

# Negligence and Inherent Unreasonableness

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## Abstract

In Australia, the reduced mental capacity which is characteristic of children alters the standard of care required of them before their behaviour will be judged legally negligent. Seemingly inconsistently, similar incapacity experienced by adults with a mental illness, has generally been regarded as irrelevant to decisions about tortious liability. To date, this has led to few practical consequences, as only a handful of mentally ill defendants have come before the courts in negligence claims. Yet with the ageing population,<sup>1</sup> the growing number of people with dementia,<sup>2</sup> and the universal policy of deinstitutionalisation, which places those with a mental illness in the wider community, it is likely that areas of law, including tort law, will come to deal more often with defendants suffering from reduced mental capacity.<sup>3</sup>

This article examines the apparently inconsistent way in which the common law of negligence responds to tortfeasors with reduced mental capacity, and contends that neither courts' reasons, nor academic analyses provide adequate explanation for this discrepancy. The article provides several proposals for resolving this dissonance.

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<sup>1</sup> The median age (the age at which half the population is older and half is younger) of the Australian population has increased by 5.1 years over the last two decades, from 31.8 years at 30 June 1989 to 36.9 years at 30 June 2009. The proportion of people aged 65 years and over has increased from 11 per cent to 13.3 per cent. During the same period, the proportion of population aged 85 years and over has more than doubled from 0.9 per cent at 30 June 1989 to 1.8 per cent at 30 June 2009. Australian Bureau of Statistics, *3201.0 — Population by Age and Sex, Australian States and Territories, June 2009* (9 December 2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3201.0>>; Australian Bureau of Statistics, *3222.0 Population Projections, Australia, 2006 to 2101* at 4 September 2009 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3222.0>> indicates that 25 per cent of the population is likely to be over 65 years of age by the year 2056, with the trend to aging continuing to increase after that time.

<sup>2</sup> Australian Institute of Health and Welfare, *Dementia in Australia: National Data Analysis and Development* (2007) 53–65.

<sup>3</sup> It is estimated that almost one in five Australians suffer a mental illness in their lifetime and that at any one time, one in five Australians will be suffering from a mental illness. It is also estimated that three per cent of Australians will experience a psychotic illness in their lifetime and that in any 1 month approximately 58 000 Australian adults have contact with mental health services because of a psychotic illness. There is also international recognition that mental illness represents 11 per cent of disease burden worldwide and it is rated third after heart disease and cancer as the largest cause of illness-related burden in Australia. See Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* ('Burdekin Report') (1993) 13, 15, 16.

## I Introduction

The test of objective reasonableness, which is at the heart of the law of negligence, sometimes requires people to reach a standard of care which they are inherently unable to meet. Some commentators have suggested that this is not only unfair, but that it creates internal difficulties for the law of negligence where liability is generally predicated on notions of fault. These commentators argue that to require people to act in a way that is beyond them is to turn fault based liability into strict liability.<sup>4</sup> The question therefore arises whether the standard of measurement for negligence should be altered to take into account, or more accurately reflect, the actual capacity of the defendant (or at least the ‘group’ to which the defendant belongs), or should it remain at a level at which the defendant may be inherently incapable of reaching?<sup>5</sup>

The law of negligence in Australia has not been entirely clear or consistent on this issue. In relation to child defendants, courts have altered the standard of care to take into account their reduced capacity levels.<sup>6</sup> Likewise, common law courts have recognised that in some circumstances, those who are suffering an incapacitating physical illness should not be required to meet the objective standard.<sup>7</sup> In relation to those with mental illness, on the other hand, courts have

<sup>4</sup> See, eg, Francis H Bohlen, ‘Liability in Tort of Infants and Insane Persons’ (1924–25) 23 *Michigan Law Review* 9; *Fiala v Cechmanek* (1999) 281 AR 248, [31]; (2001) 201 DLR (4<sup>th</sup>) 680 (Alberta Court of Appeal) [18], [29]; Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003) 42–3; Pamela Picher, ‘The Tortious Liability of the Insane in Canada ... With a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative’ (1975) 13 *Osgoode Hall Law Journal* 193, 225; WM Justus Wilkinson, ‘Mental Incompetency as a Defense to Tort Liability’ (1944–45) 17 *Rocky Mountain Law Review* 38, 56; Robert M Ague Jr, ‘The Liability of Insane Persons in Tort Actions’ (1955–56) 60 *Dickinson Law Review* 211, 221; Mark F Grady, ‘The Free Radicals of Tort’ in Francesco Parisi and Vernon Smith (eds), *The Law and Economics of Irrational Behavior* (Stanford University Press, 2005) 425, 428; William H Rodgers Jr, ‘Negligence Reconsidered: The Role of Rationality in Tort Theory’ (1980) 54 *Southern California Law Review* 1, 14–15; Tony Honoré, ‘Responsibility and Luck: The Moral Basis of Strict Liability’ (1988) 104 *Law Quarterly Review* 530 and reprinted in Tony Honoré, *Responsibility and Fault* (Hart Publishing, 1999) 14; cf Peter Cane, ‘Retribution, Proportionality, and Moral Luck in Tort Law’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press; Oxford University Press, 1998) 141; Peter Cane, ‘Responsibility and Fault: A Relational and Functional Approach to Responsibility’ in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing, 2001) 81, 100–2, who disputes that this can be regarded as strict liability. For Cane, the essential difference between strict liability and liability based on fault is that the latter provides a standard of measurement, whereas the former does not.

<sup>5</sup> This is particularly so as capacity is, in one sense, at the heart of negligence law — ‘ought implies can’. See, eg, Moran, above n 4, 142, 165; Stephen R Perry, ‘Risk, Harm and Responsibility’ in David G Owen (ed) *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 321, 341–2; Honoré, ‘Responsibility and Luck’ above n 4; Honoré, *Responsibility and Fault*, above n 4 Ch 7; Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007) 76–8; Stephen R Perry, ‘Responsibility for Outcomes, Risk and the Law of Torts’ in Gerald J Postema (ed) *Philosophy and the Law of Torts* (Cambridge University Press, 2001) 72, 91–7; Philip Pettit, ‘The Capacity to Have Done Otherwise: An Agent-Centered View’ in Peter Cane and John Gardner (eds), above n 4, 21; Arthur Ripstein, ‘Private Law and Private Narratives’ in Peter Cane and John Gardner (eds), above n 4, 37, 40–2.

<sup>6</sup> See, eg, *McHale v Watson* (1966) 115 CLR 199.

<sup>7</sup> See, eg, *Goldman v Hargrave* [1967] 1 AC 645, 663 where Lord Wilberforce suggested that ‘less must be expected of the infirm than of the able-bodied’; *Waugh v James K Allen Ltd* (1964) SC (HL) 102 (heart attack); *Billy Higgs and Sons Ltd v Baddeley* [1950] NZLR 605 (pain in the eye);

required mentally ill defendants to act as if they were not suffering from their particular mental illness.

This article considers why there is a difference in legal treatment of those whose capacity is reduced due to mental illness, and those whose capacity is reduced due to childhood, and offers proposals for reform of the law in this area.

## II Characteristics of Mental Illness and Childhood

It is not easy to explain precisely what is meant by the term mental illness.<sup>8</sup> In this article mental illness will refer to a ‘manifestation of a behavioural, psychological, or biological dysfunction’<sup>9</sup> which is often present when a person is experiencing ‘delusions, hallucinations, severe alterations of mood, or other major disturbances of psychological functions’.<sup>10</sup>

As the law assumes that people have free will and can make rational decisions about how to act,<sup>11</sup> the psychotic illnesses (for example schizophrenia, manic-

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*Smith v Lord* [1962] SASR 88 (sudden loss of vision); *Scholz v Standish* [1961] SASR 123 (pain associated with a bee sting). In cases of contributory negligence, courts have considered the fact that the plaintiff was deaf thereby reducing his ability to hear a car horn: *South Australian Ambulance Inc v Wahlheim* (1948) 77 CLR 215; and blind, thereby reducing his ability to avoid obstacles on the road: *Haley v London Electricity Board* [1965] AC 778; See also American Law Institute, *Restatement of the Law, Second, Torts* (1965) 283C. This article, however, is not primarily concerned with the comparison between physical and mental capacity, nor with the difference in treatment of capacity (as in the case of children and the mentally ill) and skill (as in the case of learner drivers and professionals), but rather of the different treatment of reduced mental capacity.

<sup>8</sup> Some have suggested that it is a mythical concept and is simply a social construct. See, eg, George J Alexander and S Thomas Szasz, ‘Mental Illness as an Excuse for Civil Wrongs’ (1967–68) 43 *Notre Dame Lawyer* 24, 27; Thomas S Szasz, ‘The Myth of Mental Illness’ (1960) 15 *American Psychologist* 113; Michael Cavadino, *Mental Health Law in Context* (Gower, 1989) 3; KWM Fulford, Tim Thornton and George Graham, *Oxford Textbook of Philosophy and Psychiatry* (Oxford University Press, 2006) 14–21. Others posit that in light of the continued physical explanations for otherwise unexplained ‘mental’ phenomena, mental illness may itself be regarded as physical. For example, epilepsy was at one time considered a ‘mental’ illness but today it is firmly understood as a physical ailment. See, eg, Peter F Bladin, *A Century of Prejudice and Progress: A Paradigm of Epilepsy in a Developing Society: Medical and Social Aspects, Victoria, Australia, 1835–1950* (Epilepsy Australia, 2001). Some people who suffer from depression have a neurochemical or hormonal imbalance which can be rectified by correcting this imbalance. See, eg, Michael R Trimble, *Biological Psychiatry* (J Wiley, 2<sup>nd</sup> ed, 1996) 183–225, 233–65; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (‘*DSM-IV*’) (4<sup>th</sup> ed, 2000) xxx; RE Kendell, ‘The Distinction Between Mental and Physical Illness’ (2001) 178 *British Journal of Psychiatry* 490. Likewise it is now thought that schizophrenia is a disorder of brain development caused as a result of the interaction between genes and environmental factors. Studies have found that people who suffer from schizophrenia have abnormalities in the temporal lobes and the central nervous system. Moreover, researchers have found that the brain wave patterns of a person suffering from schizophrenia react differently when exposed to certain sound stimuli than the brain wave patterns of a person without the illness. See Nathan J Clunas and Phillip B Ward, ‘Auditory Recovery Cycle Dysfunction in Schizophrenia: A Study Using Event-related Potentials’ (2005) 136 *Psychiatry Research* 17; Michael Gelder, Richard Mayou and John Geddes, *Psychiatry* (Oxford University Press, 3<sup>rd</sup> ed, 2005) 126–7.

