

THE STANDARD OF CARE IN NEGLIGENCE: THE ELDERLY DEFENDANT WITH DEMENTIA IN AUSTRALIA

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ABSTRACT

To date, there are no reported cases addressing negligent acts or omissions committed by an elderly defendant with dementia. Demographic and epidemiological data indicate that it is a question of when, rather than if, the courts encounter a defendant with these characteristics. This paper seeks to explore the options open to the courts in dealing with such a defendant, by examining the modifications considered to the objective 'reasonable person' test to determine the appropriate standard of care, including defendants with mental illness, physical incapacity, and child defendants, each of which class of defendant bears similarities to an elderly defendant with dementia. The paper argues that while extending the existing law relating to the liability of mentally ill defendants may *prima facie* appear to be an attractive option, it is an area of law which is overdue for reform in and of itself, and extending it to apply to elderly defendants with dementia should be resisted.

I INTRODUCTION

In determining whether a defendant has behaved negligently, the defendant's conduct is compared with the conduct of a hypothetical 'reasonable person' in the same circumstances as the defendant, thereby benchmarking the conduct against an objective standard. If the defendant's conduct matches or exceeds the level of care exercised by the 'reasonable person', then the defendant has met the requisite standard of care; if the defendant's conduct falls short of the objective standard, then other questions addressing the possible negligence of the defendant are considered by the court.

In *Blyth v Birmingham Waterworks Co*, Alderson B defined negligence as '... the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do'.¹ Although the statement predates the availability of negligence as an action, the 'reasonable man' test has been adopted as the basis for determining the appropriate standard of care in negligence.

So who exactly is the 'reasonable man'? He has variously been described as 'the man on the Clapham omnibus',² the 'man on the Bondi tram',³ and the 'reasonable man of ordinary

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¹ *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 156 ER 1047, 784.

² *McGuire v Western Morning News Co Ltd* [1903] 2KB 100, 109.

³ *Papatonakis v Australian Telecommunications Commission* (1985) 156 ZCLR 7, 36.

intelligence and experience'.⁴ *Vaughan v Menlove*⁵ established that it is an objective test, which does not permit consideration of an individual's personal idiosyncrasies.

The 'reasonable man' test of a standard of care has traditionally been viewed as inviolable – something which cannot be modified or adjusted for fear of unravelling the very fabric of negligence law. However this view represents something of a legal fiction – the 'reasonable man' has morphed into the 'reasonable person' (in name if not in fact), and other adjustments to the standard of care in limited circumstances have been permitted by the courts. Accordingly, the test has frequently been criticised for failing to accurately reflect reality – it has been applied by judges who tend to be male, well-educated, and from narrow cultural backgrounds, and ignores issues such as gender. Although the test is now referred to as a 'reasonable person' test, there is still considerable debate about whether the change in name reflects a deeper change in the characteristics of the objective standard, or whether it is merely another example of politically correct window-dressing.⁶

Other amendments to the 'reasonable person' test have clearly had greater impact. The test for determining the appropriate standard of care has been modified by statute in many jurisdictions to provide greater protection to medical practitioners⁷ and 'good Samaritans' behaving altruistically but negligently,⁸ from being sued; likewise, under the common law, several other categories of defendant have raised questions about the justice of holding all defendants to the same standard. In the case of minors, the test has been adjusted to a 'reasonable child of comparable age and experience';⁹ in the case of physically disabled defendants, some circumstances, such as sudden physical incapacity, may relieve the defendant of liability.¹⁰ In contrast, mentally ill defendants have traditionally been held to the same standard as a defendant without a mental illness in most common law jurisdictions, regardless of the defendant's capacity to achieve that standard.¹¹

The position the courts will adopt with respect to an elderly defendant with dementia is as yet untested, however the epidemiological data on the incidence of dementia against the background of an aging population, such as Australia is facing, makes it likely the courts will be required to consider it sooner rather than later. A report by public policy research group

⁴ *Glasgow Corporation v Muir* [1943] AC 448, 457.

⁵ *Vaughan v Menlove* (1837) 132 ER 490.

⁶ Discussed in Conaghan J, 'Tort Law and the Feminist Critique of Reason' in A Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (University of Kent, 1996) 51-58, extracted in Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, 'Torts: Commentary and Materials' (Lawbook Co, 10th ed, 2009).

⁷ Eg *Civil Liability Act 2002* (NSW), s 50(1).

⁸ Eg *Civil Law (Wrongs) Act 2002* (ACT), s 5(1).

⁹ *McHale v Watson* (1966) 115 CLR 199.

¹⁰ Eg *Scholz v Standish* [1961] SASR 123: the defendant driver was not liable for damage resulting from driving into a tree after being stung by a bee as the loss of control of the vehicle was both immediate and unavoidable. Contrast with *Leahy v Beaumont* (1981) 27 SASR 290, where a driver suffering a coughing fit, which eventually caused him to lose consciousness and control of the vehicle, was found liable because he had had sufficient time to pull over and stop the car prior to the accident.

¹¹ For detailed reviews of the case law on mentally ill defendants in trespass and negligence in USA, Canada, Ireland and the UK, and Australia, see Francis Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924-1925) 23 *Michigan Law Review* 9; Pamela Picher, 'The Tortious Liability of the Insane in Canada' (1975), 13 *Osgood Hall Law Journal* 193; Stephanie Splane, 'Tort Liability of the Mentally Ill in Negligence Actions' (1983-1984), 93 *Yale Law Journal* 153; The Law Reform Commission (Ireland), 'Report on the Liability in Tort of Mentally Disabled Persons' (LRC 18-1985); Nikki Bromberger, 'Negligence and Inherent Unreasonableness' (2010) 32 *Sydney Law Review*, 411-435.

