentally disabled persons in their charge do not cause injury, this goal can be more justly and efficiently achieved by imposing an obligation of supervision on the guardians directly,¹⁷ as indeed, the law has done increasingly over the years.¹⁸ Finally, it has been noted¹⁹ that this rationale was advanced at a time when the mentally disabled were taken care of by members of the family or institutions. Today many more mentally ill

¹⁴ Cf. Picher, *supra*, at 228, Ellis, *supra*, at 1084-1085, Casto, *supra*, at 717, Seidelson, *supra*, at 38. Bohlen, *supra*, at 35, fn. 38, concedes that where the mentally disabled person is old and the guardian young, "fear of the depletion of his estate by damages recovered against him may be a real stimulus to action leading to his being put under restraint"; but, where the mentally disabled person is young, "the fear of the diminution of a possible inheritance would prove a very slight incentive to proceedings so difficult and distressing as those necessary to the commitment of an insane person to proper custody."

¹⁵ Cf. Ague, *supra*, 1084-1085.

¹⁶ Ellis, *supra*, at 1084.

¹⁷ Cf. Sharpe, *supra*, at 46-47, Alexander & Szasz, *supra*, at 35-36, Bohlen, *supra*, at 35, fn. 38, appears to envisage a more strict form of liability akin to those in charge of animals *ferae naturae*.

¹⁸ Cf. *Charlesworth & Percy*, para. 9-56.

¹⁹ Splane, *supra*, at 156-157, fn. 20.

persons are living in the community but not with members of their families.²⁰

(d) Convenience in the Administration of the Law

It has sometimes been argued that it is better that no allowance should be made in tort law for mental disability than that the courts should be encumbered with the task of determining the troublesome issue of mental competence. The history of the "insanity defence" in criminal law shows just how difficult and confusing the question of mental competence can be, and as Bohlen notes:

"Courts may well have thought it better to avoid the Scylla of introducing this question into the civil side of the law by falling into the Charybdis of an illogical but practical refusal to recognise insanity as a defense to tort actions."²¹

Bohlen himself refutes this approach eloquently:

"It seems unworthy of the law, whose purpose should be to do justice and to perfect its machinery so that justice may be done, to deny immunity to persons so insane as to be incapable of culpability because of the difficulty of evolving a test satisfactory alike to lawyer and alienist by which the precise degree of mental deficiency which precludes culpability may be determined."²²

²⁰ Cf. Splane, supra, at 163, fn. 58, citing statistics in the United States indicating that currently only 23% of discharged patients return to their own homes: Talbott, Toward a Public Policy on the Chronic Mentally Ill Patient, 50 Amer. J. of Orthopsychiat. 43, at 45 (1980); see generally O'Hare, Provision of Care for the Mentally Ill Homeless in Ireland, 4 Ir. J. of Psychiatry 12 (1983), Brugha, Needs for Care: Developing and Evaluating Services for the Chronically Mentally Ill, 5 Ir. J. of Psychiatry 10 (1984).

²¹ Bohlen, supra, at 37, fn. 38.

²² Id.

It has, moreover, been pointed out²³ that a similar problem arises in many other areas of the law, including guardianship, commitment and testamentary capacity. Such adjudication "is seldom neat or clear-cut, but the law has proven tolerant of a certain amount of evidentiary and doctrinal untidiness in the area of mental health law, if only because it has discovered no practical alternative that is at the same time fair to mentally disabled people".²⁴

(e) Giving Due Respect to Individual Autonomy

We must now consider a further argument in favour of imposing liability on those persons who are categorised as mentally disabled in our society. The argument is unusual in that it is made by persons who are anxious to protect what they consider to be the individual autonomy and integrity of persons who are so categorized. It has been said that:

"to deny a person the legal capacity to form intentional acts for which he is held responsible is to diminish, or even deny, his status as a full-fledged human being."²⁵

This proposition serves as a useful reminder of the price to the defendant of holding that he or she has not the legal capacity to be answerable for his or her actions. It should be borne in mind when considering the possible scope of the exemption from responsibility on the ground of mental disability. But we do not think that it goes any substantial way towards justifying the imposition of liability on persons without any regard to the question of their mental capacity. Such an approach could be defended only if it could credibly be contended that every person, as a matter of "moral fact", is answerable for all of his or

²³ By Ellis, Tort Responsibility of Mentally Disabled Persons, 4 Amer. Bar Foundation Research J. 1979, at 1089 (1981).

²⁴ Ellis, supra, at 1089.

²⁵ Alexander & Szasz, Mental Illness as an Excuse for Civil Wrongs, Notre Dame L. 24, at 35 (1967).

her actions.²⁶ Whatever uncertainty there may be about the scope and definition of mental incapacity, such an all-embracing approach could not be defended, in our view.