<sup>9</sup> American Psychiatric Association, above n 8, xxxi. See, eg, *Mental Health Act 2007* (NSW) ss 4, 15.

<sup>10</sup> Michael Gelder et al, *Oxford Textbook of Psychiatry* (Oxford University Press, 3<sup>rd</sup> ed, (1996) 57, see also 12–13. It has also been described as a ‘pervasive inability to engage reality’: Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press, 1993) 35; *DSM-IV-TR* above n 8, xxxi.

<sup>11</sup> Peter Arenella, ‘Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability’ (1991–2) 39 *UCLA Law Review* 1511, 1529; Donald N Bersoff, ‘The

depressive disorder (bipolar disorder) and dementia) are particularly interesting. This is because sufferers often have an inaccurate understanding of the realities of the world around them, impaired insight, and limited awareness that they are experiencing symptoms which are ‘abnormal’ or that they may require treatment.<sup>12</sup>

There are several groups of defendants with whom treatment of the mentally ill could be compared — the physically ill, the inexperienced and children. Children represent the most useful comparison because some of the symptoms of a number of mental illnesses are similar to some of the characteristics of children. In particular, children at times have reduced self-awareness or understanding of the world around them (or at least different from the objective norm), and less ability to engage in what would be regarded as a rational adult thought process.<sup>13</sup> In addition, both children and those who suffer from mental illness, due to certain of their reduced abilities, may be regarded as more vulnerable than others in society. These similarities do not exist to the same extent with the physically ill or those who are lacking in experience in the particular activity that they are undertaking.

It is also important to note the relevant differences between children and those with mental illness. In particular: the reduced abilities which are common to both groups are generally more constant in children than in those with mental illness;<sup>14</sup> the reduced mental abilities experienced by those suffering from mental illness are often more difficult for others to detect than is the case with children; and there is and always has been a level of fear and distrust of people suffering from mental illness which tend not to be directed toward children.<sup>15</sup>

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Differing Conceptions of Culpability in Law and Psychology’ (2004) 11 *Widener Law Review* 83, 84; Stephen J Morse, ‘The Jurisprudence of Craziness’ in Francesco Parisi and Vernon Smith (eds), *The Law and Economics of Irrational Behavior* (Stanford University Press, 2005) 225.

<sup>12</sup> Gelder, Mayou and Geddes, above n 8, 11–12, 121.

<sup>13</sup> See, eg, Laura E Berk, *Development Through the Lifespan* (Allyn and Bacon, 3<sup>rd</sup> ed, 2004); Leland H Stott, *The Psychology of Human Development* (Holt, Rinehart and Winston, 1974).

<sup>14</sup> This is why the *Mental Health Act 2007* (NSW) s 4 defines mental illness as ‘a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person ...’ (emphasis added). The Act also recognises, and is able to accommodate, the intermittent nature of mental illness by providing for situations of both involuntary commitment and informed consent *Mental Health Act 2007* (NSW) ss 12–45, 91, 93.

<sup>15</sup> See, eg, Andrea Stier and Stephen P Hinshaw, ‘Explicit and Implicit Stigma against Individuals with Mental Illness’ (2007) 42(2) *Australian Psychologist* 106; Bruce G Link et al, ‘Measuring Mental Illness Stigma’ (2004) 30(3) *Schizophrenia Bulletin* 51; Sokratis Dinos et al, ‘Stigma: The Feelings and Experiences of 46 People with Mental Illness: Qualitative Study’ (2004) 184 *British Journal of Psychiatry* 176; Anthony F Jorm and AnneMarie Wright, ‘Influences on Young People’s Stigmatising Attitudes Towards Peers with Mental Disorders: National Survey of Young Australians and their Parents’ (2008) 192 *The British Journal of Psychiatry* 144; Geoffrey Wolff et al, ‘Community Attitudes to Mental Illness’ (1996) 168 *British Journal of Psychiatry* 183; Peter Byrne, ‘Psychiatric Stigma: Past, Passing and to Come’ (1997) 90 *Journal of the Royal Society of Medicine* 618; Nicolas Rüsch, Matthias C Angermeyer and Patrick W Corrigan, ‘Mental Illness Stigma: Concepts, Consequences, and Initiatives to Reduce Stigma’ (2005) 20 *European Psychiatry* 529; J Read et al, ‘Prejudice and Schizophrenia: A Review of the “Mental Illness is an Illness like any other” Approach’ (2006) 114 *ACTA Psychiatrica Scandinavica* 303; MC Angermeyer and S Dietrich, ‘Public Beliefs about and Attitudes Towards People with Mental Illness: A Review of Population Studies’ (2005) 113 *ACTA Psychiatrica Scandinavica* 163; Alan Rosen et al, ‘Combating Psychiatric Stigma: An Overview of Contemporary Initiatives’ (2000) 8(1) *Australasian Psychiatry* 19; Anthony F Jorm et al, ‘Attitudes Towards People with a Mental Disorder: A Survey of the Australian Public and Health Professionals’ (1999) 33 *Australian and New Zealand Journal of Psychiatry* 77; Jack K Martin, Bernice A Pescosolido and Steven A Tuch, ‘Of Fear and Loathing: The Role of “Disturbing Behavior,” Labels, and Causal Attributions in Shaping Public Attitudes Toward People with Mental Illness’ (2000) 41 *Journal of Health and Social Behavior* 208; Arthur H Crisp et al, ‘Stigmatisation of People with

### III Child Tortfeasors

In Australia and other common law countries the age of a child defendant is relevant to determining liability in negligence.<sup>16</sup> The High Court case *McHale v Watson* indicates that one of the primary reasons for this willingness to tailor the objective standard to more closely reflect the abilities of children is that children have less capacity than adults.<sup>17</sup> Kitto J regarded capacity as relevant to liability, not in terms of the personal capacity of each defendant, but of the general capacity as a natural stage of development and normality.<sup>18</sup> His Honour found that as childhood is in a sense 'normal', taking account of the age of the defendant is not to circumvent the objective test of negligence, but merely to recognise that 'normality is, for children, something different from what normality is for adults'.<sup>19</sup>

Owen J highlighted the fact that others are able to track children's development and recognise that they may have reduced capacity. His Honour also opined that to apply a reasonable person standard to a child is contrary to common sense.<sup>20</sup>

In addition to these judicial reasons, commentators have argued that children should be given the benefit of a lower standard of care because their lesser capacity puts them in a position where they need protection from the consequences of some of their actions.<sup>21</sup> A related argument is that children should be allowed to mature and develop by engaging in a variety of activities and this maturing process would be hindered if they were held liable for the mistakes they make while engaged in such learning.<sup>22</sup> It has also been suggested that it is simply 'unfair' to hold children to a standard which they are unable to meet.<sup>23</sup>

Despite the clear statement that children are to be held to an altered standard of care, the court in *McHale v Watson* did not settle on a precise test to apply in child defendant cases. Owen J formulated a rule which allows courts to take into account the age, intelligence and experience of the child,<sup>24</sup> (an approach which has been adopted by the United States),<sup>25</sup> whereas Kitto J's

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Mental Illness' (2000) 177 *British Journal of Psychiatry* 4; Julie Repper and Charles Brooker, 'Public Attitudes Towards Mental Health Facilities in the Community' (1996) 4(5) *Health and Social Care in the Community* 290.

<sup>16</sup> *McHale v Watson* (1965) 115 CLR 199; American Law Institute, *Restatement of the Law, Second, Torts*, above n 7, s 283A; Allen M Linden, *Canadian Tort Law* (Butterworths, 7<sup>th</sup> ed, 2001) 142–3; *Gough v Thorne* [1966] 1 WLR 1387; 3 All ER 398; *Mullin v Richards* [1998] 1 All ER 920.

<sup>17</sup> (1965) 115 CLR 199.

<sup>18</sup> Ibid 213.

<sup>19</sup> Ibid; See also American Law Institute, *Restatement of the Law, Third, Torts: Liability for Physical Harm – Tentative Draft No 1* (2001).

<sup>20</sup> *McHale v Watson* (1965) 115 CLR 199, 232.

<sup>21</sup> *Restatement of the Law, Second, Torts*, above n 7, s 283A(b); Caroline Forell, 'Reassessing the Negligence Standard of Care for Minors' (1985) 15 *New Mexico Law Review* 485, 499.

<sup>22</sup> *Restatement of the Law, Second, Torts*, above n 7, s 283A(a). See also 'Torts: Application of Adult Standard of Care to Minor Motor Vehicle Operators' (1962) *Duke Law Journal* 138, 139; 'A Proposal for a Modified Standard of Care for the Infant Engaged in an Adult Activity' (1966) 42 *Indiana Law Journal* 405, 408.

<sup>23</sup> *Dellwo v Pearson* 107 NW 2d 859 (Minn, 1961), 863.

<sup>24</sup> *McHale v Watson* (1966) 115 CLR 199, 234.

<sup>25</sup> *Restatement of the Law, Second, Torts*, above n 7, s 283A.

narrower test only allows consideration of the child's age (the approach adopted in Australia and the United Kingdom).<sup>26</sup>

Some common law jurisdictions have developed an 'adult exception' to the rule that children be held to a specialised child standard. If child defendants fall under this exception, they are held to the ordinary adult standard of care. Yet it is difficult to understand when a child defendant will be held to this adult standard. Some say the adult exception applies when children operate automobiles, aeroplanes or powerboats.<sup>27</sup> Other sources provide that it operates when children engage in activities 'which [are] normally undertaken only by adults, and for which adult qualifications are required'.<sup>28</sup> Yet others say that it is relevant when children engage in a 'dangerous activity that is characteristically undertaken by adults'.<sup>29</sup> For some the exception applies simply when children are engaged in an 'adult activity'.<sup>30</sup>

The precise reason why this exception exists is also unclear. One suggestion is that it is required by 'the circumstances of contemporary life' and that 'we should be sceptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence'.<sup>31</sup> Alternatively, it has been argued that the exception exists because it is unfair for the law to allow a lower standard of care to be exercised when others cannot be made aware of the lower standard and alter their behaviour to take it into account.<sup>32</sup> Some suggest that the reason for the exception to the child standard is that when a person is granted the rights of an adult that person should be held to the standard of care of an adult.<sup>33</sup> Yet this justification does not explain why almost every formulation of the rule requires something other than simply an adult activity before the exception applies.

