

Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness

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I. INTRODUCTION

In 2001, Nancy Knorr caused an accident by turning her car into oncoming traffic.¹ At the time of the accident, Ms. Knorr “believed she was the object of a conspiracy.”² She had a delusional disorder, experiencing specifically delusions of persecution, which can be terrifying.³ Ms. Knorr was aware that she had a mental illness, but her symptoms had been in remission for seven years prior to the accident.⁴ In addition, an expert witness testified that “people with delusional beliefs almost never believe something is wrong with them. . . . Knorr’s delusional beliefs that caused her to panic were ‘relatively sudden.’”⁵ Although Ms. Knorr’s beliefs were symptoms of her illness, the court did not consider that illness a defense. The plaintiff was granted a directed verdict, and the jury awarded a half-million-dollar verdict.⁶

Approximately 2.4 million American adults, or about 1.1 percent of the population age 18 and older, have schizophrenia.⁷ People with schizophrenia often have difficulty performing tasks of daily living in the face of debilitating hallucinations, delusions, and disorganized thinking.⁸ Although breakthroughs in science have produced helpful medication, such medication is not completely effective.⁹ People with schizophrenia and other severe

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¹ *Ramey v. Knorr*, 124 P.3d 314, 316 (Wash. Ct. App. 2005).

² *Id.*

³ DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—TEXT REVISION 299 (4th ed. 2000) [hereinafter DSM-IV]; NATIONAL INSTITUTE OF MENTAL HEALTH, SCHIZOPHRENIA (2006), <http://www.nimh.nih.gov/publicat/schizosph.cfm#symptoms>.

⁴ *Ramey*, 124 P.3d at 319–20.

⁵ *Id.* at 320.

⁶ *Id.* at 317.

⁷ NATIONAL INSTITUTE OF MENTAL HEALTH, THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA (2006), <http://www.nimh.nih.gov/publicat/numbers.cfm>.

⁸ DSM-IV, *supra* note 3, at 299–300; NATIONAL INSTITUTE OF MENTAL HEALTH, SCHIZOPHRENIA (2006), <http://www.nimh.nih.gov/publicat/schizosph.cfm#definition>.

⁹ NATIONAL INSTITUTE OF MENTAL HEALTH, *supra* note 8.

mental illnesses must not only cope with their disability, but also bear the brunt of financial liability for symptoms of a disease that they cannot control.¹⁰

In 1881, Oliver Wendell Holmes wrote in *The Common Law* “if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.”¹¹ One hundred twenty-six years later, the common law system has yet to progress to the modern understanding of mental illness and fairness that Holmes set forth. Instead, the common law still requires defendants in negligence actions to meet an objective “reasonable person” standard to avoid liability, even if the defendant is severely mentally ill.¹²

There has been an ongoing disagreement between legal scholars and the courts regarding whether mentally ill defendants should be held liable for their actions since Holmes’ proclamation in 1881.¹³ The common law rule that an objective standard of liability applies to actors with mental disabilities is well settled and stated in the *Restatement (Second) of Torts*.¹⁴ Although courts have cited a number of reasons for maintaining the status quo and requiring an objective standard for mentally ill defendants, each of those reasons has been addressed and refuted by treatises and journal articles.¹⁵ Perhaps because the courts have been so consistent in their basic requirement that mentally ill defendants use the same “reasonable” care as other people, the draft *Restatement (Third) of Torts* has continued to perpetuate an objective standard for those with mental illness that is inconsistent with our current fault-based system of torts.¹⁶

¹⁰ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, 176–78 (W. Page Keeton ed., 1984).

¹¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 109 (1881).

¹² KEETON ET AL., *supra* note 10, § 32, at 176–78.

¹³ Compare James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908), Robert M. Ague, *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211 (1955), and David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17 (1981), with *Hudnall v. Sellner*, 800 F.2d 377 (4th Cir. 1986), *Johnson v. Lambotte*, 363 P.2d 165 (Colo. 1960), *Young v. Young*, 132 S.W. 155 (Ky. 1910), and *Cross v. Kent*, 32 Md. 581 (1870).