Access Economics predicts that by 2050, there will be 1.13 million people with dementia in the Australian population, based on existing epidemiological data.¹² Factors contributing to this predicted increase are the increasing age of Australia's population, and increasing life expectancy of elderly Australians: more people are living to the age where they are at risk of developing dementia, and, once they develop it, they are living for longer, as a result of improved physical health. Other policies, such as deinstitutionalisation, mean that more elderly people are active participants in the community. Some of these elderly people will have early stage or undiagnosed dementia, while others may have relatively advanced dementia, but lack appropriate levels of community care to prevent them from causing harm or damage to others.

Dementia has a somewhat uncertain status as a disorder. It is a broad term, which encompasses a number of 'diseases', including Alzheimer's Disease, vascular dementia, and dementias associated with other diseases, such as Huntington's Disease and Creutzfeld-Jakob Disease. Key symptoms are cognitive decline and behavioural changes.¹³ Although it is included in the Diagnostic and Statistical Manual of Mental Disorders (DSM), which is traditionally regarded as a handbook of all recognised mental illnesses, there is widespread recognition by health professionals that dementia is a physical, rather than a mental, disease,¹⁴ a position supported by clearly identified physical causes for the cognitive and behavioural disturbances, including deposition of protein plaques in the brain, which are detectable at autopsy.¹⁵ Research has also identified a number of candidate genes which may be responsible for development of various dementias.¹⁶ Diagnosis of dementia is currently done by psychiatric interview; however advances in medical imaging technology make it likely that diagnosis based on physical manifestations prior to death will become routine in future. Cognitive behaviour levels of dementia patients are often described by comparison with the cognitive development levels of a child of a particular age, as is common practice with other forms of cognitive impairment.

These indeterminate features of dementia could arguably support a court dealing with a negligence matter electing to treat the question of the appropriate standard of care for defendants of this class the same way as minor defendants, mentally ill defendants, physically incapacitated defendants, or indeed in a completely novel way. Some courts dealing with other areas of law have indicated their willingness to treat dementia as a physical, rather than mental, illness.¹⁷

¹² *Keeping Dementia Front of Mind: Incidence and Prevalence 2009-2050* (2009) Access Economics <<http://www.apo.org.au/research/keeping-dementia-front-mind-incidence-and-prevalence-2009-2050>>. This report predicts a 4-fold increase in the numbers of Australians suffering from dementia between 2009 to 2050, from 245,400 to 1.13 million.

¹³ *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, text revision, American Psychiatric association) (DSM-IV-TR) [290.10-290.43].

¹⁴ Ticehurst, Stephen, 'Is Dementia a Mental Illness?' (2001) 35 *Australian and New Zealand Journal of Psychiatry* 716; Bromberger (above n 11) considers dementia to be a mental illness, in contrast with the view taken by this paper.

¹⁵ Alois Alzheimer, Rainulf Stelzmann, H. Norman Schnitzlein, and F. Reed Murtagh, 'An English Translation of Alzheimer's 1907 Paper, "Über eine eigenartige Erlranliung der Hirnrinde"' (1995) 8 *Clin Anat* 429.

¹⁶ Recent reviews include Paul M. Thompson, Nicholas G. Martin, and Margaret J. Wright, 'Imaging Genomics' (2010) 23 *Curr Opin Neurol*. 368; Karolien Bettens, Kristel Slegers, and Christine Van Broeckhoven, 'Current Status on Alzheimer Disease Molecular Genetics: From Past, to Present, to Future' (2010) 19 *Hum Mol Genet*. R1, R4-R11.

¹⁷ Reviewed in Ticehurst, above n 14.

In this paper, I will discuss the strengths and weaknesses of the existing law in each of these areas, focusing on Australian law as it relates to negligence, although historical developments from trespass and action on the case, and other jurisdictions, will be discussed where appropriate.

It is also important to remember that the critical question underpinning any adjustment to standard of care is the individual's capacity to achieve that standard. Not all patients with dementia will require a modified standard of care, any more than all defendants with mental illness, or all defendants with physical disability, because some of them will have the capacity to reach the standard expected of the 'reasonable person'. Clearly determination of the issue of an individual's capacity will be a question for the courts to determine on the facts of the case.

II HISTORICAL DEVELOPMENT OF THE STANDARD OF CARE

Although the law in Australia and many other common law jurisdictions currently differs with respect to the three classes of defendants with special characteristics considered (defendants with mental illness, child defendants, and defendants suffering a physical impairment), this has not always been the case. Early laws dealing with trespass treated all three categories of defendant in the same way, along with all other defendants. To understand the development of the differences, therefore, it is worthwhile to briefly consider their common origins.

Many scholars consider that the earliest form of trespass (trespass *vi et armis*) originated as a tort of strict liability, where the mens rea of the defendant was not relevant. Trespass on the case, which is more closely related to the modern tort of negligence, in contrast to trespass *vi et armis*, always required that negligence be established in order to make out the claim. Consideration of the defendant's mental state was introduced in the decision in *Weaver v Ward*, which Bohlen considers was a turning point in the development of trespass, as it recognized 'inevitable accident', and marked the transition of trespass from a tort of strict liability to one for which defences were available.¹⁸

The purpose of torts law is also relevant to its development with respect to the standard of care.