(f) Encouraging the Integration of Formerly Mentally Disabled Persons in Society

A somewhat similar argument in favour of imposing liability on the mentally disabled is less direct, but again stresses the benefits to mentally disabled persons which should follow from it. In summary, this argument contends that liability is the necessary price of social integration.

"It is significant that a person dealing with another who might raise the defense of insanity is bound to be affected by the decision made concerning liability for injury. Adults justifiably avoid dealing legally with children because of a recognition of their immunity to suit. Like-wise, mentally healthy persons may be expected to avoid dealing with mentally sick ones - indeed, with anyone who might be so classified for various reasons (i.e., previous contact with psychiatrists, poverty, political or religious deviance) - if the mentally sick are held harmless when they injure. Such a policy would then create a class of irresponsible persons, similar to the class of mental patients. However, persons in this hypothetical class might well be shut off from society and de-socialized to an extent surpassing anything with which we are familiar today."²⁷

²⁶ Radical critics of the latitude and definitional uncertainty of the concept of mental illness would, of course, concede that certain physical conditions widely categorised as mental illnesses do indeed involve those suffering from them with, in some cases at least, a lack of personal moral responsibility for their conduct. But they would categorize these as physical, rather than mental, conditions. We doubt whether this approach would prove helpful. At the end of the day, when all definitional criteria for physical and mental conditions have been settled, a problem remains as to the circumstances in which a person may properly have moral or legal responsibility attributed to his or her conduct.

²⁷ Alexander & Szasz, supra, at 36.

Specifically, it has been argued that for the law to relieve mentally disabled persons from responsibility for attacks on those taking care of them²⁸ might make the vocation so perilous that people would be less inclined to undertake it, thus leaving the mentally disabled person "more dehumanized and friendless than they are at present".²⁹

A commentator writing recently on this issue, has summarised the argument as follows:

"The mentally ill must be held to a uniform objective standard of tort liability in order to meet the present requirements and aims of community treatment. The objective standard helps minimize the burden on the community from deinstitutionalization, helps foster community acceptance of the mentally ill, and encourages the mentally ill to become self-sufficient, responsible members of the community."³⁰

From the community perspective, this commentator argues that today the levels of community acceptance and support of deinstitutionalized mentally ill persons are not satisfactory: there is, for example, evidence that mentally ill people are disproportionately represented among the homeless.³¹

She argues that, since the ultimate success of community treatment depends on community acceptance and support, holding the mentally ill to be an objective standard of tort liability facilitates this goal. She adds:

²⁸ Cf. McGuire v Almy, 297 Mass. 323, 8 N.E. 2d 760 (1937).

²⁹ Alexander & Szasz, supra, at 36.

³⁰ Splane, supra, at 163-164.

³¹ See Brahams & Weller, Crime and Homelessness Among the Mentally Ill, 135 New L.J. 626, 761 (1985), O'Hare, Provision of Care for the Mentally Ill Homeless in Ireland, 4 Ir. J. of Psychiatry 12 (1983), Brugha, Needs for Care: Developing and Evaluating Services for the Chronically Mentally Ill, 5 Ir. J. of Psychiatry 10, at 11 (1984).

"Allowing a defense of mental illness to tort liability may increase public resistance to having the mentally ill in the community. The public's attitude towards the mentally ill vacillates capriciously and it takes only a few well-publicized cases absolving the mentally ill from tort liability to start a public outcry. If the law gives the mentally ill special immunities from liability for causing havoc, then society might well restrict their opportunities to create injuries. Opportunities for the mentally ill to obtain licenses, employment, or housing might be substantially circumscribed."³²

A possible consequence of deinstitutionalization mentioned in the international professional journals is that of an increase in torts committed by mentally ill persons. It has been contended that imposition of full responsibility on these persons is desirable from the standpoint of a policy of deterrence to which tort law seeks (among other goals) to give effect.³³ This might be considered to be a less than convincing argument since, in some cases, mentally ill people will in fact be unable to be guided by moral or legal sanctions.

Several reported torts proceedings establish this clearly. But, equally so, there will be other cases in which mentally ill people may be capable of being affected by the deterrent of a legal sanction,³⁴ to a greater or a lesser extent.

³² Splane, supra, at 165.

³³ Cf. Linden, ch. 1, especially at 5ff.