¹⁴ RESTATEMENT (SECOND) OF TORTS § 283B (1965) (“Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.”).

¹⁵ See *infra* Part IV.

¹⁶ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11(c) (Proposed Final Draft No. 1, 2005) (“An actor’s mental or emotional disability is not considered in determining whether conduct is negligent . . .”).

The new proposed Restatement is similar in rule to, but different in rationale from, the *Restatement (Second) of Torts*. Although the language is slightly different, the effect of the rule is exactly the same.¹⁷ Interestingly, the new draft Restatement has done away with the standard reasons for requiring an objective standard for mentally ill actors.¹⁸ Instead, the authors of the proposed Restatement argue that because of the deinstitutionalization movement, the public needs to be protected from people with mental illness.¹⁹ They further suggest that “there can be doubts as to whether the [mentally ill] person should be allowed to engage in the normal range of society’s activities.”²⁰ At the very least, say the Restatement authors, the purpose of requiring compensation from a mentally ill defendant is to protect the interests of the public from the inevitable injury that will result from the actor’s “substandard conduct.”²¹

This recasting of an old rule with new policy considerations does not effectively ameliorate the paradox of imposing liability on an actor for actions caused by an illness, rather than free will, in a fault-based tort system. Indeed, the proposed Restatement continues to support the rule that people with physical disabilities are held to a subjective reasonable person standard, based on the capacity of persons with that disability.²² By effectively requiring a strict liability standard for defendants who have a mental (as opposed to a physical) illness precluding fault, the common law and the Restatement are perpetuating stereotypes and misunderstanding about the mentally ill population. To be consistent and fair, mentally ill defendants

¹⁷ *Id.*; RESTATEMENT (SECOND) OF TORTS § 283B (1965). The second Restatement states “his insanity or other mental deficiency does not relieve the actor from liability” rather than “mental or emotional disability is not considered” in the proposed third Restatement. In either case, mental illness, even if considered, is not an excuse or justification that would defend the actor against liability.

¹⁸ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 cmt. e (Proposed Final Draft No. 1, 2005).

¹⁹ *Id.* Deinstitutionalization is “the policy of moving severely mentally ill people out of large state institutions and then closing part or all of those institutions In 1955, there were 558,239 severely mentally ill patients in the nation’s public psychiatric hospitals. In 1994, this number had been reduced by 486,620 patients, to 71,619.” E. FULLER TORREY, *OUT OF THE SHADOWS: CONFRONTING AMERICA’S MENTAL ILLNESS CRISIS* 8 (1997).

²⁰ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 cmt. e (Proposed Final Draft No. 1, 2005).

²¹ *Id.*

²² *Id.* at § 10–11 (Proposed Final Draft No. 1, 2005) (“A child’s conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience The conduct of an actor with physical disability is negligent only if it does not conform to that of a reasonably careful person with the same disability.”).

should have a subjective standard for determining liability that is consistent with their particular disability, just as a subjective standard is available for defendants with physical disabilities.

This Note will discuss the meaning of mental illness in the legal context in Part II. Part III will discuss the development of the objective reasonable person standard with which negligence liability is currently determined, as well as exceptions to that rule, and how children and those with physical disabilities are provided a subjective standard of liability. Part IV will lay out the purposes of modern tort law and how they are inconsistent with policies for continuing to hold mentally ill defendants liable for situations that they cannot control. In addition, Part V will refute the rationale in the proposed *Restatement (Third) of Torts* for continuing to require mentally ill people to provide compensation regardless of fault. Finally, Part VI proposes a subjective standard that will address the concerns of the courts as well as provide a test for liability of mentally ill defendants that is more consistent with the fault-based tort system.

