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**CAPACITY AND THE LAW OF NEGLIGENCE – IGNORANCE AND
PREJUDICE GUIDING THE WAY**

NIKKI BROMBERGER*

Assessment of liability in negligence cases is based on the objective standard of reasonable care. A defendant's inability to reach this standard is therefore irrelevant to the determination of liability.

This principle has not been applied consistently in Australian tort law. A defendant with reduced capacity due to mental illness is required to meet the objective standard. Yet, a defendant with reduced capacity due to immature age is required to meet a standard which has been tailored to more accurately reflect the child defendant's age and capacity.

This article examines some of the leading explanations provided for this disparity in legal treatment and argues that the most likely driving force behind the law is society's unintentional and pervasively negative attitude towards the mentally ill – a prejudice known as 'sanism'.

I INTRODUCTION

Questions of capacity play an important part in most areas of the law – reduced capacity may make contracts voidable, deem crimes not to have been committed, and allow tribunals to make orders for involuntary detention and compulsory medication.

Yet in the tort of negligence, the capacity of a defendant is purportedly irrelevant to decisions about liability. This is because an assessment of negligence is based on an objective standard – did the defendant respond to a foreseeable risk the way a reasonable person in similar circumstances would have responded?¹ Characteristics or abilities specific to a particular defendant are of no legal consequence.

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¹ *Vaughan v Menlove* (1837) 3 Bing NC 468, 471. The relevant standard, until fairly recently was that of the 'reasonable man' but the expression has changed in order to recognise the inherently biased nature of this term. Some critics argue that although the new terminology purportedly represents the female population, the test remains a male concept, dressed up in the language of inclusion. See, eg, Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3.

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This test may be regarded as unnecessarily harsh, or even a form of strict liability, when applied to defendants who do not actually possess the capacity to reach this standard.² Thus the question arises whether the standard of measurement may be altered in some way to take into account or more accurately reflect the capacity of the defendant, or whether the standard will remain at a level at which the defendant is profoundly incapable of reaching.³

By the early 19th century it was confirmed that no such tailoring of the standard is acceptable – that the test of negligence is objective and unconcerned with individual idiosyncrasies.⁴ Yet the law in relation to child defendants clearly indicates that Australian and other common law courts will particularise the standard in some situations. Courts have not however, adopted this same approach for mentally ill defendants. It would therefore seem that the relevance of reduced capacity depends on the reason that it manifests. If it is caused by mental illness it does not affect liability, but if it is caused by immature age it does.

This raises several questions: Why does negligence law take into account the reduced capacity of a child? Why does it not do so when the defendant's reduced mental capacity is as a result of a mental illness? Are there differences between children and the mentally ill which explain the varied approach to similar symptoms? Or is it something in the nature of tort law which requires the different legal treatment?

This paper considers these questions in light of the limited legal scholarship and case law on this issue.

² See, eg, Mayo Moran, *Rethinking the Reasonable Person* (2003) 5. It has also been regarded as problematic because it lends itself to inconsistent application, and there is no clear understanding of the content of the expression 'reasonable person'. See, eg, Kenneth Simmons, 'Dimensions of Negligence in Criminal and Tort Law' (2002) 3 *Theoretical Inquiries in Law* 283, 310; Randy Austin 'Better off With the Reasonable Man Dead or the Reasonable Man Did the Darndest Thing' (1992) *Brigham Young University Law Review* 479, 485.

³ The reasonable person in criminal negligence has characteristics quite similar to those of the actual defendant. See, eg, *R v Lavender* (2005) 222 CLR 67.

⁴ *Vaughan v Menlove* (1837) 3 Bing NC 468; (1837) 132 ER 490.

II CHILD DEFENDANTS

In 1966 the High Court of Australia firmly established that standard of care may be attenuated so as to reflect a defendant's age.⁵ The Court did not settle on a precise test to apply in these situations. Owen J formulated the rule as that which is to be expected of 'a child of the same age, intelligence and experience'⁶ whereas Kitto J suggested the test to be that which should be expected 'of a child, meaning any ordinary child, of comparable age'.⁷ Nevertheless, the decision confirms that age is relevant to a determination of liability in negligence.⁸

Fundamental to this decision was the recognition that children have less capacity than adults.⁹ McTiernan ACJ referred to a minor's inability to form culpable intention, and also the more general proposition that a person who is 'unable to understand the nature and likely consequences of his actions' will not be found liable in negligence.¹⁰

Owen J noted not only the capacity of children, but also the ability for others to track their development and to recognise that they may have reduced capacity. In addition, his Honour found that applying a reasonable person standard to a child is contrary to common sense – a cornerstone of the common law.¹¹

⁵ *McHale v Watson* (1966) 115 CLR 199.

⁶ *Ibid* 234.

⁷ *Ibid* 215.