³⁴ Cf. Splane, supra, at 166, fn. 70, who makes the further, somewhat chilling, point that the admonitory objective of tort law is not dependant purely on monetary judgments. The fear of being involved in court proceedings "may be an even more effective deterrent in the case of the mentally ill since they are often especially fearful of going to court, having generally experienced courtroom proceedings in connection with involuntary commitment". (Citing Splane, Role and Function of the Attorney in Civil Commitment, 179 (1981) (an unpublished doctoral dissertation which states that mentally ill clients are reported to be afraid of court appearances even when told that the likely result is release from involuntary hospitalization)).

It has been argued that, even if it is not the case that full imposition of liability deters the mentally ill, nevertheless if it were replaced by a rule of immunity, that rule might be regarded by the community as the reason why the number of torts committed by the mentally ill increased thereafter.³⁵ Further, the public "might well become outraged by the perceived injustice of denying compensation to innocent victims".³⁶

On the question of contributory negligence, the same commentator argues that:

"The public is likely to be dismayed if it becomes apparent through tort cases that they are expected to keep a 'special eye' out for the safety of the mentally ill. If mentally ill persons, who have contributed significantly to causing their own injuries, are allowed to recover total damages, then the public is in effect being charged for not exercising greater care for their safety than for the average person. This could result in especially negative consequences in such areas as housing or employment. Employers would have an added justification not to hire discharged mental patients, and landlords not to rent to them, if the mentally ill could contribute to causing their own injuries and then recover complete damages."³⁷

We see the force of this argument but nevertheless it does not convince us. We are not satisfied that the price of social integration should be paid by the mentally infirm members of our society. We can see no justice in imposing on them liability based on a capacity which they do not possess. We consider that the prejudices of other members of society must be tackled through other legal, social and economic means rather than by placing an unjustifiable burden on mentally disabled individuals.

Conclusion

Having reviewed the several arguments in favour of imposing

³⁵ Splane, *supra*, at 166-167.

³⁶ Splane, *supra*, at 167.

³⁷ Splane, *supra*, at 169-170.

tortious liability on mentally disabled persons without regard to their disability we are of the view that they are not sufficiently strong to merit acceptance. Accordingly, we recommend that our law should not take this course.

If we accept that mental disability should in some cases afford a defence to certain torts, we must then consider the difficult question of the nature and degree of disability that should be sufficient to afford this defence. Our analysis may proceed most easily by considering in turn (a) the torts of trespass to the person, to goods and to land, (b) torts involving some other specific intention or state of mind, (c) negligence and contributory negligence, and (d) other torts.

(a) The Torts of Trespass to the Person, to Goods and to Land

At present, as we have seen, the torts of trespass to the person, to goods and to land may be committed where the defendant, acting voluntarily, either intends to bring about the unpermitted contact or is negligent in doing so. Voluntariness involves the direction and control over conduct by a conscious mind. Thus, to mention again examples we have already used in our Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985), a person's movements when asleep or in the course of an epileptic attack are not voluntary.

As we have seen from the cases in several common law jurisdictions, the analysis of voluntariness in relation to mentally disabled persons has generally not been very helpful. We consider, however, that the concept goes to the very heart of the issue of liability of the mentally disabled for trespass. We are of the view that, where it is shown (a) that the defendant was so affected by mental disability as substantially to lack the capacity to act freely, and (b) that as a result of this substantial lack of capacity the defendant did the act complained of, then the defendant should be relieved of liability for a trespass on the ground that his or her act was not voluntary.

A few points about this approach should be noted.

- (1) It is only where as a result of the defendant's substantial lack of capacity, the defendant did the act

complained of that the defence will apply. Thus, mentally disabled persons are not given liberty to act as they please without ever being held liable for their conduct. The question when a person's lack of capacity becomes substantial is, in one sense, one of fact in each case, but it is also one of value, since the gradation of degrees of incapacity in this context must necessarily be determined by evaluative criteria.

- (2) The expression "mental disability" clearly includes mental illness and mental retardation but we consider it desirable for the definition also to include "other mental conditions", since we do not think it appropriate that a defence should stand or fall on the question whether a particular mental condition, which admittedly causes the defendant substantially to lack the capacity to act freely, is or is not categorised as a mental illness. What is important is that the condition should have this effect, and the question whether it is also categorised as a mental illness is not relevant to this issue.
- (3) The fact that the victim of a criminal injury may obtain compensation from the Criminal Injuries Tribunal should not be ignored. The Tribunal does not take account "of any legal immunity which the person who inflicted the injury may have by reason of his mental health, his youth or otherwise".