RAP v AEP and Another (1982) 2 NSWLR 508; *CCR v PS and Another (2)* (1986) 6 NSWLR 622. In these cases, Powell J considered that the applicants, who both had dementia, did not meet the conditions required for detention as 'mentally ill' persons under the *Mental Health Act 1958* (NSW). The Act itself did not provide a clear definition of mental illness, instead referring to schedules equating 'mentally ill' with terms including insanity, lunacy, and incapability. Based on consideration of the common law dealing with these terms, Powell J found that detention orders under the Act required some evidence that the applicant was suffering delusions, hallucinations, or some other psychotic behaviour, although he did not rule out the possibility that the applicants could still be subject to orders issued under the Act on the basis that they were 'incapable'. Powell J also stated that dementia was an 'organic', rather than 'functional', disease, thereby recognising the underlying physical causes and manifestations of dementia, and distinguishing it from mental illnesses. Although the decision in *CCR v PS* was subsequently overturned, the reasoning behind it remains sound.

¹⁸ Discussed in Bohlen, above n 11. Picher, above n 11, discusses an alternative viewpoint, that of Milsom, who argued that although not reflected in the pleadings for trespass *vi et armis*, juries did consider the moral culpability of the defendant, and so it was never a tort of strict liability in practice.

One view is that the primary role of torts law is to compensate plaintiffs for the wrong they have suffered, independent of culpability. Torts of strict liability, including early actions in trespass, where liability falls on the party responsible for the tortious act, regardless of their moral blameworthiness, support this view. According to this view, torts law is designed to protect the plaintiff from the financial consequences of the negligent act that injured them or their interests. This is an approach with origins in mediaeval torts law, and has frequently been relied upon by the courts in seeking to extend liability to defendants whose actions occur in the absence of fault.¹⁹

The counterview is that the purpose of torts law to punish conduct which is in some way blameworthy or culpable, with the punitive element being an award of damages against a defendant.²⁰ An extension argument, that the punitive function also serves as a deterrent to others considering similar conduct, also arises, although evidence in support of this argument is not strong.²¹ This is a position summarised by the maxim ‘no liability without fault’, a sentiment which first appeared in *Weaver v Ward*, and has been quoted many times since:

... therefore no man shall be excused of a trespass ... except it may be judged utterly without his fault ...²²

As history has clearly demonstrated, neither view of the purpose of torts law is without limitations. Plaintiffs with a good cause of action can be left bearing the financial consequences of a negligent act due to lack of a solvent defendant, and there have been instances where the court’s decision to award damages to a plaintiff has resulted in the defendant filing for bankruptcy, leaving the plaintiff with a pyrrhic victory at best. Similarly, the award of damages may not be enough to support the plaintiff for the remainder of their days if the compensation is for serious injury, and medical expenses are not adequately allocated.²³ Additionally, if an innocent plaintiff suffers injury or loss caused by another’s negligence, the plaintiff’s loss is not lessened simply because the defendant is a child, or was suffering from a sudden physical incapacity at the time.

In all of these situations, the compensation view of torts, rather than recognition of moral wrongdoing, is problematic. In response to these problems, many jurisdictions have implemented compulsory insurance schemes under legislation, to ensure that, in the event of a motor vehicle or workplace accident, a plaintiff who is injured as the result of negligence has some avenue for recovering costs. Of course, insurance schemes themselves raise two significant issues: firstly, they create inequities between blameless plaintiffs who are distinguished only by the nature of the negligent act they suffered, ie, one covered by insurance, such as driving a registered motor vehicle, compared with one not covered by insurance, such as a pedestrian walking out into traffic, the effects of which are compounded by the courts’ tendency to ignore insurance; and secondly, the validity of arguments that the purpose of torts law is to ‘punish’ morally blameworthy conduct on the part of the defendant are somewhat blunted by the distributive nature of insurance payouts.

Of course, the moral culpability argument raises the question of whether it is right to punish defendants for failing to achieve a standard of conduct it is impossible for them to achieve. If

¹⁹ Wolff SPJ in *Adamson v Motor Vehicle Insurance Trust* (1956) 58 WALR 56.

²⁰ Goudkamp, James, ‘The Spurious relationship between moral blameworthiness and liability for negligence’ (2004) *Melbourne University Law Review* 11.

²¹ Sappideen, Vines, Grant and Watson, *Torts: Commentary and Materials* (Lawbook Co, 10th ed) [1.30].

²² *Weaver v Ward* (1616) Hobart 134.

²³ Eg *Thurston v Todd* [1965] NSW 1158.

they lack the capacity to reach that standard, is it just to punish them for failing to achieve the impossible? In the case of *Williams v Hays*, which is frequently used as authority for the proposition that there is no defence of insanity in negligence cases, Haight J specifically stated that ‘there is no obligation to perform impossible things’. If the purpose of torts law, particularly with respect to negligence, is punitive, rather than compensatory, as is indicated by Lord Atkin in *Donoghue v Stevenson* (‘The liability for negligence whether you style it such or treat it as in other systems as a species of ‘culpa’, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay’),²⁴ and reflected locally by Deane J in *Jaensch v Coffey* (a finding of negligence may be based on a ‘general public sentiment of moral wrongdoing’),²⁵ then clearly law holding incapacitated defendants categorically liable in the same way as defendants with full capacity is inconsistent with at least some authority.