⁸ In some common law jurisdictions, particularly the United States there is an exception to this rule although no such exception has been specifically incorporated into Australian negligence law. It is unclear however whether the exception is for children engaging in activities which are considered 'adult' in nature, 'dangerous' in nature or a mixture between the two. It is also unclear why this exception exists and it is beyond the scope of this paper to consider it in more detail. See, eg Caroline Forell, 'Reassessing the Negligence Standard of Care for Minors' (1985) 15 *New Mexico Law Review* 485; Note, 'Torts: Standard of Care Applied to Minors in the Operation of Dangerous Instrumentalities' (1966) 3 *Tulsa Law Journal* 186; Note, 'Torts: Application of Adult Standard of Care to Minor Motor Vehicle Operators' (1962) *Duke Law Journal* 138

⁹ The psychological research relating to childhood capacity was not canvassed by the Court. It instead regarded the issue as one of common knowledge. See, eg, Lisa Perrochet and Ugo Colella, 'What a Difference A Day Makes: Age Presumption, Child Psychology, And the Standard of Care Required of Children' (1992-93) 24 *Pacific Law Journal* 1323, 1333.

¹⁰ *McHale v Watson* (1966) 115 CLR 199, 205.

¹¹ *Ibid* 232.

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Kitto J regarded capacity as relevant to liability, not in terms of the personal capacity of each defendant, but of general capacity as a natural stage of development and normality.¹² His Honour reasoned that age is not a personal or idiosyncratic characteristic specific to the individual defendant, but merely a ‘characteristic of humanity at his stage of development’.¹³ His Honour found that as childhood is in this sense ‘normal’, taking account of the age of the defendant when considering the relevant standard is not to circumvent the objective test of negligence but merely to recognise that ‘normality is for children something different from what normality is for adults’.¹⁴

Thus, although the precise reasons for the decision and test derived from *McHale v Watson* are not clear, it is evident that the principle of objective reasonableness is flexible, and that courts are willing to adjust the standard of care to more accurately reflect the defendant’s age.¹⁵ It is also clear that a child’s reduced level of capacity as compared to adults constitutes one reason for this decision.

III MENTALLY ILL DEFENDANTS

A Overview

In light of the High Court’s approach to child defendants it is reasonable to expect courts to adopt a similar approach to other groups of defendants with reduced capacity. Defendants suffering from some forms of mental illnesses, particularly those which manifest in delusions and hallucinations, represent such a group.¹⁶ Yet the limited case law both in Australia and in some other common law jurisdictions indicates that this is not the case.

¹² Ibid 213.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Some United States courts have adopted a presumption of incapacity for negligence similar to that which exists for criminal law. See, eg, *Cox v Hugo*, 329 P.2d 467 (Wash. 1958); *Griffin v Gehret*, 564 P.2d 332 (1977); *Turner v Seyfer*, 194 N.E.2d 529 (Ill. App. 1963); *Strasma v Lemke*, 250 N.E.2d 377 (Ill. App. 1969).

¹⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 2000) 299.

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In Australia there have been only two negligence cases which have raised the issue of the defendant's mental illness – *Adamson v Motor Vehicle Insurance Trust*¹⁷ and *Carrier v Bonham*.¹⁸ In both of these cases, the defendant's mental illness was found to be irrelevant to determining liability.

Before examining these Australian decisions, it is helpful to consider the scholarship which has attempted to explain this law and its dissimilarity with the law concerning child defendants.

IV EXPLANATIONS FOR THE INCONSISTENT TREATMENT OF CAPACITY

Over the past hundred years, several articles have been written criticising the uncompromising approach courts have taken to mentally ill defendants.¹⁹ These articles also note the difference in legal treatment between mentally ill and child defendants. However, there have been very few attempts to explain or to provide a justification for this apparent inconsistency.²⁰

¹⁷ (1957) 58 WALR 56.

¹⁸ [2002] 1 Qd R 474.

¹⁹ See, eg, Pamela Picher, 'The Tortious Liability of the Insane in Canada ... With a Comparative Look at the United States and Civil law Jurisdictions and a Suggestion for an Alternative' (1975) 13 *Osgoode Hall Law Journal* 193; Elizabeth Goldstein 'Asking the Impossible: The Negligence Liability of 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; Francis Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924-5) 23 *Michigan Law Review* 9; Robert Ague, 'The Liability of Insane Persons in Tort Actions (1955-56) 60 *Dickenson Law Review* 211; William Castro 'The Tort Liability of Insane Persons for Negligence: A Critique (1971-72) 39 *Tennessee Law Review* 705; Ellis James, 'Tort Responsibility of Mentally Disabled Persons' (1981) *American Bar Foundation Research Journal* 1079; 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 Disabilities into the Standard of Care' (2004) 30 *Marshall Law Review* 169; WM Justus Wilkinson, 'Mental Incompetency as a Defense to Tort Liability' (1994-5) 17 *Rocky Mountain Law Review* 38.