If the defence which we have proposed does not apply, and the defendant's conduct is voluntary,³⁸ then the question arises as to what other possible effect mental disability may have on the defendant's liability for trespass. We consider that, if the mental disability³⁹ is such as to prevent the defendant from acting with the purpose of bringing about the effect in question, the defendant should be relieved of liability. The "effect" here means the unpermitted contact with the plaintiff's body, goods or land; it does not extend to the results of that contact. Thus if a defendant intended to trample on the plaintiff's

³⁸ Or, more strictly, is not involuntary by reason of substantial lack of capacity to act freely as a result of mental disability.

³⁹ As we have defined that term in our earlier proposals.

flowers in a flowerbed, it would not be a defence for him to show that he or she did not appreciate that the flowers would be ruined.

A person, whether mentally disabled or not, may lack a particular intention in a number of ways. He or she may intend to do something else, or may have no particular intention at the relevant time. It may also be the case that a person does have a particular intention but that intention is based on a mistaken factual belief or assumption. Thus, for example, if a man takes an umbrella from a stand in a restaurant, mistakenly believing that it is his own, he cannot say that he did not intend to take the umbrella that is in his hand.⁴⁰

Whether or not mistaken intentional conduct should constitute a tort has given rise to relatively little analysis in common law jurisdictions.⁴¹ The general thrust of the law has been to permit only a limited scope for the defence of mistake; where the question of self-defence or defence of third parties is involved there is authority for allowing the defence to apply, provided the mistake is a reasonable one.⁴²

As we have seen, several of the cases on the tortious liability of the mentally disabled deal with attacks on plaintiffs by mentally disabled defendants labouring under serious delusions. The same issue can, of course, arise in relation to trespass to goods and to land. We see no merit in transposing to the context of tort the unconvincing technicalities of the M'Naghten Rules, but we do consider that the problem of a mistake resulting from mental disability must be confronted. The general approach of the present law to the subject of mistake is one that merits detailed consideration. In the present Report we confine ourselves to the limited question of mistake attributable to mental disability. We consider it desirable that where under present law a reasonable mistake relieves a defendant from liability in respect of the tort of trespass to the

⁴⁰ Cf. McMahon & Binchy, 537-538, 545.

⁴¹ The leading discussion is Whittier, Mistake in the Law of Torts, 15 Harv. L. Rev. 335 (1902). See also Fleming, 70-73.

⁴² Cf. Gambriell v Caparelli, 7 O.R. (2d) 205 (C.A., 1975).

person, to goods or to land, it should also be an effective defence to establish that the defendant did the act complained of as a result of a mistake brought about by mental disability.⁴³

Questions of voluntariness and intention may arise in respect of other torts. We recommend that the proposals we have made regarding them should also apply with respect to these other torts. So far as reasonable mistake is concerned, we recommend that the extension we have proposed regarding a mistake brought about by mental disability should also apply with respect to other torts which allow a reasonable mistake to afford a defence; but we consider that this latter extension should not apply to the tort of negligence, in relation to which we will be proposing specific reforms to deal with the question of the liability of mentally disabled persons.

(b) Torts Involving a Specific Intention or Other State of Mind

Where a tort requires proof of a specific intention on the part of the defendant, we recommend (in line with our earlier proposal regarding intention in relation to trespass) that, if the defendant suffers from a mental disability⁴⁴ which is such as to prevent him or her from acting with the specific purpose of bringing about the effect in question, the defendant should be relieved of liability. Where the tort requires some other specific state of mind, the defendant should escape liability if he or she suffers from a mental disability⁴⁵ which is such as to prevent him or her from having that state of mind.

We appreciate that this approach gives to the court a broad range of discretion, to determine whether, in the light of the evidence, liability should be imposed. But we consider that the law must necessarily be flexible on this question: artificial or unduly technical formulae akin to those which formerly plagued the criminal law in relation to insanity, would in our view provide no adequate solution. Once the core general concepts of voluntariness, intention and, to a

⁴³ As we have defined that term in our earlier proposals.

⁴⁴ As we have defined that term in our earlier proposals.

⁴⁵ As we have defined that term in our earlier proposals.

lesser extent, mistake are subject to reasonably clear and specific guidelines, we think it unwise to clutter the law by introducing highly technical concepts to control the less central aspects of the subject.

(c) Negligence and Contributory Negligence

We must now consider the important question of what approach the law should take in determining the negligence and contributory negligence of mentally disabled persons. We can best begin our analysis by examining the argument that the standard of care should be a fully objective one, which would take no account of their mental disability.

Proponents of the objective standard of care argue that the creation of a special standard of care for the mentally disabled in negligence actions would be contrary to the approach generally applied to human conduct and would create anomalies.