Modern Australia decisions dealing with the three key categories of incapacitated defendants have differed in their outcomes. Since *McHale v Watson* (discussed below),²⁶ children in Australia have had their negligent actions judged against the standard of a reasonable child of the same age. Defendants with physical incapacities have, under some circumstances, also been judged against a reduced standard of care which takes into account the effect of their physical incapacity. In considering defendants with a mental illness in negligence, however, the courts have been resolute in their determination to cling to the early law of trespass *vi et armis*, preferring that to the law requiring consideration of the defendant’s mental state or intention, arising from trespass/action on the case.

A Child defendants

The rationale for adjusting the requirements relating to children are based on age, and, arguably, could be equally applicable to the elderly in general.

In *McHale v Watson*²⁷ the court addressed the situation where a child defendant threw a pointed metal object at a post. That object deflected off the post, and struck another child, blinding her permanently in the struck eye. At first instance, Windeyer J found that the child defendant did owe the plaintiff a duty of care, based on the vague concepts of proximity that had developed around interpretation of the neighbour principle, but also found that the appropriate standard of care for a child was that of a reasonable child of the same age. In doing so, he relied on Lord Macmillan’s view in *Glasgow Corporation v Muir*,²⁸ which said: ‘The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.’

In reaching his decision, Windeyer J stated that: ‘I do not think that I am required to disregard altogether the fact that the defendant Barry Watson was at the time only twelve years old. In remembering that I am not considering “the idiosyncrasies of the particular person”. Childhood is not an idiosyncrasy.’²⁹

²⁴ Ibid.

²⁵ *Jaensch v Coffey* (1984) 155 CLR 549, 607.

²⁶ *Jaensch v Coffey* (1984) 155 CLR 549 at 607.

²⁷ *McHale v Watson* (1966) 115 CLR 199.

²⁸ *Glasgow Corporation v Muir* [1943] UKHL 2.

²⁹ *McHale v Watson* (1964) 111 CLR 384.

Windeyer J's adjustment to that standard of care, namely that of a reasonable child of the defendants age and experience, was upheld by the High Court, the justification for this decision probably best described by Kitto J, who said:

The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard. In regard to the things which pertain to foresight and prudence – experience, understanding of causes and effects, balance of judgment, thoughtfulness – it is absurd, indeed it is a misuse of language, to speak of normality in relation to persons of all ages taken together.³⁰

This decision created a precedent for an adjustment to be made to the standard of care of certain defendants, provided the appropriate standard could be determined based on what was expected of people belonging to the same class of persons as the defendant, thus providing an objective standard. Similar adjustments to the standard of care a child is compared with have also been made in other common law jurisdictions.³¹

It could, therefore, be argued that High Court's reasoning in *McHale v Watson* does not limit the adjustment to the standard of care exclusively to children, but instead was based on the recognition that people of different ages have differing capacities to meet the standard, as a normal function of their age. Following this line of argument, it becomes clear that, for many elderly people, cognitive decline, caused by dementia or other age-related diseases, is simply a consequence of their age, and as such should permit their conduct to be judged against an age-appropriate standard at the very least, if not a standard that also adjusts for their cognitive decline.

An argument against adjusting the standard to reflect the advanced age of the defendant could be that to do so would be to treat elderly defendants as if they were children, thereby denying them respect for their autonomy. This argument is, however, somewhat superficial, for at least two reasons: firstly, it misses the fact that the reasoning underpinning *McHale v Watson* relates to the normality of the defendant's conduct relative to their developmental stage, rather than the fact the defendant was a child per se; secondly, it disregards the legislative reforms which have modified the standard of care required of other classes of defendant, such as good Samaritans and medical practitioners, and common law decisions permitting modifications to the standard for some physically incapacitated defendants. Modified standards of care are no longer the exclusive right of child defendants, and to equate a modified standard of care with a child defendant is to ignore developments in several fields of negligence related law.

A further, practical issue for consideration is that it would be a matter for the defendant to raise the issue of a modified standard of care. If an elderly defendant felt particularly strongly that having their conduct judged against that of someone of comparable age would demean them, they could simply elect not to raise age as a factor in their argument at trial.

³⁰ *McHale v Watson* (1966) 115 CLR 199, [6] (Kitto J).

³¹ Richard Franzke, 'Infants' Liability for Intentional Torts and Negligence' (1960) *Ins. L.J.* 771.

B Physically incapacitated defendants

Although the causes and manifestations of dementia are such that it is viewed as a physical, rather than mental, illness, albeit one with cognitive and behavioural symptomology, reliance on the courts' approach to dealing with physically incapacitated defendants is unlikely to be appropriate for a defendant with dementia.

Many of the cases involving physically incapacitated defendants have arisen in the context of motor vehicle accidents where the defendant was in control of a vehicle. Therefore, the existence of insurance may potentially have influenced their outcomes, either consciously or otherwise. More relevantly, however, a key consideration emerging from the decisions is the suddenness of the incapacity. Examples include drivers affected by coughing fits,³² strokes,³³ heart attacks,³⁴ and bee stings.³⁵ The critical question considered by the courts is whether defendants had an opportunity to avoid the accident before they lost consciousness or not. If they did have the opportunity, but failed to take advantage of it, they will be held liable. If the effect of the physically incapacitating event was instantaneous, they will not.