²⁰ *Ibid.*

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One author who has directly considered this problem is David Seidelson.²¹ Seidelson explains the dissimilarity in legal treatment of children and the mentally ill according to a theory based on reasonable expectations. Seidelson proposes that the proper running of society requires people to pursue their goals and organise their lives based on expectations about the behaviour of other people. The role of law in this scheme is to mediate or control these reasonable expectations.²²

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. In this regard there is a relevant difference between children and the mentally ill – people are generally cognisant of a child's reduced level of capacity but it is more difficult to identify reduced capacity in a mentally ill adult.²³ As a result, those engaging in transactions with children have more opportunity to modify their expectations and their behaviour than those engaged in transactions with the mentally ill.²⁴

Although this argument comes some way to explaining the difference in legal treatment of these two groups of defendants, it does so at the expense of consistency in relation to another group of defendants – those who have experienced a sudden physical illness such as epilepsy. Given the difficulty in recognising the potential for reduced capacity in such people, reasonable expectations theory would require these defendants to be held liable for their damaging behaviour in the same way as mentally ill defendants. But courts have been reluctant to find liability in such cases.²⁵ The reasonable expectations theory is therefore unable to provide overarching consistency in the law's approach to capacity.

²¹ David Seidelson, 'Reasonable Expectations and Subjective Standards in Negligence Law, the Mentally Impaired, and the Mentally Incompetent' (1981-82) 50 *George Washington Law Review* 17.

²² See, also Patrick Kelley, 'Infancy, Insanity, and Infirmity in the Law of Torts' (2003) 48 *American Journal of Jurisprudence* 179, 227.

²³ Seidelson, above n 21, 29. This is reminiscent of Oliver Wendell Holmes Jr, *The Common Law* (1881) 109 stating that '[W]hen a man has a distinct defect of such a nature that all can recognise it as making certain precautions impossible, he will not be held answerable for not taking them...'. It is also the argument on which *Cook v Cook* (1986) 162 CLR 376 proceeds.

²⁴ *Ibid.*

²⁵ See, eg, *Roberts v Ramsbottom* [1980] 1 All ER 7; *Waugh v James K Allan Ltd* [1964] SC (HL) 102.

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Seidelson's theory is also problematic because it does not accurately reflect the actual requirements of negligence law.²⁶ Liability in negligence is imposed on defendants who have not behaved the way an ordinary person in that position would have behaved – this is a defendant rather than plaintiff focussed approach. Theories based on reasonable expectations are plaintiff directed – they are about the plaintiff's expectations rather than the defendant's reasonableness. As such, the theory of reasonable expectations does not in fact accord with the general principles of the law and it is ultimately unconvincing.

Some scholars have considered the law relating to mentally ill defendants in isolation from its relationship with the law relating to child defendants. Yet these explanations only serve to highlight the inconsistent treatment of these two classes of defendants. For example, Jules Coleman has argued that the only way to explain negligence law's refusal to take account of the mental illness suffered by a defendant is by viewing tort as a purely victim orientated compensation scheme.²⁷

While Coleman may be correct, and despite the fact that tort law is most likely concerned with more than simply compensation,²⁸ this analysis does little to explain why compensation concerns would be paramount when the defendant is mentally ill, but not when the defendant is a child. The argument does not therefore explain the different legal treatment of the two groups.

Tony Honoré's theory of luck may provide some justification for holding mentally ill defendants to an unattainable standard. Honoré argues that as those who are born with superior talents (good luck) are held to the consequences of their actions, there is nothing

²⁶ There is also concern regarding the existence of any principled way of characterising what is meant by reasonable expectations. See, eg, Kuklin, B 'The Justification For Protecting Reasonable Expectations' (2001) 29 *Hofstra Law Review* 863, 865.

²⁷ Jules Coleman 'Mental Abnormality, Personal Responsibility and Tort Liability' in Brody and Engelhardt, (eds) *Mental Illness: Law and Public Policy* (1980), 125.

²⁸ See, eg, Earnst Weinrib, *The Idea of Private Law* (1995) (tort law as corrective justice); Peter Cane *Responsibility in Law and Morality* (2002) (tort law as distributive justice).

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inconsistent or unfair in holding those born with inferior talents (bad luck), to the consequences of their acts.²⁹

Apart from concerns regarding the adequacy of Honoré's theory as it applies to the mentally ill,³⁰ this luck theory does not explain the disparity in legal treatment of the mentally ill and children – why should the bad luck of mental illness be borne by the defendant but not the bad luck of not yet being of mature age.