II. DEFINING MENTAL ILLNESS IN THE LAW

Mental illness, or mental disorder, generally encompasses a broad range of illnesses and conditions.²³ However, in the law, mental illness and “mental capacity” mean something very specific based on the context. There are a range of standards for mental disorder in the areas of contract, probate, health care, and divorce law, which are defined by various determinations of the actor’s ability to understand his actions.²⁴ In addition, there is a statutory

²³ The *Diagnostic and Statistical Manual—Fourth Edition* defines mental disorder as a “clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress . . . or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.” DSM-IV, *supra* note 3, at xxxi. The categories recognized within this broad definition are substance-related disorders, psychotic disorders (such as schizophrenia), mood disorders (such as depression and bipolar disorder), anxiety disorders, eating disorders, sleep disorders, personality disorders, and others. *Id.*

²⁴ Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1, 35 (1995). In contract law, the “lack of mental capacity sufficient to execute a deed” is defined as a lack of “sufficient consciousness or mentality . . . to understand the import of [his or] her acts’ when the deed was executed.” *Daughton v. Parson*, 423 N.W.2d 894, 896 (Iowa Ct. App. 1988) (citation omitted). In probate law, the standard for sufficient mental capacity is weaker than in contract law. In *Burns v. Marshall*, 767 So. 2d 347, 353 (Ala. 2000), the court defined “testamentary capacity” as:

mind and memory sufficient to recall and remember the property she [is] about to bequeath, and the objects of her bounty, and the disposition which she [wishes] to make—to know and understand the nature and consequences of the business to be

definition for disability, which includes mental disability, in the context of the Americans with Disabilities Act.²⁵ The definition of mental disability revolves around the effect on the actor's daily life rather than mental capacity, which is based on his understanding of his actions.

The most common, and likely the most discussed, legal standard for mental illness is "insanity" in the context of criminal law. There are two general kinds of tests used to measure insanity for purposes of criminal defense—cognitive and impulse control.²⁶ The most common cognitive test is the M'Naghten Rule, based on an 1843 British case, which states that a defendant is insane if he did not "know the nature and quality of [his] act," or, if he did know, "he did not know he was doing what was wrong."²⁷ On the other hand, the "irresistible impulse" test does not depend on understanding right from wrong; rather, the question is whether or not the actor was able to control his actions.²⁸

For the purposes of this Note, and in considering a legal standard for liability, the term "mental illness" will refer to those diseases that include significant cognitive impairment, including delusions and hallucinations. The analysis of tort law and its reaction to individuals with mental illness will be in the context of an actor's inability to distinguish between fact and thoughts and sensations caused by the actor's illness. An appropriate test for measuring liability based on mental illness is proposed in Part VI.

performed, and to discern the simple and obvious relation of its elements to each other.

Id. For purposes of tolling a statute of limitations period, "'insanity' . . . is any mental condition which precludes the plaintiff's understanding the nature or effects of his acts and thus prevents him from comprehending his legal rights." *Pederson v. Time, Inc.*, 532 N.E.2d 1211, 1213 (Mass. 1989) (citations omitted).

²⁵ Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A) (2000) ("The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual.").

²⁶ Richard E. Redding, *The Brain Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 80–85 (2006).

²⁷ M'Naghten's Case, (1843) 8 Eng. Rep. 718, 722 (H.L.).

²⁸ Redding, *supra* note 26, at 81–82. Jurisdictions are split regarding the definition of insanity used in criminal defense, if it is allowed as a defense at all. Most jurisdictions use a cognitive test for insanity. Eighteen states and the District of Columbia incorporate a control test in their insanity standards, and five states have eliminated the insanity defense in their jurisdiction. *Id.*

III. NEGLIGENCE AND THE REASONABLE PERSON STANDARD

The legal definition of negligence is “not exercis[ing] reasonable care under all the circumstances.”²⁹ To further determine what “reasonable care” is, the fact finder in a negligence action is charged with determining what a “reasonable man of ordinary prudence,” or reasonable person, would do in that situation.³⁰ The reasonable person is an ideal of a model citizen, but will have shortcomings as determined appropriate by the fact finder.³¹