Dementia alone does not cause instantaneous incapacity in the same way that some physical causes of incapacity do; additionally, the (relatively) gradual onset of symptoms provides potential defendants with dementia the opportunity to abstain from driving before they are affected- as such, it would be inappropriate to allow development of this area of law to be influenced by the existence of insurance. For these reasons, the law regarding physically incapacitated defendants is not appropriate under these circumstances.

C Mentally ill defendants

Weaver v Ward,³⁶ widely regarded as a key transitional case in the development of trespass, did not directly deal with the issue of insanity; however, it was referred to, somewhat ambiguously, in dicta, and has been relied on as foundational justification for the liability of mentally ill defendants ever since.

... if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass ... except it may be judged utterly without his fault.

The ambiguity of this statement is obvious: on face value, it determines that insanity will not excuse a defendant of liability for his actions; however, for fault to be established, it must be determined that the defendant had the requisite intention, something many mentally ill defendants (or 'lunatics') lack the capacity to form under the law. Judgments dealing with mentally ill defendants in many common law jurisdictions since this case have relied on the simplistic portion of the judgment referring specifically to 'lunatics', without considering the changes that have occurred since this decision with regard to establishing fault.³⁷

In Australia currently, as remains the case in many common law jurisdictions, a mentally ill defendant whose negligent act causes harm or damage to others will be treated in the same

³² *Leahy v Beaumont* (1981) 27 SASR 290.

³³ *Roberts v Ramsbottom* [1980] 1WLR823.

³⁴ *Waugh v James K Allan Ltd* [1964] SC 102.

³⁵ *Scholz v Standish* [1961] SASR 123.

³⁶ *Weaver v Ward* (1616) Hobart 134.

³⁷ Picher, above n 11, 203.

way as a defendant without mental illness, and their actions will be judged against the actions of a 'reasonable person' in the same circumstances.³⁸ This occurs regardless of whether or not the defendant had the capacity to act rationally (or 'reasonably'), or exercise the foresight required to identify and mitigate any negative consequences of their actions. Effectively, the law holds a mentally ill defendant to a standard of conduct it may simply be impossible for them to reach.

Unsurprisingly, the apparent injustice of this has been criticised and commented on extensively by legal scholars, although it appears to have attracted less critical analysis by the bench. Criticism of the law relating to mentally ill defendants in trespass cases predates the development of negligence as a cause of action; yet many of these early criticisms remain valid today. Little has been written specifically about Australian cases dealing with mentally ill defendants under any tortious cause of action, possibly because of the paucity of cases. It is not the intention of this paper to conduct a comprehensive review of this area of the law throughout common law jurisdictions, as this has been done extensively elsewhere;³⁹ however, much of the critical analysis relating to mentally ill defendants in negligence, trespass or trespass on the case, from other common law jurisdictions, is equally applicable to the Australian decisions, illustrating why this area of the law is unsatisfactory and in need of reform, and why extending it to encompass elderly defendants with dementia should be resisted.

III THE KEY AUSTRALIAN CASES

In spite of the sizeable body of case law dealing with mental and psychological injury to plaintiffs resulting from acts of negligence, there is very little case law available in Australian dealing with mentally ill defendants. In 1970, Windeyer J described law as 'marching with medicine but in the rear and limping a little' when discussing the law's traditional reluctance to recognize psychological and mental harm to plaintiffs.⁴⁰ Indeed, the legislative reforms in various jurisdictions in the wake of the Ipp review⁴¹ seeking to limit the scope of claims for pure psychological harm indicate that the legislatures remain cautious about recognising such claims, even brought by 'blameless' plaintiffs, without clear legislative boundaries, fearing a floodgates effect.⁴² Little wonder, then, that mentally ill defendants, with the nasty aroma of 'moral culpability' hanging around their supposed actions, are treated the way they are in the existing policy environment.

In the original Australian case dealing with mentally ill defendants, *White v Pile*, the court considered the defendants' mental illness in finding him not liable in negligence; this decision was ignored in the subsequent cases of *Adamson v Motor Vehicle Insurance Trust*, and *Carrier v Bonham*.

³⁸ *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56; *Carrier v Bonham* [2001] QCA 234 .

³⁹ See above n 11.

⁴⁰ *Mt Isa Mines v Pusey* (1970) 125 CLR 383 at 393.

⁴¹ Australia, *Review of the Law of Negligence: Final Report* (September 2002) (Ipp report) 140.

⁴² eg *Civil Law (Wrongs) Act 2002* (ACT), s 34; *Wrongs Act 1958* (Vic), s 73; *Civil Liability Act 2002* (NSW), s 30.

A *White v Pile*

In *White v Pile*,⁴³ while on short-term release from a mental hospital, the defendant, a schizophrenic with a history of delusions, attacked the plaintiff. At the time of the attack, the defendant was suffering from a delusion that the plaintiff was his wife. In response to the question of whether the defendant would have known that what he was doing was wrong, medical evidence presented to the court stated that the defendant would not have had ‘any full appreciation of what he was doing’.