It has also been suggested that when children are engaged in activities which are covered by insurance, the balance between the competing interests of plaintiff and defendant fall in favour of the plaintiff recovering because many of the arguments used to justify the child standard (for example, unfairness and the need

<sup>26</sup> For the Australian approach, see, eg, *Mye v Peters* (1967) 68 SR (NSW) 298, 304; *Griffiths v Wood* (1994) 62 SASR 204. For the UK approach, see, eg, *Gough v Thorne* [1966] 1 WLR 1387; 3 All ER 398, 400; *Mullin v Richards* [1998] 1 All ER 920, 924. Canada oscillates between the two: see Linden, above n 16, 142–3.

<sup>27</sup> *Dellwo v Pearson* 107 NW 2d 859 (Minn, 1961), 863.

<sup>28</sup> American Law Institute, *Restatement of the Law, Second, Torts*, above n 7, §283A(c).

<sup>29</sup> American Law Institute, *Restatement of the Law, Third, Torts*, above n 19, s 10.

<sup>30</sup> *McErlean v Sarel* (1987) 61 OR 2d 396 (CA), 412. The court in *Dellwo v Pearson* 107 NW 2d 859 (Minn, 1961) did not give particular guidelines as to which activities would be regarded as adult and it seems that what Justice Loevinger is chiefly referring to are those activities which involve motor-powered vehicles. No Australian court has specifically dealt with this issue. Both McTiernan ACJ and Owen J in *McHale v Watson* (1966) 115 CLR 199 quoted authority which referred to the adult activities exception but neither of the Justices addressed the issue or made specific comment on this point: at 205, 208, 234.

<sup>31</sup> *Dellwo v Pearson* 107 NW 2d 859 (Minn, 1961), 863.

<sup>32</sup> Ibid. See also David E Seidelson, 'Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent' (1981) 50 *George Washington Law Review* 17; Forell, above n 21, 502 n 98. This will be considered in more detail below.

<sup>33</sup> See 'Torts: Standard of Care Applied to Minors in the Operation of Dangerous Instrumentalities' (1966) 3 *Tulsa Law Journal* 186, 188; Linden, above n 16, 145. See also Irish Law Reform Commission, *Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors* (1985) 53.

for protection from the consequences of their actions) are militated against by the existence of insurance.<sup>34</sup>

Nevertheless, despite this confusion, it is clear and settled principle that the law of negligence can and does accommodate the particular characteristics associated with childhood, in particular, the reduced capacity for 'normal' adult behaviour. Thus, even though the law of negligence is generally predicated on the concept of an objective falling short of a standard of care,<sup>35</sup> moral fault does form a part of negligence law. The test of negligence for children can now be described as a hybrid subjective/objective test, or an objective test with subjective side-constraints.<sup>36</sup> That is, although the standard of care is tailored to take into account the difference in age, and therefore capacity, between a particular defendant and other people, the particular defendant is nevertheless judged according to the external or objective standard of the reasonable person of the same age and not simply according to whether the particular defendant had acted to the best of her or his abilities.<sup>37</sup>

#### IV Mentally Ill Tortfeasors

Negligence law, as it relates to defendants who may be said to have reduced capacity for 'normal' adult behaviour due to mental illness, is more controversial than the law of negligence as it relates to children. Not only has there been no final court of appeal decision on the issue in any common law jurisdiction, but very few cases come before the courts at all. In addition, unlike the case of children, there is a marked difference of opinion between common law judges and tort academics in their respected responses to the issue.<sup>38</sup>

<sup>34</sup> Linden, above n 16, 145; Allen E Smith, 'The Misgenetic Union of Liability Insurance and Tort Process in the Personal Injuries Claim System' (1969) 54 *Cornell Law Review* 645, 680. See also 'Torts: Application of Adult Standard of Care' above n 22, 143; Bruce Dunlop, 'Torts Relating to Infants' (1966) 5 *Western Law Review* 116, 118, 119; Forell, above n 21, 503–6; John G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 126. See also *Imbree v McNeilly* (2008) 236 CLR 510, 540–66 (Kirby J).

<sup>35</sup> Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown and Co, 1881) 77–127; Peter Cane, 'Responsibility and Fault', above n 4, 101; Thomas C Grey, 'Accidental Torts' (2001) 54 *Vanderbilt Law Review* 1225, 1265; Henry W Edgerton, 'Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence' (1925–26) 39 *Harvard Law Review* 849, 849–52; Beever, above n 5, 82. It is interesting that despite the fact tortious fault bears no necessary connection with moral fault, a person labelled with the tag 'negligent' is still generally condemned to being blameworthy: Anita Bernstein, 'The Communities that Make Standards of Care Possible' (2002) 77 *Chicago-Kent Law Review* 735, 735. There are those who argue that it is not possible, or at least not desirable to have one without the other: See Moran, above n 4.

<sup>36</sup> Harry JF Korrell, 'The Liability of Mentally Disabled Tort Defendants' (1995) 19 *Law & Psychology Review* 1, 22; Harry Shulman, 'The Standard of Care Required of Children' (1927) 37 *Yale Law Journal* 618, 625; Linden, above n 16, 142.

<sup>37</sup> The United Kingdom has followed Australia's approach to child defendants in negligence actions: see *Mullin v Richards* [1998] 1 All ER 920. But some United States jurisdictions have adopted a presumption of incapacity approach which is similar to the law of crime and contracts. See, eg, American Law Institute, *Restatement of the Law, Third, Torts*, above n 19, s10(d).

<sup>38</sup> See, eg, Picher, above n 4; Elizabeth J Goldstein, 'Asking the Impossible: The Negligence Liability of the Mentally Ill' (1995–96) 12 *Journal of Contemporary Health Law & Policy* 67; WGH Cook, 'Mental Deficiency in Relation to Tort' (1921) 21 *Columbia Law Review* 333; Bohlen, above n 4; Ague, above n 4; William R Castro, 'The Tort Liability of Insane Persons for Negligence: A Critique' (1971–72) 39 *Tennessee Law Review* 705; James W Ellis, 'Tort Responsibility of Mentally Disabled Persons' (1981) *American Bar Foundation Research Journal* 1079; Wm B Hornblower, 'Insanity and the Law of Negligence' (1905) 5 *Columbia Law Review* 278; Okianer Christian Dark, 'Tort Liability and the "Unquiet Mind": A Proposal to Incorporate Mental

In the two relevant Australian cases on this issue, the different courts approached the issue from different angles, although both ultimately found the mentally ill defendant liable in negligence.<sup>39</sup>

In *Adamson v Motor Vehicle Insurance Trust* Wolff SPJ rejected the adoption of a mental illness defence in negligence along the lines of that which exists in criminal law.<sup>40</sup> This was partly because he found the criminal defence of insanity itself to be unsatisfactory,<sup>41</sup> and partly because he felt that the theoretical differences between the criminal law and negligence law — punishment as opposed to compensation — militated against the introduction of such a defence.

It is here suggested that while the problems encountered by the law of crime in relation to the defence of mental illness may be adequate reason for not adopting the criminal test in its entirety and, without tailoring it to the circumstances of the law of negligence, it is not on its own adequate reason for denying some manner of test altogether.<sup>42</sup> Moreover, even if his Honour's characterisation of the law of crime and the law of negligence is accepted, it is difficult to understand why the driving force behind negligence is said to be compensation in cases where the defendant has a mental illness, but not in cases where the defendant is a child.

Wolff SPJ also found that, as a matter of policy, where one of two innocent persons must bear a loss, the loss must fall on the person who caused the damage.<sup>43</sup> Yet if this policy were the underlying principle of negligence law, it would imply that liability is based purely on causation, rendering the concept of duty of care redundant. Moreover, regardless of whether this 'two innocents' argument is a valid policy argument in general, it is not the approach the law takes to other 'innocent' defendants such as children.<sup>44</sup>

Wolff SPJ also refers to additional policy reasons such as, the simple and unsubstantiated statement that 'the lunatic must bear the loss occasioned by his torts as he bears his other misfortunes',<sup>45</sup> and that imposing liability on mentally ill defendants will induce relatives to keep the defendant under restraint and prevent tortfeasors from feigning insanity. This is despite there being no evidence that making those with mental illness liable for behaviour they cannot understand or control will alter the actions of those people caring for the mentally ill,<sup>46</sup> nor that people will feign mental illness in order to avoid civil liability.<sup>47</sup> And in the 21<sup>st</sup>

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Disabilities into the Standard of Care' (2004) 30 *Thurgood Marshall Law Review* 169; Wilkinson, above n 4.

<sup>39</sup> *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56; *Carrier v Bonham* [2002] 1 Qd R 474.

<sup>40</sup> (1957) 58 WALR 56.

<sup>41</sup> *Ibid* 66.

<sup>42</sup> See Castro above n 38, 714. The confusion surrounding mental illness in the criminal law is more supposed than real. It has been suggested that there is around 90 per cent agreement among professionals in insanity defence cases in the United States. See Michael L. Perlin, "'Everything's a Little Upside Down, As a Matter of Fact The Wheels Have Stopped": The Fraudulence of the Incompetency Evaluation Process' (2004) 4 *Houston Journal of Health Law & Policy* 239, 244.

<sup>43</sup> See *Williams v Hays* 38 NE 449 (NY, 1894).

<sup>44</sup> Goldstein, above n 38, 75.

<sup>45</sup> *Adamson v Motor Vehicle Trust* (1957) 58 WALR 56, 62-3.