That the law of negligence proceeds on the general basis of an objective standard is clear. In a famous passage, Holmes wrote:

"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, for more than one sufficient reason [W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect."⁴⁶

Yet the law of negligence has not applied an objective standard inflexibly. In some cases a modified standard has

⁴⁶ O. Holmes, The Common Law, 108 (1881).

been recognised, where application of the objective test would be likely to involve manifest injustice.⁴⁷ Thus, a person affected by a physical disability is judged by the standard of a "reasonable person afflicted with the particular disability in question."⁴⁸

Similarly a blind person will not be required to see,⁴⁹ nor a deaf person required to hear,⁵⁰ nor will a lame person be required to be agile⁵¹ nor will the victim of a heart attack,⁵² epileptic seizure,⁵³ insulin reaction⁵⁴ or other

⁴⁷ Cf. McMahon & Binchy, 152-154.

⁴⁸ See generally Vance, Note: Negligence: Physical Defects as Affecting the Standard of Care in Civil and Criminal Laws, 30 Ky. L. J. 220, at 220-222 (1942), Weisiger, Negligence and the Physically Infirm, 24 N. Carolina L. Rev. 187 (1946), More, Note, 34 N. Carolina L. Rev. 142 (1955).

⁴⁹ Fleming, 107, Lowry, The Blind and the Law of Tort: The Position of a Blind Person as Plaintiff in Negligence, 20 Chitty's L. J. 253 (1972), M'Kibbin v Glasgow Corporation 1920 S.C. 590. See, however, Duffy v Fahy, [1960] Ir. Jur. Rep. 69, at 75 (per Lavery, J.).

⁵⁰ South Australian Ambulance v Wahlheim, 77 C.L.R. 215 (1948). Cf. Smith v Browne, 28 L. R. Ir. 1 (Q. B. Div., 1891), Gaffney v Dublin Ltd., Tramways Co., [1916] 2 I.R. 472 (C.A.), Wade v Hegarty, unreported, Sup. Ct., 13 July 1960 (85/1959).

⁵¹ Goodman v Norwalk Jewish Center, 139 A. 2d (1958).

⁵² See Kraig, Heart Attack as a Defense in Negligence Actions, 12 Clev. Mar. L. Rev. 59 (1963).

⁵³ See Perr, Epilepsy and the Law, 7 Clev. Mar. L. Rev. 280, at 292-296 (1958). Smith, Medico-Legal Facets of Epilepsy, 31 Tex. L. Rev. 765, at 773-776 (1953), Note, 1 Baylor L. Rev. 499 (1949).

⁵⁴ Porter v Price, 11 Utah 2d 80, 355 P. 2d 66 (1960), Boomer v Penn., 52 D.L.R. (2d) 673 (Ont. H. Ct., Evans, J., 1965).

sudden medical⁵⁵ or physical⁵⁶ emergency be required to behave as though all were well.

The law does not ask of such a person that he achieve "the impossible by conforming to physical standards which he cannot meet".⁵⁷

Of course this deference by the law to subjective considerations does not mean that physically disabled persons may act as they please. Since they must act as reasonable persons suffering from their particular disability, they may have to take particular precautions to take account of the disability.⁵⁸

⁵⁵ Kelly v Gilmore, unreported, Sup. Ct., 28 July 1970 (54-1969), Murray v Gilmore, unreported, Sup. Ct., 20 December 1973 (95-1972). Voluntary intoxication does not excuse. Some of the issues concerning the relationship between intoxication and negligence are more complex than might at first appear: see McCoid, Intoxication and Its Effect Upon Civil Responsibility, 42 Iowa L. Rev. 38 (1956).

⁵⁶ Cf. Donoghue v Burke, [1960] I.R. 314 (Sup. Ct., 1958) (driver dazzled by headlights of approaching car), Scholz v Standish, [1961] S.A.S.R. 123 (bee sting). See also Billy Higgs & Sons Ltd. v Baddley, [1950] N.Z.L.R. 605 (C.A.).

⁵⁷ Prosser & Keeton, 176. See also Ellis, supra, at 1098. It should be noted that where the physical condition renders the action involuntary this may afford a defence on the basis that there is no "act", unless the defendant was negligent in failing to take reasonable steps to prevent injury from the involuntary "act" where it should be foreseen. See Mitchell, Note: Negligence - Defense of Unavoidable Accident, 52 Neb. L. Rev. 559 (1973), Dale, Note: Negligence - Involuntary Act Performed While Asleep, 2 St. Louis U.L.J. 186 (1953); cf. the critical analysis by Kaufman & Kantorowicz, The Case of the Sleeping Motorist, 25 N.Y.U.L.Q. 362 (1950).

⁵⁸ Fleming, 107. Cf. the critical analysis by ten Broek, The Right to Live in the World: The Disabled in the Law of Torts, 54 Calif. L. Rev. 841, at 886ff. (1966). See also Kelly v Gilmore, supra. Cf. Chan Shin-nin v Tang Kam-ho, [1974] H.K.L.R. 1 (Cons. J., 1973).