In finding for the defendant, O’Sullivan DCJ found, on the evidence, that the defendant met the requirements of rules analogous to those used to establish a defence of insanity in criminal cases, the M’Naghten Rules – namely, the defendant either did not know what he was doing, or did not know that what he was doing was wrong. He stated:

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

O’Sullivan DCJ rejected American and New Zealand precedents rejecting adjustment of the standard, preferring his perception that recent opinion was changing in favour of granting immunity to mentally ill defendants on the basis of similar criteria to the M’Naghten Rules. He also commented on the inconsistency of a defendant being held civilly liable when he would have been able to rely on a defence against a criminal charge. The decision was subsequently criticised by academics, and was either not followed, or not considered, in other common law jurisdictions, as well as Australia.

B *Adamson v Motor Vehicle Insurance Trust*

In *Adamson v Motor Vehicle Insurance Trust*⁴⁴, the facts were as follows: A schizophrenic (Burt), suffering from ‘a frenzied fear that his workmates were going to kill him’,⁴⁵ causing him to experience ‘an irrational compelling impulse to get away at all costs to save his life’,⁴⁶ stole a car and drove it through an intersection against the directions of the traffic pointsman on duty, knocking down a cyclist and the plaintiff, Adamson. The driver drove off without stopping, later claiming that his failure to stop was because he was unfamiliar with the operation of the gears of the car.

He was subsequently interviewed by police, charged, and remanded to a mental hospital, where the treating psychiatrist diagnosed him with schizophrenia. He was discharged from the hospital in an improved, rather than cured, state, and the criminal charges against him were withdrawn. He then disappeared, leaving the Motor Vehicle Insurance Trust to be sued as the defendant, under the insurance legislation in operation at the time of the accident.⁴⁷

⁴³ *White v Pile* 68 W.N. (N.S.W) 176 (1950).

⁴⁴ *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56.

⁴⁵ *Ibid.*, 60.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 59; *Motor Vehicle Insurance Act 1943-1954* (WA), s 7(2).

Wolff SPJ found that the defendant insurer was liable as the statutory underwriter of Burt's conduct, on the basis that insanity was not a defence against a claim of negligence. In reaching this conclusion in the absence of case authority dealing with insanity in negligence claims, Wolff SPJ considers previous authority dealing with the liability of 'lunatics' in relation to the non-negligent torts, and authorities drawn from criminal and divorce law. He quotes Holdsworth, quoting Hale, in *History of English Law* (Vol III – The Mediaeval Common Law at page 375), as stating:

... such incapacities as infancy, madness compulsion, or necessity, do not excuse the person suffering from them from liability to a civil action for damages for the wrong done "because such a recompense is not by way of penalty but a satisfaction of damage done to the party".⁴⁸

Wolff SPJ again quotes from Holdsworth (at page 376):

... the law declined to excuse lunatics and infants who by their acts had damaged another. The State might remit penalties, but they were civilly liable, like anyone else, to pay damages to the injured party. Bacon in his maxims accurately summed up the law as it existed then and in his day. "In capital cases in favorem vitae the law will not punish in so high a degree except the malice of the will and intention do appear, but in civil trespasses and injuries that are of an inferior nature the law doth rather consider the damage of the party wronged than the malice of him that was the wrongdoer".

He also cites similar, more modern, views on the liability of lunatics for tortious act attributed to Clerk & Lindswell, Salmond, and particularly Winfield who, commenting on the US decision of *Williams v Hayes* suggests that there are several reasons why lunatics should be held liable for their negligent acts: 1) that if both parties are innocent, the one who caused the loss should bear it; 2) a public policy based argument designed to encourage 'the relatives to keep the lunatic under restraint', and to prevent defendants from seeking to avoid liability by pretending to be insane; and 3) that 'the lunatic must bear the loss occasioned by his torts as he bears his other misfortunes'. It is the first of these justifications offered by Winfield that Wolff SPJ most approves of, in the absence of any case authority dealing specifically with negligent acts committed by a person with mental illness.⁴⁹

Wolff SPJ also considered the treatment of insanity in criminal and divorce cases, and the applicability of the M'Naughten test for criminal responsibility in divorce cases based on cruelty, but rejected the idea that the M'Naughten test should be applied in determining liability in torts law, a position which echoed that of Lord Denning in *White v White*, whom he quoted with approval, when he rejected insanity as a defence on the grounds that the 'criterion of liability in tort is not so much culpability but on whom the risk should fall'.⁵⁰

So based on his analysis of academic authority, a large part of Wolff SPJ's reasoning seems to arise from the argument that lunatics and infants are both viewed in the law in the same way, and that neither infancy or lunacy relieves a defendant from liability for the consequences of his or her act, because the key purpose of tort law is compensation of the affected party, rather than punishment of the negligent party.

In reaching his finding, Wolff SPJ is treading in the footprints of judges from many common law jurisdictions, including the US, Canada, the UK and New Zealand. Judgments in all these jurisdictions have found mentally ill defendants liable for trespassory or negligent acts, and

⁴⁸ Ibid, 60.

⁴⁹ Ibid, 61-63.

⁵⁰ Ibid, 64.

many of the judgments cite the same reasoning and precedents. There is, however, a significant amount of legal research which indicates that in adopting these arguments, the decision simply further entrenches a body of bad law based on flawed analysis and legal reasoning.

C *Carrier v Bonham*

The decision in *Adamson v Motor Vehicle Insurance Trust* was cited with approval in the more recent case of *Carrier v Bonham*,⁵¹ in a decision which seemingly fails to recognise both the significance of the defendants' financial state and lack of insurance in the broader context of the function of torts law, as well as the intervening, and significant, adjustment to the standard of care requirements for child defendants, which effectively distinguished between the treatment of child and mentally ill defendants from 1966 onwards.