<sup>46</sup> It would be more logical to impose relevant duties directly onto such caregivers rather than indirectly through the people for whom they are caring: *Fiala v MacDonald* (2001) 201 DLR (4<sup>th</sup>) 680 (Whittman J); Picher, above n 4, 228.

<sup>47</sup> Michael Perlin, above n 42, 244.



century, society and governments do not proceed on the bases that those with mental illness must deal with their misfortunes alone and unaided.

The second Australian case which has dealt with the question of a mentally ill tortfeasor, *Carrier v Bonham*, did not consider whether it should introduce a defence of mental illness, but rather, whether the standard of care should be altered to take into account the defendant's mental illness.<sup>48</sup> In doing so, the court, in two separate judgments, rejected the claim that mental illness should be treated in a similar way to sudden physical incapacity (such as that which results from an epileptic seizure) because the former cases concern the defendant's mental capacity, whereas the latter cases involve facts in which defendants' actions cannot properly be attributed to them at all.<sup>49</sup>

It may be correct from a scientific or medical point of view that the lack of capacity which results from a physical illness involves a complete lack of consciousness or voluntariness, whereas psychiatric illness results in the sufferer's action being directed and controlled by a confused, disordered or distorted consciousness. Yet it remains difficult to understand why an inability to act rationally due to a complete lack of consciousness should be treated differently to an inability to act rationally due to a 'malfunctioning consciousness'. Perhaps it is that the law will excuse inability to act rationally due to physical impairment but not inability to act rationally due to a mental dysfunction. Yet this is particularly difficult to justify given the increasing scientific understanding of the overlap between the physical and the mental realms.<sup>50</sup> The court in *Carrier v Bonham* did not provide adequate answers to these questions.

In comparing the different legal treatment of children and those with mental illness, the court in *Carrier* identified two relevant differences between these respective two groups. First, as all people pass through childhood, whereas not all people experience a mental illness in their lifetime, childhood can be categorised as a 'normal' human state, whereas mental illness cannot.<sup>51</sup>

But most adults have, for example, been intoxicated or exhausted at some point in their lifetime, yet these are not features that determine how the standard of care is set.<sup>52</sup> On the other hand, a medical practitioner is held to the standard of a qualified doctor rather than a 'normal' person when engaging in medical activities even though it could not be statistically characterised as 'normal' to be a doctor. In fact, with one in five people experiencing a mental illness in their lifetime,<sup>53</sup> having a mental illness is a much more statistically normal occurrence than is being a doctor.<sup>54</sup>

The second and related reason offered by the *Carrier* Court is that no appropriate standard could be devised for those with mental illness in the same way that it is for children.<sup>55</sup> This argument is based on the premise that there is no such thing as a 'normal' condition for someone of 'unsound mind'.<sup>56</sup>

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<sup>48</sup> [2002] 1 Qd R 474.

<sup>49</sup> Ibid 486.

<sup>50</sup> Above n 8.

<sup>51</sup> *Carrier v Bonham* [2002] 1 Qd R 474, 487.

<sup>52</sup> Beever, above n 5, 88.

<sup>53</sup> See Human Rights and Equal Opportunity Commission, 'Burdekin Report', above n 3, 13, 15, 16.

<sup>54</sup> Ibid 13.

<sup>55</sup> McMurdo P came to a similar conclusion in *Carrier v Bonham* [2002] 1 Qd R 474, 480.

<sup>56</sup> Ibid 487.

While this may be so, it is equally true that there is no 'normal' condition for someone of 'unsound body' or for somebody who is experiencing 'childhood'. But this is not what the law of negligence requires of these defendants. There may be a normal condition for someone who has only one leg or who is 10 years old but this is not to deny that there will be a wide range of variance on either side of the norm.<sup>57</sup> In this way the 'normal' condition for someone who is suffering schizophrenia is akin to the 'normal' condition of a child of a particular age. If this were not the case, it would be impossible for psychiatrists, psychologists and other health professionals, to make diagnoses and provide the effective treatment in the way that they do.

Moreover, if medical professionals are able to make judgments about the general nature and capacity of people suffering certain types of mental illness for diagnostic and treatment purposes, it is unclear why these generalisations can not form the basis of an attenuated objective standard, the same way that generalisations about childhood development and people in general form the basis of objective standards.<sup>58</sup> As courts and tribunals already make judgments about the mental capacity of those with mental illness when deciding issues of guilt and innocence, efficacy of legal documents, appropriateness of involuntary commitment, and appointment of others to manage one's affairs, it seems difficult to sustain an argument that such determinations cannot be made adequately by courts.

Further, the court's suggestion that a reasonableness standard cannot be applied to a person who is not reasonable appears to misconstrue the meaning of 'reasonable' in the expression 'reasonable person'. That expression does not require a particular static level of rationality or reasoned thought but rather it connotes ordinariness.<sup>59</sup> It is not inconsistent, in applying the standard of care, to find that the reasonable or ordinary person in the defendant's position (say, that of a person suffering from a mental illness) is not actually reasonable. That is, if the defendant's behaviour is irrational but accords with what others in that situation might have done, then the defendant will be found to have satisfied the standard of care regardless of how 'unreasonable' some may feel the behaviour to have been.<sup>60</sup>

The *Carrier* Court also expressed concern that lowering the standard of care to take into account mental incapacity will erode the objective standard to such an extent that it will no longer be of any significance. Such concerns, however, have not stopped courts from taking into account either young age or physical disability that causes a sudden incapacity when determining the standard of care. So this argument on its own appears not to justify ignoring the mental illness suffered by a defendant.

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<sup>57</sup> Ibid.

<sup>58</sup> Goldstein, above n 38, 78.

<sup>59</sup> This is why, in explaining the expression 'reasonable person', judges have used expressions such as 'the man on the Clapham omnibus': *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, 109; or the 'hypothetical person on a hypothetical Bondi tram': *Papatonais v Australian Telecommunications Commission* (1985) 156 CLR 7, 36.

<sup>60</sup> There are commentators who disagree with this line of argument, instead seeing the ordinary person standard as normative rather than sociological or descriptive. They argue that the standard of care represents an ideal standard to which all should aspire, so that the question to which negligence is directed is what the defendant should have done to avoid a foreseeable risk: See, eg, Beever, above n 5, 84; Moran, above n 4. But this analysis does not accord with the law in Australia relating to the standard of care for children, as Windeyer J in *McHale v Watson* found that the defendant was old enough to appreciate the dangers associated with his behaviour but he was, nevertheless, not liable in negligence: *McHale v Watson* (1964) 111 CLR 384, 398.

Interestingly, the court found that if those with mental illness who live in society 'take advantage'<sup>61</sup> of their liberty, there will be a reversion to the inhumane practice of institutionalisation.<sup>62</sup> Apart from implying that there is a glut of people suffering from mental illness wreaking havoc in the community — a fact which no evidence supports — this argument misunderstands the history of institutionalisation and deinstitutionalisation.<sup>63</sup> It seems fanciful to suggest that a few actions for negligence will result in a complete regression of government policy to one which is expensive, unnecessary and inhumane.

It would seem that Australian law relating to the appropriate treatment of mental illness for the purposes of liability in negligence, is based both on unreliable or inadequate legal authority, and misguided and uninformed policy considerations, derived as a result of out-of-date and inaccurate assumptions about mental illness and medical knowledge.

## V Academic Responses to Mentally Ill Tortfeasors

While several commentators have criticised the law of negligence in relation to mentally ill defendants, few have provided a theoretical analysis of this law. In an attempt to understand why there is a difference in legal treatment of children and those with mental illness, this article considers some of the limited scholarship in this area.<sup>64</sup>

### A *The Compensation Objective*

In his article 'Mental Abnormality, Personal Responsibility and Tort Liability' Jules Coleman argues that the only way for tortious liability to be imposed on mentally ill tortfeasors is by viewing tort law as a system of compensation.<sup>65</sup> This is because theories grounded in deterrence or moral culpability do not adequately explain why the current law holds mentally ill defendants liable for their tortious actions,<sup>66</sup> and, as a matter of general structure, both tort law and the concept of compensation are plaintiff- or victim-focussed.<sup>67</sup>

Coleman does not conclude that mentally ill tortfeasors will always be held liable for their actions. He considers that human action or agency is a prerequisite for liability in tort.<sup>68</sup> By agency he means the abilities to form intentions, transform them into human conduct, and understand the relation between the two.

<sup>61</sup> *Carrier v Bonham* [2002] 1 Qd R 474, 487.

<sup>62</sup> Ibid 487–8. See also Stephanie I Splane, 'Tort Liability of the Mentally Ill in Negligence Actions' (1983) 93 *Yale Law Journal* 153, 163–5.

<sup>63</sup> Dark, above n 38, 185–6.

<sup>64</sup> This article does not consider the broader questions relating to the purposes and nature of tort law more generally. It therefore does not discuss notions of corrective justice, the economic theories of tort law, distributive justice, nor any other such inquiry.

<sup>65</sup> Jules L Coleman, 'Mental Abnormality, Personal Responsibility and Tort Liability' in Baruch A Brody and H Tristram Engelhardt Jr (eds), *Mental Illness: Law and Public Policy* (D Reidel Publishing Co, 1980) 107.

<sup>66</sup> Ibid 111–12, 116–18.

<sup>67</sup> Ibid 125–6.

<sup>68</sup> Ibid 128–9; See also, Beever, above n 5, 74–8; Martin Stone, 'On the Idea of Private Law' (1996) 9 *Canadian Journal of Law & Jurisprudence* 235, 265; Ernest J Weinrib, *The Idea of Private Law* (1995) 13, 84–90; Jules Coleman, 'The Mixed Conception of Corrective Justice' in Ernest J

This approach explains why acts which are often referred to as ‘acts of God’, such as weather conditions, do not fall within the ambit of tort liability. Coleman suggests that if adult tortfeasors cannot be said to have actually acted, in the sense that they lack ‘authorship’ of the act, they too cannot be held liable for any resulting damage. Thus, the proposed agency exception does not deny liability due to the defendant being ‘innocent’ or not culpable, but because the defendant could not be regarded as having actually engaged in an action.<sup>69</sup>

Coleman considers that some categories of mental illness may operate so as to deny this assumption of agency and therefore the possibility that the tortfeasor can be subject to legal judgement and sanction by the courts. For example, he suggests that people who suffer from psychotic disorders are sometimes unable to translate intention into action, and are sometimes not the compelling force in their action. Coleman opines that such people lack agency where, for example, their bodily movements cannot be correctly termed as their own actions. They should therefore not be held liable for their otherwise tortious behaviour.<sup>70</sup>

Although Coleman’s analysis appears to offer a moral explanation as to why the law of negligence does not take into account a tortfeasor’s capacities or mental illness when determining liability, this analysis, as well as his application of it to those with a mental illness, is problematic.