As none of these theories adequately explain the courts' varied approaches to standard of care and capacity it may be enlightening to look beyond tort scholarship and consider similar problems in other legal categories. Michael Perlin has published extensively on issues surrounding mental illness in a variety of legal areas – crime and mental health law in particular. Perlin suggests that the many problems associated with the law's response to the mentally ill in these and other areas of law are due to society's irrational prejudice, fear and misunderstanding of all things relating to mental illness.³¹ Perlin terms this bias 'sanism' and notes that it is 'of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry'³² and that it is based predominantly on 'stereotype, myth, superstition, and deindividualization.'³³

²⁹ Tony Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 *Law Quarterly Review* 530.

³⁰ These issues are beyond the scope of this paper.

³¹ Michael Perlin, "She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense", (2003) 10 *William and Mary Journal of Women and the Law* 1; Michael Perlin, "Things Have Changed:" Looking At Non-Institutional Mental Disability Law Through the Sanism Filter (2003) 22 *New York Law School Journal of International & Comparative Law* 165; Michael Perlin, 'On "Sanism"' (1992) 46 *Southern Methodist University Law Review* 373; Michael Perlin, 'Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence' (1989-9) 40 *Case Western Reserve Law Review* 599; Michael Perlin, "Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "US" and "Them", (1998) 31 *Loyola Louisiana Law Review* 775; Michael Perlin, "The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment' (1997) 82 *Iowa Law Review* 1375.

³² Perlin, "Things Have Changed:" above n 31, 166.

³³ *Ibid* 166.

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Perlin notes that sanism is particularly powerful because it is largely invisible, generally socially acceptable and intimately tied to notions of 'ordinary common sense'.³⁴ It is so pervasive and so entrenched, says Perlin, that most are unaware of its existence at all. According to Perlin, this results in laws which do not reflect or adequately respond to 'empirical evidence, scientific discoveries, competing philosophical interests and new behavioral constructs' but instead are simply reactions to 'unconscious decision-making, defense mechanisms, primitive need, and basal instincts'.³⁵

Perlin further argues that if the scientific realities of many issues surrounding mental illness are being overshadowed by subconscious prejudice in the areas of law that he and others have investigated – crime, mental health, clinical practice, legal education and trusts and estates,³⁶ it is likely that all areas that come into contact with the mentally ill will be similarly affected.³⁷

In light of this suggestion, it is revealing to examine in detail the reasons for judgment in the Australian case law on mentally ill defendants to negligence actions.

V IS AUSTRALIAN NEGLIGENCE LAW SANIST?

The Queensland Court of Appeal case *Carrier v Bonham*³⁸ is the most authoritative Australian case to deal with this issue. In this case, a chronic schizophrenia sufferer jumped in front of a bus in an attempt at suicide. While he suffered only mild injury as a result, his behaviour caused psychological damage to the driver of the bus, who subsequently sued him for negligence.

³⁴ Perlin, "She Breaks Just like a Little Girl" above n 31.

³⁵ Perlin, 'Unpacking the Myths' above n 31, 643.

³⁶ Pamela Champine, 'A Sanist Will?' (2003) 25 *New York Law School Law Review* 547.

³⁷ Perlin, "'Things Have Changed:" above n 31, 171.

³⁸ [2002] 1 Qd R 474.

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At trial, the Queensland District Court assessed the defendant's behaviour according to a standard of care altered to take into account his mental illness. According to this standard the defendant's behaviour was not negligent.³⁹ The Queensland Court of Appeal reversed this decision, finding that the reasonable person standard was the appropriate measure of behaviour in this case, regardless of the effect the defendant's mental illness may have had on his ability to reach this standard.

The reasons and decision in this case indicate that Perlin's unintended yet pervasive sanism exists and influences the development of the law of negligence in Australia.

A Precedent

A suggestion of sanism is first apparent in the Court's use of precedent. The role of a defendant's mental illness in Australian negligence liability had not been authoritatively decided prior to *Carrier v Bonham*. There has been no superior court decision in any common law jurisdiction on the issue, and in fact, very few such cases have come before the courts at all. In addition, there is precedent in both Australia and other common law jurisdictions which suggest that negligence law could be alternatively responsive, or unresponsive to the realities of mental illness. The choice made by the Queensland Court of Appeal in *Carrier v Bonham* is therefore quite revealing in terms of the impact that sanist attitudes have on the development of Australian negligence law.

In making its choice as to which line of precedent to follow, the Court ignored cases which adopt an accommodating approach to mentally ill defendants,⁴⁰ and instead relied on less sympathetic cases and cases which, for various reasons, should be regarded with caution.

³⁹ *Carrier v Bonham* (2000) 21 Qld Lawyer Reps 87, [78].

⁴⁰ See, eg, *Buckley and Toronto Transportation Company v Smith Transport Limited* (1964) 4 DLR 721; *Fiala v Chechmanek* (1999) 9 W.W.R. 402; *Fiala v Chechmanek* (2001) 201 D.L.R. (4th) 680.