Carrier v Bonham dealt with a mentally ill defendant, John Bonham, who stepped out into the road into the path of an oncoming bus, driven by Keith Carrier, in an attempt to commit suicide.

Earlier on the night in question, Bonham had been admitted to the Royal Brisbane Hospital psychiatric ward. He had a long history of mental illness, having been diagnosed with chronic schizophrenia some 19 years earlier. At the time of the incident, the defendant was a regulated patient, and was liable to an ongoing involuntary detention order, although the admitting psychiatrist was unaware of the order at the time, and did not rely on the order in admitting the defendant. The psychiatrist ordered that the defendant be subject to quarter hourly observations; under this protocol, the defendant stated he was going outside to smoke, and it was at this time that he walked out of the hospital grounds, and in front of the bus driven by the plaintiff. He didn't succeed in his suicide attempt; however he did cause psychological harm to the plaintiff bus driver, which prevented Carrier from being able to work again.⁵²

At first instance, McGill DCJ found that Bonham was not liable to the plaintiff in negligence, rejecting Wolff SPJ's view in *Adamson v Motor Vehicle Insurance Trust* that insanity could not operate as a defence to negligence. He did, however, find in favour of the plaintiff against Bonham based on the tort established in *Wilkinson v Downton*,⁵³ summarising his position thus:

Liability for negligence does not depend just on causation of the injury to the plaintiff, it depends on an issue of fault, and the reasoning which justifies a lower standard of care as the test of the existence of fault in the case of children also justifies a lower standard of care as the test for the existence of fault in the case of persons of unsound mind. I prefer the approach of those decisions, and those academic writers who arrived at that conclusion. I note that a similar conclusion, that the defendant was liable in trespass but not liable in negligence, was reached by Paris J of the British Columbia Supreme Court in *Attorney General for Canada v Connelly* (1989) 64 DLR (4d) 84. I think it is easier to identify the presence of fault in the case of liability for intentional acts than liability for careless acts, which would explain why a situation could arise where a person would be liable for an intentional tort but not liable for negligence. To look at it another way, if a person of unsound mind inadvertently walks just in front of a bus because of an inability to appreciate the danger to himself posed by that course of action, he ought not to be liable in negligence for psychiatric injury caused to the bus driver, but I think there is a logical distinction

⁵¹ *Carrier v Bonham* [2001] QCA 234.

⁵² *Carrier v Bonham & Anor* [2000] QDC 226.

⁵³ *Wilkinson v Downton* [1897] 2QB 57.

between that situation and one where the person of unsound mind deliberately steps in front of a bus in order to cause a collision with the intention of thereby killing himself.⁵⁴

The decision was appealed to the Supreme Court of Queensland Court of Appeal, primarily on the grounds that the defendant's mental illness should not have affected his liability in negligence. In upholding the appeal, the judges found that there was no defence of insanity available for negligence claims, and that liability for the defendant's actions should be determined by reference to 'the standard (of care) of the ordinary reasonable person'.⁵⁵

Carrier v Bonham explicitly rejected the opportunity provided under *McHale v Watson* to adjust the standard, with McMurdo P stating as follows:

Whilst a child's actions in a negligence claim can be judged by the objective standard to be expected of an ordinary reasonable child of comparable age, the action of an adult lacking capacity because of mental illness in a negligence claim cannot be similarly judged by any objective standard of an ordinary reasonable person suffering from that mental illness; if the mental illness has deprived the person of capacity then the person has also been deprived of rationality and reasonableness. The standard of care must be the objective standard expected of the ordinary person.⁵⁶

McPherson JA, in his judgment, went on to state:

Unsoundness of mind is not a normal condition in most people, and it is not a stage of development through which all humanity is destined to pass. There is no such thing as a "normal" condition of unsound mind in those who suffer that affliction. It comes in different varieties and different shades or degrees. For that reason it would be impossible to devise a standard by which the tortious liability of such persons could be judged as a class. As Baron Bramwell once said, insanity is a misfortune and not a privilege. It attracts human sympathy but not, at least in the case of negligence, immunity under the law of civil wrongs.

In some of the discussions of the topic, there are appeals to the natural sentiment of sympathy for the wrongdoer and his family or dependants. Without invoking similar feelings for the victim and his family, it is relevant to mention the following point in the present case. Part at least of the reason why the defendant Bonham was able to escape from the hospital from which he absconded is that psychiatric practice no longer insists that persons in his condition be kept in strict custody. More humane methods of treatment now prevail, under which greater liberty of movement is, for their own perceived good, permitted to patients in this unhappy state. If in the process they take advantage of that liberty to venture, even if briefly, into "normal" society, it seems only proper that, in the event of their doing so, their conduct should be judged according to society's standards including the duty of exercising reasonable foresight and care for the safety of others. If that principle is not applied, then it is only a matter of time before there is reversion to the older and less humane practices of the past in the treatment of mental patients.⁵⁷

Overtly, the court refused to adjust the standard of care for mentally ill defendants because they felt that to do so would be catering to a 'personal idiosyncrasy' of the defendant. However this denies the reality that mental illness is actually quite common within the population, and, if anything, appears to be increasing.⁵⁸ It is not so rare as to be a personal idiosyncrasy – indeed, it is surprising that judges, in 2001, considered that schizophrenia was

⁵⁴ *Carrier v Bonham & Anor* [2000] QDC 226, [75]-[76].