However, the reasonable person may act differently in different situations. The fact finder must determine what a reasonable person would do “under the same or similar circumstances” as the defendant.³² Although the reasonable person standard of conduct is clearly determined by taking account of the facts of each situation, the reasonable person standard is, minus narrow exceptions, an objective standard in regards to the actor.³³ The idiosyncrasies of individuals are not taken into account when determining whether an actor is liable for damages. For example, a defendant who is clumsy cannot use such clumsiness as a defense.³⁴ If defendants were able to use their individual characteristics or shortcomings, there would be unlimited defenses for tort actions because every defendant could show some clumsiness, or slightly lower intelligence, or lesser ability to pay attention, than others. As a result, people injured by others’ negligence would have no protection. For these reasons, the reasonable person must be at some level an objective standard.

²⁹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005).

³⁰ KEETON ET AL., *supra* note 10, § 32, at 174 (citing *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.)).

³¹ KEETON ET AL., *supra* note 10, § 32, at 175.

³² *Id.* (citation omitted). *See also* *Brooks v. Lewin Realty III, Inc.*, 835 A.2d 616, 624 (Md. 2003); *Foulke v. Beogher*, 850 N.E.2d 1269, 1273 (Ohio Ct. App. 2006); *Herr v. Wheeler*, 634 S.E.2d 317, 320 (Va. 2006).

³³ RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) (“The [reasonable person] standard . . . must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. . . . [The standard] affords a formula by which, so far as possible, a uniform standard may be maintained.”). *But see* Warren F. Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 GEO. L.J. 241, 241 (1989) (stating that courts have not decided whether the reasonable person standard is objective or subjective).

³⁴ *See* HOLMES, *supra* note 11, at 108.

A. *Development of Rules of Negligence*

Historically, the tort system existed to compensate plaintiffs for their loss, not necessarily to serve justice. The primary purpose of tort law was to avoid the problem of those injured taking justice into their own hands.³⁵ If the plaintiff was injured, he would be compensated, regardless of whether the defendant was morally culpable.³⁶ This system of strict liability was used not only to avoid what might otherwise be a violent method of dispute resolution, but also for administrative reasons. The common law courts believed that the state of mind of a person could not be ascertained.³⁷ Matters of intent did not enter into liability disputes; the process was entirely objective.³⁸ As a result, the original purpose of tort law was purely compensation for injury.

The common law strict liability rule that mentally ill people should be subject to the same liability as others was born within this historical context of strict liability. No defense, including mental illness, infancy, physical disability, and self-defense, was available in the original common law writ system.³⁹ However, as the writ system fell and a broad theory for tort actions was being developed, scholars and courts began to carve out exceptions to the harsh strict liability standard for negligence actions.

³⁵ KEETON ET AL., *supra* note 10, § 4, at 21 (“[T]he law doth not so much regard the intent of the actor, as the loss and damage of the party suffering.”) (quoting *Lambert v. Bessey*, (1681) 83 Eng. Rep. 220 (K.B.); HOLMES, *supra* note 11, at 2–4.

³⁶ KEETON ET AL., *supra* note 10, § 4, at 21; G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 12–14 (expanded ed. 2003) (“The crucial inquiry in tort actions prior to the 1870s was not whether a defendant was ‘in fault’ or had otherwise violated some comprehensive standard of tort liability, but whether something about the circumstances of the plaintiff’s injury compelled the defendant to pay the plaintiff damages.”).

³⁷ KEETON ET AL., *supra* note 10, § 4, at 23–24.

³⁸ *Id.* at 24; David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 83 n.148 (1996).