First, the aim of compensation does not adequately and comprehensively explain tort law. Viewing tort law solely or even primarily, as a compensation scheme does not explain why the particular defendant, rather than anyone else, must provide the compensation to the injured party. If compensation were the central issue, the compensation system would take account of the fact that a person’s loss is the same regardless of whether it came about through wrongful behaviour or otherwise.<sup>71</sup>

Nor does viewing tort law as a compensation scheme adequately explain why courts in many common law countries, such as Australia and the United Kingdom, traditionally refuse to consider whether one of the parties is in a better position than the other to shoulder the financial burden of the accident, either through personal means or insurance.<sup>72</sup> It does not explain why money is to be paid

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Weinrib (ed), *Tort Law* (Ashgate, 2002) 427, 442–3; Jules L Coleman, ‘The Practice of Corrective Justice’ (1995) 37 *Arizona Law Review* 15, 26; Stephen R Perry, ‘The Moral Foundations of Tort Law’ (1992) 77 *Iowa Law Review* 449, 509; Moran, above n 4, 21.

<sup>69</sup> Coleman, ‘Mental Abnormality’ above n 65, 128.

<sup>70</sup> Ibid 130–1.

<sup>71</sup> Weinrib, above n 68, 43; Stone, above n 68, 237.

<sup>72</sup> Kenneth S Abraham, ‘Liability Insurance and Accident Prevention: The Evolution of an Idea’ (2005) 64 *Maryland Law Review* 573; Richard Lewis, ‘The Relationship Between Tort Law and Insurance in England and Wales’ in Gerhard Wagner (ed) *Tort Law and Liability Insurance* (Springer, 2005) 61, 67; Lord Diplock, ‘Judicial Developments of the Law in the Commonwealth’ [1978] 1 *Malayan Law Journal* cviii, cxii; Tom Baker, ‘The View of an American Insurance Law Scholar: Six Ways that Liability Insurance Shapes Tort Law’ in Gerhard Wagner (ed) *Tort Law and Liability Insurance* (Springer, 2005); Gerhard Wagner, ‘Tort Liability and Insurance: Comparative Report and Final Conclusions’ in Gerhard Wagner (ed) *Tort Law and Liability Insurance* (Springer, 2005); Peter Cane, *Atiyah’s Accidents, Compensation and the Law* (Cambridge University Press, 6<sup>th</sup> ed, 2004); Simon Deakin, Angus Johnson and Basil Markesinis, *Markesinis and Deakin’s Tort Law* (Clarendon Press; Oxford University Press, 5<sup>th</sup> ed, 2003) 3; James Fleming Jr, ‘Accident Liability Reconsidered: The Impact of Liability Insurance’ (1948) 57 *Yale Law Journal* 549, 551. Cf Jane Stapleton, ‘Tort, Insurance and Ideology’ (1995) 58 *Modern Law Review* 820; William L

exclusively to one person rather than to society's representative — the state — to make the best use of recourses in accordance with its aims.<sup>73</sup>

From a practical point of view, regarding tort law largely as a form of compensation condemns it to being judged vastly inadequate in this task.<sup>74</sup>

Finally, tort as compensation does not provide adequate account of the fundamental structure of tort law — the concepts of duty, breach and causation. Theories based on the notion of tort as compensation are essentially forward-looking as they focus on the consequences of imposing liability and improved reflective practice. But tort law is ultimately backward-looking because it is primarily concerned with attributing responsibility for past aberrant or legally culpable behaviour.<sup>75</sup>

Assuming however that Coleman's analysis of tort law as an expression of compensatory justice is correct, his application of it to sufferers of mental illness seems to misunderstand the nature of mental illness. The 'agency-denial' approach to responding to mental illness does not take into account the fact that while, in some cases, it may be appropriate to say that a person suffering a psychotic episode is, in a sense, not in control,<sup>76</sup> in other instances a person experiencing delusions and hallucinations can arguably translate mere intentions into actual conduct, even though the reality on which the intentions are based is irrational and fantastic.<sup>77</sup>

Moreover, even if Coleman were correct in his categorisation of tort law as a form of compensatory justice, and even if his application of it to defendants with a mental illness made scientific sense, his analysis only serves to reinforce the view that common law courts have taken an inconsistent or anomalous approach to standard of care. That is, if it is justifiable to judge defendants according to their acts rather than their abilities, it is unclear why courts have been flexible in their approach to the test of objective reasonableness as it applies to child defendants. Apart from very young infants, children cannot be said to be lacking agency in the way Coleman provides.<sup>78</sup> Children intend their actions much the same way that people who suffer from a mental illness intend their actions. Further, as with those

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Prosser, *Handbook of the Law of Torts* (West Pub Co, 4<sup>th</sup> ed, 1971); *Nettleship v Weston* [1971] 2 QB 691, 699. See also *Morris v Ford Motor Co Ltd* [1973] QB 792, 798; *Lynch v Lynch* (1991) 25 NSWLR 411, 420; *Kars v Kars* (1996) 187 CLR 354; *Imbree v McNeilly* (2008) 236 CLR 510.

<sup>73</sup> Stone, above n 68, 238; Richard L Abel, 'A Critique of Torts' (1989–90) 37 *UCLA Law Review* 785, 807.

<sup>74</sup> See, eg, Abel, above n 73, 796; Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67 *Modern Law Review* 384, 394; Cane, *Atiyah's Accidents*, above n 72, 150; Don Dewees, David Duff and Michael Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, 1996), 412–13; Harold Luntz and David Hambly, *Torts: Cases and Commentary* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2002); National Rehabilitation and Compensation Scheme Committee of Inquiry, *Compensation and Rehabilitation in Australia: report of the National Committee Enquiry ('The Woodhouse Report')* (Australian Government Publishing Service, 1974); Carolyn Sappideen et al, *Torts: Commentary and Materials* (Lawbook Co, 9<sup>th</sup> ed, 2006) 5–7.

<sup>75</sup> Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72 *Fordham Law Review* 1811, 5; Stone, above n 68, 239; Weinrib, above n 68, 43, 47; Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 61.

<sup>76</sup> See expert evidence provided in *Fiala v Cechmanek* (1999) 281 AR 248, [11], [16].

<sup>77</sup> Morse, above n 11, 226.

<sup>78</sup> Lisa Perrochet and Ugo Colella, 'What a Difference A Day Makes: Age Presumption, Child Psychology, and the Standard of Care Required of Children' (1992–93) 24 *Pacific Law Journal* 1323; Berk, above n 13, 19; Stott, above n 13, 192–4.

who have a mental illness, it is simply that children sometimes lack awareness of the world around them and make questionable judgement calls in relation to their intentions and desires. It is unclear why a compensation-focussed, plaintiff-oriented approach to liability is adopted when the adult defendant suffers from a mental illness, but not when the defendant is a child.

Coleman's account therefore does not adequately explain the law as it applies to tortfeasors with a mental illness in light of the law as it relates to child tortfeasors.

## **B The Role of Luck in Tort Law**

Tony Honoré rejects the suggestion that the objective standard is justified only by reference to the social goal of reducing accidents. Instead, he attempts to provide a moral justification for the test and the seemingly harsh consequences it sometimes produces.<sup>79</sup>

Honoré's premise is that we live in a society in which people are held responsible for what they do — even in circumstances where they could not foresee the consequences of their actions or did not intend to act in the way that they did. This, he refers to as, 'outcome responsibility'.<sup>80</sup> We adhere to such a system because being responsible for one's actions is part of what it is to be a human being — to be a person operating in the world. To deny responsibility for actions is to deny one's status as a person.<sup>81</sup>

Honoré also argues that 'accepting responsibility for our actions makes for a better society because it encourages us to do well and to enjoy the credit that comes from doing well.'<sup>82</sup> If this is the case, not only does Honoré defeat his own attempts to move beyond such consequentialist-based approaches to tort law, but we are faced with the question of how liability should be imposed on those who are unable to be deterred, or are unable to respond positively to the potential of receiving credit for doing well.<sup>83</sup>

This concern aside, Honoré argues that because of our commitment to outcome responsibility, 'luck' plays a significant role in the apparent fairness of a finding of legal liability. Luck, for Honoré, concerns both people's natural abilities ('dispositional luck') and the circumstances in which they find themselves ('circumstantial luck'). Good luck is, within this scheme, the blessing of having been born with average or superior personal attributes and finding oneself in favourable circumstances. Bad luck, on the other hand, is the misfortune of having been born with inferior personal attributes and being faced with less than favourable circumstances.<sup>84</sup>

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<sup>79</sup> Honoré, *Responsibility and Fault*, above n 4; See also Thomas Nagel, 'Moral Luck' in Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979) 24, 31.

<sup>80</sup> Honoré, *Responsibility and Fault*, above n 4, 15.

<sup>81</sup> See also Cane, 'Moral Luck', above n 4, 143.

<sup>82</sup> Honoré, *Responsibility and Fault*, above n 4, 10.

<sup>83</sup> Ibid. Interestingly, this emphasis on identity and character is in complete contrast to Coleman's thesis that tort law is not concerned with the person, but the action the person performs.

<sup>84</sup> For a more detailed explanation of the notion of luck see Bernard Williams, *Moral Luck* (Cambridge University Press, 1981); Cane, 'Moral Luck' above n 4; SL Hurley, *Justice, Luck and Knowledge* (Harvard University Press, 2003); John CP Goldberg and Benjamin C Zipursky, 'Tort Law and Moral Luck' (2007) 92 *Cornell Law Review* 1123.