What conclusion should we draw from the fact that negligence law permits a deviation from the objective standard in the care of the physically disabled? Does this mean that a similar deference to subjective considerations should apply to the mentally disabled? One commentator has analysed the problem in clear terms. Referring to the approach of the law to the physically disabled, he observes:

"In making allowances for these particularly appealing tort defendants, the law has abandoned a stance in which full equity can be achieved short of adoption of a subjective standard for all defendants, no matter what sort of uncontrollable disability they might claim (poor education, absent-mindedness, pathological lack of consideration for their fellow human beings, or whatever). Since the law certainly is unwilling to go this far in accommodating the varieties of human nature (both for administrative reasons and because of the presumed reduction in compensation to injured plaintiffs), any claim for a subjective standard for mentally disabled defendants will have to stand on a perception of extraordinary injustice to such defendants and on assurances that such a standard would not be unworkable."⁵⁹

The question thus resolves itself into whether the analogy between physical and mental disability is sufficiently strong to justify the establishment of a special criterion of responsibility for the mentally disabled.⁶⁰

Let us examine some of the factors. One element in the law's approach to the physically disabled, as we have seen, is the requirement that a person afflicted by a physical disability must take that condition into account in planning his or her activities. In contrast, it has been pointed out that:

"[t]he ability to plan 'around' the disability will be available less frequently for mentally disabled persons. The fact that it is the individual's mind that is affected will reduce the occasions when the person can identify that his disability is likely to

⁵⁹ Ellis, *supra*, at 1088.

⁶⁰ Cf. Seidelson, *supra*, at 46.

create hazardous situations for himself or others. Such occasions are not impossible in all cases - a retarded person may know that his disability makes it unwise to engage in a particular activity that his teaching suggests is associated with danger. But such instances will be rarer for the mentally retarded and mentally ill than they are for the physically handicapped who suffer no substantial mental impairment."⁶¹

As has been mentioned, some decisions⁶² have attempted to create a subjective standard modified by a requirement that the mental disability occurs so suddenly that it is not reasonably possible for the defendant to take steps to prevent injury resulting from it. This goes some way towards applying the same standard as for sudden physical disablement, but clearly does not provide the total answer so far as the mentally disabled are concerned.

If the analogy with the physically disabled is not entirely satisfactory, we must also consider another group to whom a subjective standard is applied: children. The test applied to a child is whether he or she acted reasonably having regard to his or her age, mental development and experience.⁶³ The commentators are divided on the usefulness of the analogy between children and mentally disabled persons. Bohlen, a supporter of the parallel, argues that:

"An infant or insane person should be liable for having caused by an act done with the actual but innocent purpose of producing it to exactly the same extent as for his failure to conform to those standards of conduct which are obligatory upon normal persons.

In each case the injury to the plaintiff is the same.

⁶¹ Ellis, supra, at 1100-1101.

⁶² E.g. Breunig v American Family Insurance Co., 45 Wis. 2d 536, 173 N.W. 2d 619 (1970), Buckley and Toronto Transport Commission v Smith Transport Ltd., [1946] O.R. 798, [1946] 4 D.L.R. 721.

⁶³ See our Report on the Liability in Tort of Minors and of the Liability of Parents for Damage Caused by Minors, (LRC 17-1985).

In each the defendant's innocence or culpability is identical. Immaturity or deficiency which makes it impossible for the infant or insane person to realize the consequences of his acts and to provide against their effects, makes it equally impossible for him to realize the necessity of refraining from acts of aggression."⁶⁴

Hornblower, however, considers that the analogy is only partially correct:

"It is quite true that an infant, especially in earlier stages of childhood, is not fully conscious of the consequences of his acts or of the seriousness of their nature. He may act from mere childish impulse, without stopping to consider, or without fully appreciating the inherent character of his acts and the injury which will result therefrom. Nevertheless, even children are intelligent beings, and unless of such very immature years as to be utterly unconscious of right and wrong, they should be held responsible for the consequences of their voluntary acts When we come, however, to the question of a person non compos mentis, we have a situation of absolute mental incapacity, which the criminal law recognizes to its fullest extent. There seems to be no reason why a lunatic should be free from criminal responsibility for assault and battery, or even for murder, while he can be held liable in damages for the same offence."⁶⁵

Alexander and Szasz take issue with the analogy between children and the mentally disabled, from a different philosophical perspective:

"Paternalistic supervision of the activities of the child and decision-making for the child differ significantly from comparable activity on behalf of the insane. However demeaning the role of the child may be perceived to be by the child, at least it is a socially acceptable one. The same cannot be said of insanity. Furthermore, childhood is a status that one can, by the mere passage of time, count on outgrowing.