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For example, the Court found the New Zealand Court of Appeal case *Donaghy v Brennan*⁴¹ and the Queens Bench single judge decision *Morriss v Marsden*⁴² to be persuasive, despite them both having been criticised for the lack of sound policy reasons for their conclusions, for the obscure authority on which they rest and because they ignore well reasoned cases which find the contrary conclusion.⁴³ In addition, as both cases arise out of actions in trespass rather than negligence, caution is required when applying their principles to cases about negligence.

The Court also relied on the Western Australian Supreme Court single judge decision of *Adamson v Motor Vehicle Insurance Trust*⁴⁴ which rejected the introduction of a criminal law style insanity defence in tort law. The *Adamson* court reasoned that there was no authority for introducing such a defence,⁴⁵ that criminal and civil law have different aims (punishment as opposed to compensation)⁴⁶ and that the criminal law rules themselves are unsatisfactory.⁴⁷

That the Court in *Carrier v Bonham* relied on *Adamson* is problematic for several reasons. First, the Court in *Adamson* did not examine in detail, nor substantiate the reasons it gave for its conclusion. In particular, it did not consider Australian precedent which endorsed such a defence, at least in relation to the tort of trespass to the person.⁴⁸ Second, while the Court observed that the law in this area has not been satisfactorily decided, it concluded that ‘there is much to be said in support of the theory that a lunatic should be responsible for his tortious acts’.⁴⁹ Other than vague statements of the ‘good of

⁴¹ (1900) 19 NZLR 289.

⁴² [1952] 1 All ER 925.

⁴³ See, eg *White v Pile* (1950) 68 WN (NSW) 176; See, eg, Picher above n 19, 206, 210.

⁴⁴ (1957) 58 WALR 56.

⁴⁵ *Ibid* 63.

⁴⁶ *Ibid* 61.

⁴⁷ *Ibid* 66; Cf Castro, above n 19, 714.

⁴⁸ See, eg, *White v Pile* (1950) 68 WN (NSW) 176; Picher, above n 19, 206, 210.

⁴⁹ *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, 67.

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the community⁵⁰, and a 'rule of convenience'⁵¹ it is unclear what these good reasons may be.

Not only are the Court's reasons in *Adamson* unconvincing, so too is the authority on which it rests. The New York Court of Appeals case *Williams v Hays*⁵² for example, not only contains statements of law which were both fundamental to its decision and quite inconsistent with Australian law, but it has also been discredited in its own right.⁵³ In light of these facts, this case should be approached with extreme caution by Australian courts.⁵⁴

Finally, and perhaps most significantly, *Adamson* represents a limited or incomplete analysis of the problem of the mentally ill defendant to a negligence action. It asked whether an insanity defence is applicable to limit the consequences of otherwise wrongful behaviour, but did not consider how liability in such situations should be determined in the first place – can the standard of care be adjusted to more accurately reflect the abilities of the defendant, in line with the way it is adjusted to take into account the abilities of children.⁵⁵ Thus *Adamson* answers a different question to the one that *Carrier* asks.

For these reasons, the precedent relied on by the Court in *Carrier* must be regarded with caution and of limited assistance in determining the law in this area. Yet the Court in *Carrier* did not find these inadequacies significant, and instead adopted the untested and unsatisfactorily reasoned explanations of these cases.

⁵⁰ *Ibid.*

⁵¹ *Ibid* 68.

⁵² 42 Am. S.R. 743.

⁵³ Wilkinson, above n 19, 42 stated that although *Williams v Hayes* may be 'filled with the drama of the sea [it] ... is not very enlightening as to the law of the land'; Hornblower, above n 19, 296 stated that the court, in reaching its decisions 'played battledore and shuttlecock, and which finally resulted in favour of the defendant'. See, also, Picher above n 19, 218-219; Bohlen, above n 19, 23-27.

⁵⁴ The court found that 'there can be no distinction as to the liability of infants and lunatics' (*Williams v Hays*, (1894) 42 Am St R 743, 749) and that there was no reason for not holding both infants and 'lunatics' liable for damage caused by their negligent acts.

⁵⁵ *Carrier v Bonham* (2000) 21 Qld Lawyer Reps 87, [55].

B *Mental Illness Compared to Physical Illness*

In addition to relying on unsatisfactory precedent, the Court in *Carrier* provided inadequate reasons for the factual distinctions it made in relation to the mentally and physically ill. The Court found that no comparison could be drawn between the incapacity experienced by a mentally ill person say during a psychotic episode, and the incapacity that results from a physical cause such as epilepsy. There is therefore no inconsistency of principle in denying liability in one but not in the other.⁵⁶

While it may well be true from a physiological point of view that these two occurrences are qualitatively different, it remains difficult to explain (and the Court does not attempt to do so) why it is significant from a legal perspective whether the lack of ability to act rationally is the result of complete lack of consciousness, or whether the lack of ability to act rationally is a result of a confused, disordered or distorted consciousness.