In being held responsible for the outcomes of their actions, adults are sometimes held responsible for their bad luck. Although this may appear intuitively unfair, and although liability in every case may not in fact be fair under this system,<sup>85</sup> Honoré argues that the system, as a whole, is justifiable. This is for three reasons: first, the system works reciprocally so that people are held responsible for their good luck, and equally for their bad luck.<sup>86</sup> Second, people generally have the benefit of experiencing more good consequences from their actions than bad (although Honoré does not explain why, or even if, this is in fact the case).

Third, 'outcome responsibility' only applies to those who possess the minimum capacity for reasoned choice and action.<sup>87</sup> The reason why a minimum capacity is required for outcome responsibility is because those who lack this base level of capacity are not likely to have the benefit of more 'credit' than 'debits' with regard to their actions, thus creating an unacceptable balance between positive and negative actions. This ultimately results in an unfair application of outcome responsibility.<sup>88</sup>

This analysis is similar to Coleman's agency requirement. It does not dictate that if any time people are unable to meet a legal standard, or to behave in a particular way, they should be immune from legal responsibility, but rather that people must have the general ability to perform the type of behaviour that is required of them. For example, although licence-holders may sometimes drive unsafely, they do generally have the ability to drive in a safe manner. They therefore have the general capacity to drive. But on a particular occasion it may be that they were not able to do so. An infant, on the other hand, does not have the general ability to drive at all, and therefore does not possess the required minimum capacity.<sup>89</sup>

It is not entirely clear how those suffering from a mental illness fit into Honoré's analysis. Honoré is uncomfortable with denying people responsibility for their actions because of his belief in the relationships between legal 'responsibility' and personhood, and identity and self respect.<sup>90</sup> Putting those adults who have a mental illness into the category of those who do not possess minimum capacity (as is the case when a person experiences an epileptic seizure or is engaged in sleep walking) is problematic for similar reasons that it is problematic for Coleman. That is, categorising those who have a mental illness, as not possessing the capacity for forming intentions or transforming them into actions, does not explain, from a scientific or medical perspective, what is really at issue for a person with mental illness. Their lack of capacity is related to an inability to engage in rational thinking and to have a rational awareness of themselves and the world around them. It is not based generally on an inability to control their behaviour physically or to form and act on intentions.<sup>91</sup>

<sup>85</sup> See, Ripstein, 'Private Law and Private Narratives', above n 5, 39.

<sup>86</sup> Honoré, *Responsibility and Fault*, above n 4.

<sup>87</sup> Ibid 26–7, 32.

<sup>88</sup> Ibid 28, 32.

<sup>89</sup> Ibid 11–12, 38. See also HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, 1968) 152; Cane, 'Moral Luck', above n 4, 148–9.

<sup>90</sup> See also Cane, 'Moral Luck', above n 4, 143; Tony Honoré, 'Appreciations and Responses' in Cane and Gardner (eds), *Relating to Responsibility*, above n 4, 226.

<sup>91</sup> See Michael Smith, 'Responsibility and Self-Control' in Cane and Gardner (eds), *Relating to Responsibility*, above n 4, 1, who argues that a person can be capable of acting intentionally but nevertheless be a victim of circumstance in the sense that such a person has no rational control.

As Honoré does not specifically examine the issue of mentally ill tortfeasors, it is unclear how his theory applies to the intermittent and vastly different levels that a person with mental illness may experience. A person who experiences psychotic episodes may be quite capable and rational when not experiencing these symptoms, but has an incredibly distorted view of reality when in the midst of a psychotic episode. It is unclear from Honoré's account whether these varying abilities can be adequately accounted for. Is she or he to be judged according to whether, when having psychotic episodes, they are more or less likely to have more good rather than bad experiences over time, or whether their abilities are cumulative (including when they are having psychotic episodes and when they are not) so that their generally positive experiences, when not in a psychotic state, overshadow their generally negative experiences when psychotic? This question, based on the medical realities of mental illness, is not explored by Honoré and thus no ready answer is immediately apparent from his theory.

Honoré does, however, examine the relationship between the objective legal standard and the case of children as putative tortfeasors. He considers that child defendants have minimum capacity, but if they are held to the adult standard, they will not have the benefit of more positive than negative outcomes of their behaviour because they cannot generally act the way an adult would. This is why the standard is altered for them — we judge them according to the standard that they are usually able to attain.<sup>92</sup> This simply gives a more plausible meaning to the expression 'capacity to act otherwise' which is the basis of negligence law.<sup>93</sup>

Defendants with a mental illness are similar in all relevant respects. They are generally regarded by courts as having minimum capacity in the way envisaged by Honoré; they are attributed with both the 'good' and the 'bad' consequences of their behaviour. Further, depending on the state of their illness, they may or may not receive the benefit of more positive than negative consequences of their actions. It therefore seems plausible, according to Honoré's explanation, to argue that the standard of care for those with some forms of mental illness should be tailored to make 'capacity to act otherwise' more realistic for them in the same way that it is for children. But as this is not the current law, it remains unclear why the bad luck of mental illness is to be borne by the defendant but not the bad luck of not yet being of mature age.

Thus Honoré's analysis does not explain why there is a difference in legal treatment of children and mentally ill defendants in negligence.

### C *Reasonable Expectations*

David Seidelson's approach is different from that of Coleman and Honoré.<sup>94</sup> Seidelson does not aim to provide a moral justification for the objective test of negligence or for the current legal treatment of those with mental illness. Instead, he seeks to explore, from a descriptive perspective, why the law will sometimes adjust the objective standard of care and take into account particular characteristics of the

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<sup>92</sup> Honoré, *Responsibility and Fault*, above n 4, 34.

<sup>93</sup> See, eg, Pettit, above n 5.

<sup>94</sup> Seidelson, above n 32.



defendant.<sup>95</sup> His article addresses the precise question of this article: why is there a different legal response to child defendants and defendants with a mental illness?

Seidelson's answer lies in a theory of reasonable expectations. That is, as orderly societies require people to pursue their goals and organise their lives based on expectations about the behaviour of other people, the role of law is to mediate or control these expectations to ensure that they are reasonable.<sup>96</sup> In other words, law delineates an appropriate balance between the interests of the plaintiff, defendant and wider society.

According to Seidelson, whether expectations are reasonable or not will depend on any relevant knowledge one person has of another, particularly in relation to capacity. Only if a person is, or should be, aware of the reduced capacity of another is it justifiable to require expectations (and therefore the objective standard) to be altered.<sup>97</sup> This is because when a plaintiff does not know of special facts which may make the defendant unable to act reasonably, the plaintiff is unlikely — and in fact cannot be expected — to take additional precautions in light of the defendant's special characteristics. The plaintiff's reasonable expectations are therefore unreasonably, rather than justifiably, frustrated.<sup>98</sup>

Seidelson applies his theory to several cases: the minor, the person with developmental delay, and the person with a mental illness. He finds that the altered standard of care for children (as well as the exception to this standard) makes sense in light of his analysis because people are generally aware of the likely reduced capacity of the person with whom they are interacting when this person is a child.

Likewise, where questions arise regarding the standard of reasonableness a developmentally-delayed person must meet, Seidelson cites favourably a Missouri Court of Appeal case in which the judge found that the defendant 'had intimately known [the] plaintiff since he was twelve years of age, and knew he was mentally subnormal',<sup>99</sup> so could not expect him to act the way a reasonable adult would have done.

Reference to reasonable expectations also explains why the Wisconsin court in *Breunig v American Family Ins Co* found the defendant liable when she drove across the dividing line and crashed into the plaintiff, even though the defendant was, at the time, experiencing a psychotic episode due to her undiagnosed schizophrenia.<sup>100</sup>

Thus Seidelson appears to have articulated a theory which explains the law's response to tortfeasors with mental illness, even in light of its response to child tortfeasors. That is, the relevant difference between children and people suffering a mental illness is that people are generally cognisant of a child's reduced level of capacity; it is more difficult to identify reduced capacity in an adult who is

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<sup>95</sup> Seidelson does not differentiate between plaintiff or defendant but instead focusses on the 'actor' — whether in primary or contributory negligence — and her or his requirement to meet the standard of care.

<sup>96</sup> See, also Patrick Kelley, 'Infancy, Insanity, and Infirmary in the Law of Torts' (2003) 48 *The American Journal of Jurisprudence* 179, 227.

<sup>97</sup> Seidelson, above n 32, 29.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Lynch v Rosenthal* 396 SW 2d 272 (Mo Ct App, 1965), 276.

<sup>100</sup> 45 Wis 2d 536, 173 NW 2d 619 (1970).

suffering from a mental illness.<sup>101</sup> When engaging in transactions with children, people have more opportunity to modify their expectations and behaviour, than those engaged in transactions with those who have a mental illness.<sup>102</sup>

Seidelson's theory, however, is problematic for several reasons. First, although his proposal goes some way to explaining the difference in legal treatment of children and defendants with mental illness, it does so at the expense of consistency in relation to another group of defendants; it does not explain why those who have experienced a sudden physical illness such as epilepsy, bee sting,<sup>103</sup> or pain in the eye,<sup>104</sup> are generally not held liable for the damage they cause. Given the difficulty in recognising the potential for reduced capacity in such people, reasonable expectations theory would require these defendants to be held liable for their damaging behaviour in the same way as defendants with a mental illness. But courts have been reluctant to find liability in such cases.<sup>105</sup> The reasonable expectations theory is therefore unable to provide overarching consistency in the law's approach to defendants with reduced capacity.<sup>106</sup>

Seidelson's theory is also problematic because it does not accurately reflect the actual requirements of negligence law.<sup>107</sup> Liability in negligence is imposed on defendants who have not behaved the way an ordinary person in that position would have behaved. This is a defendant- rather than plaintiff-focussed approach. Theories based on reasonable expectations are plaintiff-directed — they are about the plaintiff's expectations rather than the defendant's reasonableness.