⁶⁴ Bohlen, supra, at 3.

⁶⁵ Hornblower, supra, at 282-283.

Again, the same cannot be said of the status of insanity. Lastly, the matter of children's rights is under periodic review, and societal responsibility is often shared with persons still under the age of contract. For example, a minor may drive, marry, in New York drink, consent to intercourse, and fight in the armed forces. An insane person, however, cannot count on any of these rights."⁶⁶

The application of the subjective standard to children's conduct has been supported in part by the fact that "there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them".⁶⁷ Does a similar basis of community experience exist in relation to what is to be expected of the mentally ill? Ellis considers that:

"[i]t is certainly true that jurors are more likely to have informative experience about the abilities of children than they are about various forms of mental disability. Therefore the key issue is whether expert testimony can provide sufficient assistance to jurors to allow them to implement a subjective test for mentally handicapped adults.

It is important to note that the child standard itself requires the jury to inquire into the subjective state of children 'of like ... intelligence'. In a case involving a mentally retarded child, for example, the fact-finder would have to determine what a reasonable child with intelligence comparable to the defendant's would have done in a similar situation. This inquiry does not differ substantially from the question presented in the case of a mentally retarded adult defendant if the latter were also to be measured by a subjective standard. No greater degree of evidentiary complexity attends the case simply because the mentally retarded defendant has attained majority. Nor is it likely that jurors' experience with mentally retarded children is significantly greater than their acquaintance with mentally retarded adults; most jurors will have had little or no experience with either. Thus, insofar as the mentally retarded are concerned, there appears to be no valid argument

⁶⁶ Alexander & Szasz, *supra*, at 34-35.

⁶⁷ Restatement (Second) of Torts, section 283A, Comment b.

against a subjective standard that does not apply equally in cases involving children - cases that are already tried under a subjective test."⁶⁸

Ellis considers⁶⁹ that the implementation of a subjective standard of care for mentally retarded defendants would not entail difficulties beyond those that are already accepted under the subjective standard applied to children.⁷⁰

The position of mentally ill adults is less easily comparable with that of children than that of mentally retarded adults. Mentally retarded adults have with children a lack of the intellectual capacity which other adults possess. But mentally ill adults do not necessarily suffer from a similar lack of intellectual capacity. Their illness may well interfere with their intellectual assessment of particular situations but it need not necessarily do so. It may instead affect their behaviour or their psychological equilibrium. The analogy with children in some of these cases would be weak indeed.

Other commentators have contended that the difference in legal policy towards children and the mentally disabled, respectively, is the product of greater societal familiarity with, and sympathy for, the problems of childhood (as well as of the physically disabled) than of the mentally disabled. As Picher comments:

"Few people relate to the plight of the insane and

⁶⁸ Ellis, supra, at 1103.

⁶⁹ Id., at 1104.

⁷⁰ A particular problem mentioned by Ellis, id., at 1104, fn. 89 relates to the imposition of an objective adult standard on children engaging in "adult activities", such as driving cars. He comments:

"This rule arose from concern about public safety. Similar concerns may be involved in the creation of a similar exception to a subjective standard for mentally disabled adults - that they will not be excused from negligence when they violate traffic laws. See Criez v Sunset Motor Co., 123 Wash. 604, 213 P. 7 (1923)."

assume insanity won't befall them; it is therefore easy to put the insane in a separate category and apply different principles."⁷¹

We have come to the conclusion that the best approach would be for the law to 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 disability⁷² 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.

A number of points about this recommendation should be noted.

- (1) The objective test would apply unless the mental disability was serious. Some line must be drawn and we are satisfied that it should not be drawn in such a way that minor mental disabilities would relieve persons from the obligation to compensate their victims. We would not wish, for example, that every person with a mental capacity less than the average in the community should, on that account alone, be relieved of liability.
- (2) For the defence to apply, it would be necessary to show that the mental disability affected the person in the performance of the act. Thus where the disability is not relevant, it will be ignored for present purposes.
- (3) The court would have to determine in each case whether the mental disability was such as to have made the affected person unable to behave according to the standard of care appropriate to the reasonable person. It is not every disability, even a serious one, that

⁷¹ Picher, supra, at 227. Cf. Ellis, supra, at 1099-1100.

⁷² As we have defined the term "mental disability" in our earlier proposals.

would have this effect. It is possible, for example, that a paranoid or seriously depressed person could, in spite of his or her condition, retain the ability to act according to the standard of care appropriate to the reasonable person when performing certain acts, such as driving a car or holding an expensive antique.