³⁹ Seipp, *supra* note 38, at 83 n.148 (“Neither prosecutions for felony nor writs of trespass allowed defendants to plead accident—i.e., lack of intent, mens rea, negligence, or fault—as a special defense.”); Patrick Kelley, *Infancy, Insanity, and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179, 181 (2003). *See also* KEETON ET AL., *supra* note 10, § 4, at 21. However, this rule of complete strict liability only applied to negligence causes of action; like today, if intent were an element of the tort, the child or mentally ill individual would not be liable if he was not able to form such intent. Kelley, *supra*, at 185.

B. *Exception for Children*

In the late 1800s, as the standards for negligence began to develop, the issue of the liability of children began to shift.⁴⁰ At the same time, the focus on compensation as the sole purpose of the tort system began to give way to morality or fault as an important factor in determining liability.⁴¹ Because courts found that children had a different capacity for morality, they slowly changed the reasonable person standard by first addressing how contributory negligence was determined for plaintiff children. The new standard of liability for contributory negligence included the fact of a plaintiff's age.⁴² Although children were now held to a different standard than adult plaintiffs, the standard varied from court to court; most had some formula that included consideration of the child's age, capacity, and/or experience.⁴³ However, although there was a new standard for contributory negligence, negligence of child defendants was still determined by the same standard of liability as adults.⁴⁴

In 1911, the Wisconsin Supreme Court in *Briese v. Maechtle* first used the subjective standard of liability for a child defendant.⁴⁵ The plaintiff was injured by the defendant while he was playing a game of tag during recess in a schoolyard.⁴⁶ The court felt strongly that it was an injustice to find a child liable for an injury caused through play and affirmed the lower court's grant of nonsuit for the defendant.⁴⁷ The case was decided based on precedent that used the subjective standard of liability for children in the context of contributory negligence.⁴⁸ In addition, the court emphasized a strong policy argument: suits based on accidents in the playground would have a chilling effect on the necessary exercise and fun of children playing.⁴⁹ Through its policy argument, the court acknowledged that society does not expect, or even want, children to be held financially liable for acting like children.

⁴⁰ Kelley, *supra* note 39, at 189.

⁴¹ KEETON ET AL., *supra* note 10, § 4, at 22 ("Toward the close of the nineteenth century this tendency [to ignore moral innocence] was so marked, that efforts were made by noted writers to construct a consistent theory of tort law upon the basic principle that there should be no liability without 'fault' . . .").

⁴² Kelley, *supra* note 39, at 189.

⁴³ *Id.* at 190.

⁴⁴ *Id.* at 191.

⁴⁵ 130 N.W. 893, 893 (Wis. 1911).

⁴⁶ *Id.*

⁴⁷ *Id.* at 894.

⁴⁸ *Id.* (citing *Anderson v. Chicago Brass Co.*, 106 N.W. 1077 (Wis. 1906)).

⁴⁹ *Briese*, 130 N.W. at 893.

Finally, in 1934 the *Restatement (First) of Torts* stated what is now the standard for the liability of children: “the standard behavior to be expected from a child of like age, intelligence and experience,” applicable to both negligence and contributory negligence.⁵⁰ This standard is extremely subjective; two children of the same age may be held to different standards based on their intelligence.⁵¹

Many jurisdictions place age limits below which negligence cannot be found. In a plurality of jurisdictions, negligence cannot be found in children seven years old or younger; however, there is little agreement between states as to what exactly the age limit for liability should be.⁵² In addition, some states provide an older limit below which there is a rebuttable presumption that the child is not liable.⁵³

Finally, in a majority of jurisdictions, a child defendant is held to an adult standard when he engages in a dangerous activity usually reserved for adults.⁵⁴ This exception to the subjective child standard indicates that society still values compensation and freedom from danger, and that children should have a disincentive from engaging in particularly dangerous activities.

C. Exception for Persons with Physical Disabilities

Like the standard for children, defendants with physical disabilities were historically held to the same standard as the non-disabled reasonable

⁵⁰ RESTATEMENT (FIRST) OF TORTS § 283 cmt. e (1934).