Moreover, the recent Australian High Court case *Imbree v McNeilly* specifically found that learner-drivers do not owe a lower standard of care to their supervisors even where the supervisor is aware that the learner-driver has less experience and ability to drive than a fully licensed driver.<sup>108</sup> Although *Imbree* is in the context of the learner-driver and supervisor, it indicates that a plaintiff's special knowledge of the abilities of the tortfeasor is irrelevant to liability. The theory of

<sup>101</sup> Seidelson, above n 32, 29. This is reminiscent of Holmes, above n 35, 109 stating: '[W]hen a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them ...'. It is also the argument on which *Cook v Cook* (1986) 162 CLR 376 proceeds (although note that *Cook v Cook* has recently been overturned by *Imbree v McNeilly* (2008) 236 CLR 510).

<sup>102</sup> Ibid.

<sup>103</sup> *Scholtz v Standish* [1961] SASR 123.

<sup>104</sup> *Billy Higgs & Sons Ltd v Baddeley* [1950] NZLR 605.

<sup>105</sup> See, eg, *Roberts v Ramsbottom* [1980] 1 All ER 7; *Waugh v James K Allan Ltd* [1964] SC (HL) 102.

<sup>106</sup> Seidelson notes this inconsistency and uses it to ultimately reject the law in relation to defendants with a mental illness. He notes that if the interests of the plaintiff, who is injured by a defendant and experiences a sudden physical illness, can be legally frustrated, then the same can apply for those injured by a defendant who has a mental illness. Seidelson says that in such cases, the frustration of the plaintiff's interests gives way to the inappropriateness of holding a person who is incapable of culpability, liable in negligence. Thus it has been said of Seidelson's article that 'we have the unusual case of an author who develops a brilliantly successful descriptive theory and then immediately rejects that theory as normatively inadequate.' It has been suggested that Seidelson's dilemma was created because his theory 'ultimately fell back on a seemingly ad hoc balancing test, with no principled basis in the purpose of negligence liability to decide which claim was better.' See Kelley, above n 96, 210 (emphasis altered).

<sup>107</sup> There is also concern regarding the existence of any principled way of characterising what is meant by reasonable expectations. See, eg, Bailey H Kuklin, 'The Justification for Protecting Reasonable Expectations' (2001) 29 *Hofstra Law Review* 863, 865.

<sup>108</sup> (2008) 236 CLR 510.

reasonable expectations therefore does not accord with the general principles of Australian law and is ultimately unconvincing, or at least, incomplete.

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

## VI Resolving the Dissonance?

This article has highlighted a difference in legal treatment of children and the mentally ill. It has argued that neither the courts nor academics have adequately explained this difference. There are several possible responses to this lack of parity.

First is to accept the current law, reject any criticism about it, and support the courts' reasons for their decisions in the relevant cases. This is, in essence, to accept that the incremental nature of common law sometimes results in inconsistencies between particular instances. Alternatively, it is to characterise the reduced capacity which may result from mental illness as significantly different (from a legal perspective) to the reduced capacity which is a concomitant to childhood.

Similarly, it may be thought best to embrace the current law not because of a belief in its appropriateness or adequacy, nor due to general agreement with the courts' reasons, but rather because, given the scarcity of case law on the subject, it would seem that actions against children and defendants with a mental illness do not often arise. It may be argued that the apparent legal anomaly (between children and those with mental illness), can be regarded as of little practical significance and, therefore, not worth the time and effort that this and other works have spent on the issue.

But it is argued here that the infrequency of cases does not make it any less necessary for particular areas of law to be intellectually plausible. It does not make it any less appropriate for the legal treatment of those with reduced capacity to be fair and just in light of the medical realities of such reduced capacities.

An alternative response to the issue is to recognise the apparent inconsistency in modern negligence law and to revert to the rules of negligence propounded by some 19<sup>th</sup> century scholars and judges who argued that children and the mentally ill should be treated in a like manner and both should be liable to provide compensation for the damage suffered as a result of the accidents they cause.<sup>109</sup> Thus instead of suggesting that the law relating to the mentally ill should be brought into line with the law as it relates to children, this argument requires the law relating to child defendants to be brought into line with the law relating to defendants with a mental illness. However, in light of the mostly united support in all common law jurisdictions — both at the bench and in legal scholarship — for the law of negligence as it relates to children, it would seem unlikely that the dissonance will be resolved in this way.

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<sup>109</sup> See, eg, *Williams v Hays* 38 NE 449 (NY, 1894); Susanna L Blumenthal, 'The Default Legal Person' (2007) 54 *UCLA Law Review* 1135, 1251–2.

An option for reform at the opposite extreme is for courts to create a new particularised category for those suffering from a mental illness similar to the one that exists for children. This would not mean that defendants with a mental illness would automatically be immune from liability in negligence. The standard of care according to which such a defendant would be judged, would be tailored in some way to better reflect the capacities of those suffering from mental illness — the same way that the standard of care for children is tailored to better represent their abilities.

This proposal could be subject to two criticisms. First, while it may meet the tests of intuitive fairness, humanity and logic from the perspective of those suffering from a mental illness,<sup>110</sup> it would leave the injured plaintiff without compensation in a situation where the defendant may well be able to provide such compensation, perhaps by means of insurance. It has been argued that this situation is unfair to the injured plaintiff and that it gives too much weight to the defendant's interests to the detriment of the plaintiff.<sup>111</sup> But, given the importance and prevalence of insurance, this objection may be more theoretical than practical.

Second, it has been argued from a doctrinal point of view that creating a standard specifically for defendants with a mental illness would be to compromise the objective test to such an extent that it becomes meaningless.<sup>112</sup> Yet these two arguments have not been used in relation to the altered standard of care for children, and they seem therefore to simply beg the question.

An off-shoot of this suggestion of an altered standard of care for those with a mental illness is one which draws on the therapeutic and deterrent significance of tort liability. It argues that if tort law is aimed at deterring unsafe behaviour, it must take into account the reality of accident causation and the way in which the standard of care may impact on therapeutic concerns. The argument is that imposing liability on those suffering from a mental illness will encourage them to seek treatment for their illness.<sup>113</sup> In this way, the objective test encourages a higher rate of treatment for mental illness and thereby reduces risks in society.

Regardless of whether liability does, in fact, encourage people to seek treatment, or whether risks would be significantly reduced by those with a mental illness seeking treatment for their illness,<sup>114</sup> the question remains how to respond to those defendants who have sought treatment for their illness. The law currently responds to those who have sought treatment and those who have not in the same way. Therefore those who have acted responsibly, by following the recommended treatment regime, are given no extra credit for this behaviour.<sup>115</sup>

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<sup>110</sup> See Allan Beever, 'Particularism and Prejudice in the the Law of Tort' (2003) 11 *Tort Law Review* 146 for a discussion about the role of intuition in decision-making in the law of torts.

<sup>111</sup> Beever, *Rediscovering the Law of Negligence*, above n 5, 81–2; 2; Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune' (1995) 41 *McGill Law Journal* 91, 112–3; Cane, 'Responsibility and Fault' above n 4, 81, 106; Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge University Press, 2001) 269–70; Alan Calnan, 'The Fault(s) in Negligence Law' (2007) 25 *Quinnipiac Law Review* 695, 726.

<sup>112</sup> As noted in *Fiala v MacDonald* (2001) 201 DLR (4<sup>th</sup>) 680, [27] this was one of the main concerns of Tindal CJ in *Vaughan v Menlove* (1837) 3 Bing NC 468; 132 ER 490.

<sup>113</sup> Daniel W Shuman, 'Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care' (1992–93) 46 *SMU Law Review* 409, 420.

<sup>114</sup> Grant Morris, 'Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence' (1994) 47 *SMU Law Review* 1837, 1850.

<sup>115</sup> Shuman, above n 113, 420.

It has been argued that if tort law is to truly encourage those suffering from a mental illness to seek treatment, it must take into account the realities of treatment for such illnesses (side effects, increase in risks of accident in the short term, decreased cognitive abilities).<sup>116</sup> This may be achieved by differentiating defendants with a mental illness depending on whether or not they have sought treatment — or at least have made a good faith effort to seek treatment for their illness.<sup>117</sup> For those who have sought treatment for their illness prior to the injury-causing behaviour, the standard of care should be altered so as to take into account the treatment the defendant has received.<sup>118</sup> That is, if seeking treatment is a reasonable response to signs of mental illness, then this response should be considered at the time of determining liability for a defendant's behaviour.<sup>119</sup> Those who, on the other hand, have not sought treatment for their known mental illness, will be judged according to the ordinary objective standard.

The concern regarding this suggestion is that it is premised on the inadequately proven assumption that tort law does deter unsafe behaviour.<sup>120</sup> It also fails to recognise one of the hallmarks of mental illness — a lack of self-awareness in relation to one's illness, which inhibits a person's appreciation for the fact that they may need to seek treatment. In this sense, the therapeutic suggestion may in fact lead to a harsher response towards those who have severe mental illness, than those whose illness is somewhat milder. In addition, it would seem to treat unfairly those suffering from a mental illness for which treatment has been ineffective,<sup>121</sup> and perhaps does not adequately take into account the importance of the compensation goal of tort law.<sup>122</sup>

A further response to the current law for adult defendants with a mental illness does not propose altering the law, so much as altering the way in which mental illness is categorised.<sup>123</sup> This proposal suggests that, in light of current medical knowledge which recognises the physiological basis for the majority of mental illnesses,<sup>124</sup> those with a mental illness could easily be classified with those who have what are traditionally known as physical illnesses. This is because most illnesses which would be classified as mental or psychiatric are, in fact, caused as a result of a physical element such as chemical imbalance, lesions or the like. By reclassifying 'mental illness' in this way, there is no change to the existing law, its application as it relates to those suffering from a mental illness is more in line with medical knowledge, and those suffering from a mental illness are no longer burdened with a liability which seems intuitively unfair and anomalous.

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<sup>116</sup> Ibid 423.

<sup>117</sup> Ibid 427.

<sup>118</sup> Ibid 424.

<sup>119</sup> Ibid 425.

<sup>120</sup> See, eg, Daniel W Shuman, 'Psychology of Deterrence in Tort Law' (1993) 42 *University of Kansas Law Review* 115; Michael J Trebilcock, 'The Future of Tort Law: Mapping the Contours of the Debate' (1989) 15 *Canadian Business Law Journal* 471; Don Dewees and Michael Trebilcock, 'The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence' (1992) 30 *Osgood Hall Law Journal* 57; Gary T Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994–95) 42 *UCLA Law Review* 377.