It is also unclear why an inability to act rationally due to a physical impairment should be treated differently to an inability to act rationally due to a mental dysfunction.⁵⁷ This is especially so given the apparent overlap between physical and mental, with ever increasing recognition that physical causes are the source of otherwise unexplained mental phenomena. In fact, medical knowledge about cause, diagnosis and cure of mental illness has developed to such an extent that it is possible now to ask whether there is such a thing as 'mental illness'.⁵⁸

⁵⁶ *Carrier v Bonham* [2002] 1 Qd R 474, 486.

⁵⁷ *Carrier v Bonham* (2000) 21 Qld Lawyer Reps 87, [59]; Hornblower, above n 19, 284.

⁵⁸ For example, those who suffer from depression may have a neurochemical or hormonal imbalance. In particular they may possess reduced availability of neurotransmitters as compared to those people not suffering from this mental illness. See, eg Graham Meadows, Bruce Singh and Margaret Grigg, (eds) *Mental Health in Australia* (2nd ed. 2006), 521-2; *Fiala v Chechmanek* 1999 ABQB 489, [11], [15].

C Mentally Ill as Compared to Children

Likewise, the Court's comparison between mentally ill and child defendants suggests that the mentally ill are being subject to requirements not imposed on other groups of defendants. The Court reasoned that as all people pass through childhood, but not all people experience a mental illness in their lifetime, it is not necessary for the law to treat these two groups of defendants similarly.⁵⁹

While it may be true that mental illness is not experienced by the entire population,⁶⁰ it seems fallacious to suggest that the only reason to particularise the standard of care is if the defendant is experiencing a condition that everyone in their lifetime experiences.⁶¹ Not everyone is a doctor in their lifetime, but a doctor will be held to the standard of a doctor rather than a 'normal' person when engaging in medical activities, and not all people will suffer from a sudden physical incapacity, but courts take an accommodating approach to these defendants.

As the Court does not explain why a different rule should exist for the mentally ill in this regard – why mental illness should be ignored for reasons of abnormality but skill and physical illness are not, it perhaps can be explained by the existence of unintended but entrenched fear and ignorance of the mentally ill.⁶²

D Issues Of Practicality

The Court's focus on issues of practicality is perhaps the strongest suggestion that there is a general mistrust or misunderstanding of many factors relating to mental illness. For example, the Court found that due to the inherently irrational nature of mental illness it is

⁵⁹ *Carrier v Bonham* [2002] 1 Qd R 474, 487. .

⁶⁰ It is estimated that 3% Australians will experience a psychotic illness such as schizophrenia, bipolar disorder and drug induced psychosis in their lifetime. Justin Healey (ed) *Mental Health Issues in Society*, (2003) volume 190, 5, 30.

⁶¹ This is suggested in Kitto J's judgment in *McHale v Watson* (1966) 115 CLR 199, 213. However neither of the other two majority judges made reference to this requirement.

⁶² Michael Perlin, "Where the Winds Hit Heavy on the Borderline", above n 31; Michael Perlin, "The Borderline Which Separated You From Me", above n 31.

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impossible to create an attenuated objective standard of reasonableness for mentally ill defendants akin to the attenuated standard for children. Mentally ill defendants are therefore required to meet the general 'ordinary person' standard.⁶³

This line of reasoning is problematic for a myriad of reasons. First, accepting the somewhat concerning proposition that the mentally ill are simply irrational, the Court thus openly requires an irrational person to act rationally – a particularly problematic approach to adopt for a system of law built on reason.

Second, this argument appears to misconstrue the meaning of 'reasonable' in the expression 'reasonable person' – or at least it accepts only one of several possible meanings. It is here suggested that the expression does not require a particular static level of rationality or reasoned thought but rather it connotes ordinariness as represented by expressions such as 'the man on the Clapham omnibus'⁶⁴ or the 'hypothetical person on the hypothetical Bondi tram'.⁶⁵

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 mentally ill person) is not particularly reasonable. The question to which the reasonable person test is directed is not what a person in the defendant's situation *should* have done, but what a person in the defendant's position *would* have done.⁶⁶ The answer to this enquiry – what would the ordinary person have done – will of course be the basis for the court's decision as to what the defendant *should* have done, but the former question must be answered first.

Thus, it may very well be unreasonable in the minds of most people for a person to throw a sharp metal object at a tree next to which a vulnerable child is standing. If the person who has thrown the object happens to be a twelve-year-old boy, it does not change the

⁶³ *Carrier v Bonham* [2002] 1 Qd R 474, 480, 487.

⁶⁴ *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, 109 (CA).