⁵⁵ *Carrier v Bonham* [2001] QCA 234, [37] (McPherson JA).

⁵⁶ *Ibid*, [8] (McMurdo P).

⁵⁷ *Ibid*, [35]-[36] (McPherson JA).

⁵⁸ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Results 2007*, Report number 4326.0 (2008)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4326.0Main%20Features32007?opendocument&tabname=Summary&prodno=4326.0&issue=2007&num=&view=>>. This report estimated that 1 in 5 Australians experience a mental health disorder of some kind in any given year, while almost half of all Australians experience some form of mental illness during their lifetime.

so rare that the defendant's actions could not be judged by reference to the standard of care expected of a class of other people suffering from the same type of schizophrenia.

More subtly, however, the courts seem to be indicating that they feel it is beyond them to determine the appropriate standard of care to be expected of a person suffering the same condition of the defendant. In refusing to establish an adjusted standard of care for the defendant in *Carrier v Bonham*, the court was effectively refusing to do in a civil jurisdiction what it has been asking juries to do in a criminal jurisdiction for the past one hundred and fifty years at least – to establish, either objectively or subjectively, what is occurring in the mind of a mentally ill defendant at the time they committed the relevant act, and, based on that determination, establishing whether they should be held accountable for that act. Considering that claims in negligence are generally directed at a much lower grade of moral culpability than criminal cases, it seems both bizarre and inconsistent that the courts would, in effect, make no allowances for a defendant who has committed a less blameworthy negligent act as a result of circumstances beyond his or her control, but would if the same person had committed a truly grievous crime, such as murder, simply because it is too hard for judges to put themselves in the position of someone of the class to which the defendant belongs.

Clearly, *Carrier v Bonham* is a decision which is inconsistent with the reality of mental illness. It is a far more common part of society than the judges in *Carrier v Bonham* appreciate. Furthermore, its prevalence is such that there is no good reason why expert evidence could not be used to establish an objective standard based on the type and severity of the defendant's mental illness in the vast majority of cases. As such, it is an unsatisfactory area of law, and should not be extended to encompass elderly defendants with dementia.

Arguments in favour of treating elderly defendants according to the law regarding mentally ill defendants are mainly grounded in convenience, and are largely superficial. Dementia and age-based cognitive decline are included in the DSM, which is tacitly viewed as the court's handbook on mental illness. However, their inclusion in this publication is arguably an acknowledgement that the same groups of professionals (psychologists, psychiatrists) tend to treat both, rather than an acceptance that they are truly a form of mental illness – it is worth bearing in mind that although the DSM is relied on by the courts, the courts is not the primary purpose for which the DSM exists. Furthermore, it disregards the fact that the health sector itself tends to view dementia as a physical, rather than mental, disease.

Additionally, if the courts were to accept a modification to the standard of care for elderly defendants with dementia taking into account the impact of their diseases, the courts would have to place greater reliance on expert medical opinion to establish the standard, based on the facts of each case. Furthermore, this could lead to increased scrutiny of cases involving mentally ill defendants, and ultimately increase the medical evidence required in those cases. This is not, however, an unprecedented development – expert medical evidence is used in courts all the time to establish the capacity of mentally ill defendants in criminal matters, and matters before the guardianship and protective jurisdictions.

The benefits of supporting these views are, however, completely outweighed by the negative consequences of extending this position to encompass elderly defendants with dementia.

As the consequences of the decision in *Carrier v Bonham* demonstrated clearly, this is an unsatisfactory area of the law, whose expansion should be avoided at all costs. Mr Bonham's illness was such that his affairs were under the management of the Public Trustee; he had only one asset (his home) and as a pedestrian, he was uninsured. The judgment awarded against him exceeded the value of his asset, and can have been of limited deterrent or punitive value. Furthermore, in terms of compensation the decision fails, as it does not consider the defendant's ability to actually pay the compensation awarded, which in this case was limited, if not non-existent. Extending the law to include elderly defendants with dementia is likely to lead to similar unjust consequences of little benefit to either party.

IV CONCLUSION

Elderly defendants with dementia should not be held to the objective 'reasonable person' standard in actions for negligence if they can demonstrate that they are incapable of achieving the standard as a result of their condition. There are several models dealing with similarly incapacitated defendants that the courts could consider following to adjust the standard of care under these circumstances: minors, mentally ill defendants, and physically incapacitated defendants. This paper argues that the judgment outlining the adjustment to the test currently available for child defendants is sufficiently flexible to encompass cognitive decline/dementia occurring at the other end of life. To do so is not to treat defendants as children, but rather to focus on the reason the adjustment was permitted in the first place – the broader issue of the developmental stage of the defendant, as discussed by Kitto J, rather than just the infancy of the defendant.

The paper also argues that the other models available, those of physically incapacitated and mentally ill defendants, should be avoided, because they are inappropriate, and lead to unjust and out-dated outcomes, respectively. In particular, the law regarding the liability of mentally ill defendants is overdue for significant reform.

Finally, in order to avoid issues associated with lack of compensation available to plaintiffs injured by negligent elderly defendants with dementia, it is the view of this author that governments adopting a policy position of deinstitutionalization and community care, which leads to more defendants with dementia being in the community unsupervised and unsupported, as a corollary should earmark funds for compensation payouts for plaintiffs injured by defendants in these circumstances. This viewpoint also extends to compensation for plaintiffs injured by mentally ill defendants.