<sup>121</sup> Goldstein, above n 38, 89.

<sup>122</sup> Morris, above n 114, 1846–9.

<sup>123</sup> Dark, above n 38.

<sup>124</sup> See above n 8.

Such an approach, however, does not necessarily accord well with society's and the law's understanding of illness more generally, which divides illnesses into mental and physical (whether correctly or incorrectly). In addition, although this test may circumvent the 'problem' of what to do with defendants suffering from a mental illness, it does so at the expense of furthering the understanding and legitimacy of mental illness.<sup>125</sup> This option may solve the problem from a practical perspective, but not from a theoretical one.

Further, it may be suggested that neither of these accounts (reclassifying mental as physical, and altering the standard for defendants with a mental illness who have sought treatment) adequately addresses the need for, and role of, tort law in providing compensation to injured parties.

It has been noted that this concern for compensating the injured party is treated differently depending on whether the defendant is a child or someone suffering from a mental illness. Nevertheless, children who fall under the 'adult exception' are subject to similar legal treatment as the mentally ill. Although this paper has noted several justifications for this exception, many commentators believe that what is actually behind the law of child defendants is a greater consideration of insurance than is usually admitted in the courts.<sup>126</sup> It would seem that those situations in which a child's activity has been deemed to be adult have a remarkable correlation with activities that are the subject of insurance.<sup>127</sup> This may explain why driving a car or engaging in employment activities have both been regarded as adult, but shooting has not.<sup>128</sup> It may therefore be suggested that it is not in fact the principle that the child is engaging in an activity which by its nature is adult, but rather, that she is engaging in an activity for which ensuing damage is covered by insurance. The moral quandary then, in deciding which of two innocent parties should bear the loss, is not as acute as would be the case if insurance did not exist.

Although courts have historically taken a silent approach to issues of insurance in tort law it seems almost impossible today not to recognise the impact that insurance has on the direction of the law. In recent years, common law courts have increasingly recognised this fact.<sup>129</sup>

Two different sources have suggested a way in which the law of negligence can more closely align the law relating to defendants with mental illness, with that of child defendants, and also to fairly balance the interests of defendant and plaintiff in a particular instance. These two approaches adopt Kirby J's insistence, recently reiterated in *Imbree v McNeilly* that the reality of compulsory insurance be taken into account when determining tortious liability.<sup>130</sup> They also accord with the general rule and 'adult' exception for child defendants that is adopted in the United States.<sup>131</sup>

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<sup>125</sup> See similar arguments in *Fiala v MacDonald* (2001) 201 DLR (4<sup>th</sup>) 680, [36].

<sup>126</sup> Fleming, *The Law of Torts*, above n 34, 126.

<sup>127</sup> Ibid 126.

<sup>128</sup> See, eg *Purtle v Shelton* 251 Ark 519, 474 SW 2d 123 (1971); *LaBarge v Stewart* 84 NM 222, 501 P 2d 666 (Ct App, 1972); *Thomas v Inman* 282 Or 279, 578 P 2d 399 (1978). See Forell, above n 21, for the argument that shooting should fall within the ambit of the exception.

<sup>129</sup> See *Imbree v McNeilly* (2008) 236 CLR 510, [143] (Kirby J), cf [22], [23] (Gleeson CJ). See also *Robertson v Swincer* (1989) 52 SASR 356, 361, 370.

<sup>130</sup> (2008) 236 CLR 510, [143].

<sup>131</sup> See above nn 8–10.

The first suggestion is that offered by the Irish Law Reform Commission ('the Commission').<sup>132</sup> The Commission's proposal has three parts. First, the standard of care should remain objective and static for defendants with a mental illness — they will be required to meet the reasonable person test. Second, mentally ill defendants should have the benefit of a defence of mental illness along the lines of the M'Naghten rules of criminal law. That is, liability will not ensue if the defendant can establish:

(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.<sup>133</sup>

Thus the Commission did not provide for an altered standard of care similar to that provided for children. Rather, if the defendant is unable to perform according to the objective standard, then no standard at all applies.

The final part of the test is that the defence of mental illness should not apply in the case of motor vehicle accidents, unless the defendant was unable to act voluntarily in the sense of having the capacity to act freely.<sup>134</sup>

The Commission justifies this exception on the basis that road accidents are a 'serious social problem' which warrants the finding of liability regardless of the mental state of the driver.

This approach attempts to find (and arguably succeeds) a balance between the interests of plaintiff and defendant, while trying to remain true to the current law. Yet it does not address the central claim of this article which is that the mentally ill and children are inappropriately treated differently by the law of negligence. That is, under the Commission's approach, the mentally ill defendant remains subject to the objective reasonable person standard whereas the child defendant does not. It also treats children and the mentally ill differently in that a mentally ill defendant who meets the suggested defence of mental illness will automatically be excused from liability, whereas a child's capacity will be used to determine whether she or he has reached the standard of care to be expected of them.

Moreover, it is unclear why the exception applies only to the case of motor vehicle accidents. If it is the compulsory nature of motor vehicle third party indemnification, then it would make sense for the exception to be broadened to any situation where there exists such compulsory insurance.<sup>135</sup>

A variation to this approach was suggested by the trial judge in *Carrier v Bonham*.<sup>136</sup> McGill DCJ noted that negligence law has undergone fairly recent developments due to the existence of compulsory insurance. His Honour found that in those areas where compulsory insurance schemes are the norm exceptionally

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<sup>132</sup> Irish Law Reform Commission, *Report on the Liability in Tort of Mentally Disabled Persons* (1985).

<sup>133</sup> *Ibid* 69.

<sup>134</sup> *Ibid* 70.

<sup>135</sup> This accords with Kirby J's discussion on the nature of compulsory insurance in *Imbree v McNeilly* (2008) 236 CLR 510, 542–63.

<sup>136</sup> *Carrier v Bonham* [2000] QDC 226 (4 August 2000) (McGill DCJ).

high standards of care have been imposed on defendants, making it easier for plaintiffs to establish liability.<sup>137</sup> This development is no doubt due to the certainty of compensation for the plaintiff and the loss spreading benefits to the defendant, which insurance provides.

His Honour found this situation to be problematic and unfair when the law, as altered to take into account the existence of insurance, extends to situations where the defendant is not insured. As a solution, his Honour proposed that liability of both children and those suffering from a mental illness should vary according to whether there is an insurance fund standing behind the defendant.<sup>138</sup> Thus, as a general rule, those suffering from a mental illness would be treated similarly to children in that their mental incapacity would be taken into account when determining the standard of care applicable to them. The standard would be that which is reasonably expected of a person with the particular mental state of the defendant. For liability to attach in these cases the defendant must have at least a rudimentary understanding of cause and effect in relation to his or her actions in the sense that 'if something is done, someone else may suffer harm'.<sup>139</sup>

However, when the defendant with a mental illness is covered by insurance, her or his mental illness and resulting diminished capacity will not be taken into account when determining liability.<sup>140</sup>

Of the options available in response to the current law, this article prefers the proposal suggested by McGill DCJ, subject to one amendment — the reasonable person standard (rather than the attenuated standard) should only apply in the context of compulsory insurance. This approach has several benefits. It provides compensation to plaintiffs even when there is no fault (in the everyday or moral sense) on the part of the defendant, but only in situations where the financial burden of this 'strict liability' can be spread among wider sections of the community. It is anticipated that the defendant would raise the issue of mental illness as one of the factors which determine standard.

In openly acknowledging, rather than denying, the effect of insurance on liability, and in attempting to develop the law accordingly, this solution perhaps balances the right of the plaintiff to be compensated with the right of the defendant not to be held to an unattainable standard, in a way which more realistically takes into account the relative positions of both parties.

This approach creates some parity between laws in relation to children and the mentally ill such that reduced mental capacity is regarded consistently by the courts. However, it overcomes the claim that McGill DCJ's solution is too broad in allowing any form of insurance to turn the standard owed into that of the reasonable person.

This approach may lead to criticisms of being unprincipled, yet it is a tenet of our common law that 'theoretical attraction' should sometimes 'yield to practical

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<sup>137</sup> For example in the areas of motor vehicle accidents and accidents occurring in the course of employment. See also Luntz and Hambly, above n 74, 244; New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales, Final Report 1* (1984) [3.35], [3.95]; *Imbree v McNeilly* (2008) 236 CLR 510, 543 (Kirby J).

<sup>138</sup> *Carrier v Bonham* [2000] QDC 226 (4 August 2000) [73] (McGill DCJ).

<sup>139</sup> *Ibid* [74].

<sup>140</sup> *Ibid*.



considerations'.<sup>141</sup> As Kirby J has explained, the existence of various compulsory insurance schemes is one of those considerations which must be acknowledged and accounted for by our laws.<sup>142</sup>

## VII Conclusion

In Australia considerations of mental capacity arising from mental illness are treated differently from considerations of mental capacity arising from childhood. Unlike children, where avoidability serves as an important precondition to liability, adults whose inherent unreasonableness is associated with mental illness must behave the same way as ordinary people who do not suffer from a mental illness, thus exposing them to liability even when their limited cognitive abilities mean that they lack the ordinary person's capacity to perceive or understand the relevant risk.

This article has canvassed several explanations for this different legal treatment yet has concluded that neither judges' justifications, nor commentators' explanations, provide convincing reason for this anomaly. The article has provided several possible legal responses to the current law but prefers an approach which would hold mentally ill defendants to an attenuated standard of care similar to the standard as it applies to children, except where the damaging conduct occurs in the context of a compulsory insurance scheme. This, it is argued, would provide consistency in the way the law responds to defendants with reduced mental ability, acknowledge the realities (such as the existence of compulsory insurance schemes) in which the law of negligence has come to exist and responds to plaintiffs' legitimate concerns.

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<sup>141</sup> *Nettleship v Weston* [1971] 2 QB 691, 707.

<sup>142</sup> *Imbree v McNeilly* (2008) 236 CLR 510, 552. This, Kirby J notes, has even been recognised by those who have resisted the push to incorporate the existence of insurance into the law of negligence — at least in the context of traffic accidents. Stapleton, 'Tort, Insurance and Ideology' above n 72, 841–3.