⁶⁵ *Papatonais v Australian Telecommunications Commission* (1985) 156 CLR 7, 36.

⁶⁶ Cf Moran, above n 2.

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fact that, in isolation, the throwing of a sharp metal object at a tree when there are other children close by, is of itself unreasonable. However it may be found (and of course was found in *McHale v Watson*) that this 'unreasonable' behaviour is in fact reasonable behaviour to expect of a child of this age, given the generally reduced level of capacity to understand the cause and effect of behaviour and the inability to repress impulses at such an age.

Likewise, jumping in front of a bus in order to commit suicide may be considered quite unreasonable behaviour. However, if the person who jumped in front of the bus is a chronic schizophrenic it may very well be reasonable behaviour (in the sense of ordinary or normal), considering the possibility of command hallucinations and delusions associated with the illness, coupled with the high rate of suicide and attempted suicide amongst such sufferers.⁶⁷ This again is not to say that to jump in front of a bus is in itself reasonable behaviour, but in the circumstances of a person suffering chronic schizophrenia it may well be quite within the bounds of normalcy and in that sense reasonable to expect.

It is also unclear (and the Court does not attempt to explain) why it is necessary to construct a standard based on the broad category of 'unsound mind' or 'mental illness', when such a requirement is not imposed on the physically ill or children. That is, the law will make allowance for judging a ten year old boy according to the standard of a ten year old boy, rather than putting him into the general and unworkable category of 'childhood', and will make allowance for a one legged man, rather than putting him into the general and unworkable category of 'physically impaired',⁶⁸ but does not allow a command response schizophrenic to be judged against the average command response schizophrenic, but rather imposes the general and unworkable category of 'mentally ill' or 'person of unsound mind'. Assuming this inconsistent treatment is unintended, it

⁶⁷ American Psychiatric Association, above n 16, 304 states that between 19% and 40% make at least one attempt at suicide over the course of the illness.

⁶⁸ At least in relation to contributory negligence. See, eg, *Goldman v Hargrave* (1966) 115 CLR 458.

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displays a remarkable lack of awareness and understanding of the nature and variety of mental illness, a hallmark of Perlin's sanism.

Perhaps one of the reasons for the Court's willingness to consider reduced mental abilities due to immature age but not due to mental illness is the difference in the way each of these conditions manifests. Capacity in childhood is relatively constant (or more correctly, it changes very gradually), but capacity in people suffering from mental illness may be quite intermittent. A person with bipolar disorder, for example, has far less mental capacity when s/he is experiencing a manic episode, than at other times.⁶⁹

This intermittent nature of reduced capacity in the mentally ill may make it more difficult for the lay person to understand or for a judge to formulate a particularised standard than is the case with children. This is no doubt due to the fact that the average person (or more correctly, the average judge) has been a child but possibly not mentally ill before and therefore has a greater sense of understanding and acceptance of the behaviour of children as opposed to the mentally ill.⁷⁰

However, judges do not make decisions without the aide of experts. Current medical knowledge about mental illness renders the 'it's too hard' argument adopted by the Court (no standard can be created, no such thing as reasonableness) unsustainable and more likely due to out of date perceptions of mental illness and psychiatry generally, than on any real consideration of practicality.

⁶⁹ This intermittent nature of capacity of the mentally ill is evidenced by provisions of the individual state mental health legislation. See, eg the definition of 'mental illness' in the *Mental Health Act 1990* (NSW). The Act also recognises and is able to accommodate the intermittent nature of mental illness by providing for situations of both involuntary commitment (chapter 3) and informed consent (s91) by these patients, indicating that at different times, the same person may be incapable for example of forming rational thoughts or of appreciating the difference between reality and illusion to the extent that s/he is a danger to him/herself or others, such that a form of preventative detention may be justified, and sometimes may be capable of understanding and consenting to complex and intrusive medical treatment.

⁷⁰ John Fleming, *An Introduction to the Law of Torts*, (2nd ed 1985), 26.

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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. And in fact, courts already do apply such standards and make judgments about mental capacity of the mentally ill when deciding issues of guilt and innocence, efficacy of legal documents, appropriateness of involuntary commitment and appointment of others to manage one's affairs. It seems difficult therefore to sustain an argument that such determinations cannot be made adequately by courts.

This is not to suggest that there are no difficulties with making such judgments, but it is simply to recognise that there is not necessarily any more difficulty associated with finding relevant information in relation to the mentally ill in negligence law as there is in relation to any other factual issue in any other lawsuit, such as the correct way to build a bridge or to deliver a baby.⁷¹

It simply appears to be based on misinformed and age old assumptions about mental illness and the mentally ill, similar to those recognised in the criminal and mental health law context by Perlin. In negligence cases, as well as in criminal cases, this has led to judgments that are substantially out of step with modern scientific knowledge and empirical evidence. In the criminal law it is in failing to adjust the relevant test to more appropriately fit with modern day understanding of mental illness. In tort law it is a failure even to avert to the topic because it is simply seen as too hard or just not worth the effort.