- (4) Where the disability renders the person unable to behave according to the standard of the reasonable person, then he or she will be entirely relieved of negligence or contributory negligence, as the case may be. We do not consider it desirable to introduce a reduced standard of care for these persons: such an approach would be likely to prove unjust and unworkable in practice.

We have considered whether our recommendations as to negligence and contributory negligence should apply to persons causing injury to others or themselves when driving a motor vehicle. We have come to the conclusion that it would be better, on balance, for it not to do so. The present law modified by our general recommendation as to voluntariness will afford sufficient flexibility to deal with cases involving a sudden onset of insanity, in our view. So far as lack of voluntariness is concerned, we have already proposed that, in all actions for negligence (whether relating to driving or otherwise) a defendant should be relieved of liability if he or she was so affected by mental disability as substantially to lack the capacity to act freely and, as a result of this substantial lack of capacity, did the act in question.

We consider that road accidents represent such a serious social problem that the balance of the argument in this context lies against the operation of our proposed⁷³ new general defence of mental disability in negligence actions. We do not believe that this exceptional case will tilt the balance of liability too far; on the contrary, we consider that to fail to make this exception would risk causing injustice on a greater scale. We should stress that the full range of exemption from liability existing under the present law, so far as it may be determined, would continue to apply.

⁷³ Cf. p. 70, supra.

(d) Other Torts

We do not consider that the present law relating to the mentally disabled requires any change⁷⁴ so far as other torts are concerned.

Where a defendant is exonerated from liability in tort by reason of his or her mental disability, then, if no change were made in the law other than those already proposed, the employer or principal of that defendant could not be vicariously liable for his or her wrong, as there would be no tort to which vicarious liability should attach. We consider that social policy would be better served if in such circumstances vicarious liability were to continue to attach. To permit an employer or principal to escape liability by reason of the mental disability of the defendant would in our view defeat the aims of vicarious liability.⁷⁵

Of course, before vicarious liability can attach, it must be shown that the tort was committed in the course of the employee's employment. Thus, for example, if a mentally ill barman attacked a patron whom (on account of the illness) he believed to be a robber, then the employer could be vicariously liable, but if the same barman attacked a patron because (on account of the illness) he thought that the patron was having an affair with his wife, then the employer would not be liable.

It should also be noted that an employer may be liable personally rather than vicariously where he is negligent in the selection of an employee: thus if he employs a person whom he has reason to know is so mentally disabled as to constitute a danger to others (or to himself) then the employer may be liable for injuries foreseeably resulting from this risk.

⁷⁴ Save, of course, so far as our general recommendations in relation to voluntariness, intention and mistake apply to these torts.

⁷⁵ Cf. Fleming, 338-339.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

1. Where it is shown (a) that the defendant was so affected by mental disability as substantially to lack the capacity to act freely, and (b) that as a result of this substantial lack of capacity the defendant did the act complained of, then the defendant should be relieved of liability for a trespass on the ground that his or her act was not voluntary. The term "mental disability" should include mental illness, mental retardation and other disabling mental conditions.
2. If the mental disability is such as to prevent the defendant from acting with the purpose of bringing about the effect in question, the defendant should be relieved of liability in an action for trespass.
3. Where under present law a reasonable mistake relieves a defendant from liability in respect of the tort of trespass to the person, to goods and to land, it should also be an effective defence to establish that the defendant did the act complained of as a result of a mistake brought about by mental disability.
4. The proposals summarised in paragraphs 1 and 2 with regard to voluntariness and intention in actions for trespass should apply with respect to other torts where these questions of voluntariness and intention arise.
5. The proposal summarised in paragraph 3 with regard to mistake brought about by mental disability should apply also to other torts (save negligence) which allow a reasonable mistake to afford a defence.
6. Where a tort requires proof of a specific intention on the part of the defendant, then, if the defendant suffers from a mental disability which is such as to prevent him or her from acting with the specific purpose of bringing about the effect in question, the defendant should be relieved of liability. Where the tort requires some other specific state of mind, the defendant should escape liability if he or she suffers from a mental disability which is such as to prevent him or her from having that state of mind.

7. The law should apply the objective test of "the reasonable person" when determining a person's negligence or 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.
8. The previous recommendation should not apply to persons causing injury to others or themselves when driving a motor vehicle; liability in such a case should be determined by the principles established under present law, modified by the recommendation as to voluntariness in paragraphs 1 and 4.
9. Where a defendant is not liable in tort by reason of his or her mental disability, an employer (or principal) who would otherwise be vicariously liable for the tort should continue to be so.

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