⁷¹ Goldstein, above n 19, 78.

E Policy Reasons

In similar cases in other common law jurisdictions, broader policy reasons have supported the argument that mentally ill defendants should be judged according to an ordinary person standard. However, each of these reasons has been easily discredited, and in light of this fact, it is difficult to understand why judges in the 21st century continue to rely on them, unless perhaps, as Perlin suggests, it reveals an underlying misunderstanding and distrust of all issues surrounding mental illness.

For example, it has been argued that:

- When one of two innocent parties is injured, the party who caused the damage must bear the loss⁷² – yet there is no explanation as to why this argument applies to the mentally ill but not to children;
- Imposing liability will make the guardians of the mentally ill exercise more care in controlling their actions⁷³ – yet no evidence whatsoever has been provided to show that this is or could be the case;
- In the absence of liability tortfeasors will feign mental illness – a fiction, again unsupported by evidence, and in fact, in the criminal sphere, it appears that the evidence on this matter is quite to the contrary;⁷⁴
- It is unfair to the victim not to be compensated if the mentally ill defendant can pay⁷⁵ – again, an appeal to justice which is not reflected in the law relating to the child defendant;
- Granting immunity to the mentally ill would introduce into the civil law the chaos surrounding the insanity plea in criminal law⁷⁶ – a fear which displays a lack of

⁷² *White v White* [1942] 2 All ER 339, 351.

⁷³ *Williams v Hays* (1894) 42 Am St R 743.

⁷⁴ Goldstein, above n 19, 76.

⁷⁵ *Williams v Hays* (1894) 42 Am St R 743.

⁷⁶ See, eg, George Alexander and Thomas Szasz, 'Mental Illness as an Excuse for Civil Wrongs' (1967) 43 *Notre Dame Lawyer* 24.

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understanding of the problems associated with the law of mental illness in the criminal law;

- It is too difficult to draw a line between mental deficiency and mere variations of temperament and ability⁷⁷ – a clear indication that there is a complete lack of understanding of mental illness and a mistrust of psychiatry more generally.⁷⁸

While not relying specifically on these arguments, the Court in *Carrier v Bonham* suggested that if the mentally ill who live in society do not act like ‘normal proper’ people, there will be a reversion to the inhumane practice of institutionalisation.⁷⁹ This comment implies that there is a glut of mentally ill people reeking havoc in the community, a fact which no evidence supports, and which is likely due to unintended yet deeply entrenched fear of the mentally ill. It also displays a misunderstanding of the history of deinstitutionalisation – a policy which was implemented due to the combined factors of growing costs and perceived inhumanity of institutionalisation, and the discovery of drugs which effectively controlled many of the symptoms of some of the more troubling mental illnesses.⁸⁰ It is simply fanciful to suggest that a few actions in negligence will result in a complete regression of government policy when such policy is expensive, unnecessary and inhumane.

The final reason for the Court’s decision centred on its view of the underlying purpose or philosophy of tort law. The Court took the view that negligence law is primarily a system of compensation so that the moral as oppose to legal fault (in terms simply of falling short of a standard) of the defendant is largely irrelevant.⁸¹

⁷⁷ Ibid.

⁷⁸ Picher, above n 19, 225; Responses to many of these arguments are provided in *Fiala v Chechmanek* (2001) 201 D.L.R. (4th) 680 and in the articles referred to above n 19. See, eg, Castro, above n 19, 715-6; Goldstein, above n 19, 75.

⁷⁹ *Carrier v Bonham* [2002] 1 Qd R 474, 487-488. See, eg Stephanie Splane, ‘Tort Liability of the Mentally Ill in Negligence Actions’ (1983) 93 *Yale Law Journal* 153, 163-165.

⁸⁰ Dark, above n 19, 185-6; Department of Health, NSW *Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled* (1983).

⁸¹ This is the view adopted by Denning J in dissent in *White v White* [1942] 2 All ER 339, 351.

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Yet, it remains difficult to understand why the driving force behind negligence is said to be compensation in cases where the defendant is mentally ill, but not in cases where the defendant is a child or is suddenly incapacitated due to a physical illness.

VI CONCLUSION

In light of the discussion above, it would seem that there has been little adequate explanation provided, either by Australian courts or by tort commentators, for the current approach of Australian courts in treating child defendants and mentally ill defendants to negligence actions differently. It must also be concluded that *Carrier v Bonham*, the most authoritative decision in Australia regarding the appropriate treatment of mental incapacity 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. It is therefore suggested that the real explanation for the difference in legal treatment between defendants who are children and those who are mentally ill is that the sanism evident in some areas of the law also exists in the law of negligence in Australia.