⁵¹ *Morse v. Goduti*, 777 A.2d 292, 295 (N.H. 2001) (finding that contributory negligence of 10-year-old was determined taking into account his developmental disabilities). *See also Carrillo v. Kreckel*, 352 N.Y.S.2d 730, 734 (App. Div. 1974) (“[I]nfants must abstain from negligent acts and thereby exercise the degree of care to which children of their age, experience, intelligence and ability are capable.”); *First Nat’l Bank of Ariz. v. Dupree*, 665 P.2d 1018, 1021 (Ariz. Ct. App. 1983); *Hoyt v. Rosenberg*, 182 P.2d 234 (Cal. Ct. App. 1947).

⁵² KEETON ET AL., *supra* note 10, § 32, at 180; *Creasy v. Rusk*, 730 N.E.2d 659, 662 (Ind. 2000) (“[C]hildren under the age of 7 years are conclusively presumed to be incapable of being contributorily negligent, from 7 to 14 [years] a rebuttable presumption exists they may be guilty thereof, and over 14, absent special circumstances, they are chargeable with exercising the standard care of an adult.”) (quotation omitted).

⁵³ KEETON ET AL., *supra* note 10, § 32, at 180.

⁵⁴ *Id.* § 32, at 181 (“[W]henever a child . . . engages in an activity which is normally one for adults only . . . the child must be held to the adult standard . . .”). *See also Wollaston v. Burlington Northern Inc.*, 612 P.2d 1277, 1279 (Mont. 1980) (“We hold that a youth driving an automobile is held to the same standard of care as an adult . . .”); *Gunnells v. Dethrage*, 366 So. 2d 1104, 1105 (Ala. 1979); *Betzold v. Erickson*, 182 N.E.2d 342, 345 (Ill. App. Ct. 1962).

person.⁵⁵ However, there was always a subjective standard for disabled plaintiffs when determining contributory negligence.⁵⁶ Similar to the evolution of the liability standard for children, courts provided a defense in the context of contributory negligence before allowing the physical disabilities of a defendant to impact his standard for negligence.⁵⁷

The current state of the law provides a caveat to the reasonable person standard—that a person with a physical disability is held to the standard of a reasonable person with that same disability.⁵⁸ A more objective standard than that for children, the standard for adults with physical disabilities does not take into account the intelligence of the individual, but still provides that the actor's physical characteristics be included in the circumstances surrounding the situation. Tort law does not require those with physical impairments to perform the impossible and act as if they are able-bodied.⁵⁹

This standard is both more lenient and in some ways stricter than the objective standard. For example, someone who is blind is not required to see something he cannot; however, he may be required to walk with a cane on the street, where a sighted person is not so required.⁶⁰ A person with physical disabilities is required to take extra precautions to avoid accidents related to his disability.

In addition to accommodating existing physical disabilities, the law currently exculpates those actors who cause harm due to sudden, unforeseeable incapacitation.⁶¹ Often these incidents occur while the actor is driving a car.⁶² However, the defendant “has the burden to produce evidence

⁵⁵ Kelley, *supra* note 39, at 192 (citing Mahan v. State, 191 A. 575 (Md. 1937) and Roberts v. Ring, 173 N.W. 437 (Minn. 1919)).

⁵⁶ Kelley, *supra* note 39, at 192.

⁵⁷ *Id.*

⁵⁸ KEETON ET AL., *supra* note 10, § 32, at 175–76; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 (Proposed Final Draft No. 1, 2005).

⁵⁹ KEETON ET AL., *supra* note 10, § 32, at 176.

⁶⁰ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 cmt. b (Proposed Final Draft No. 1, 2005) (“Physical disability can both advantage and disadvantage actors at trial . . . [It can] advantage the actor at trial by showing that the actor was unable to adopt a precaution that would be feasible for most persons. . . . [Conversely, an actor] can be found negligent for not adopting special precautions that can reasonably reduce the special dangers that the actor’s conduct involves.”).

⁶¹ *See id.* at § 11(b) (The conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent “only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor.”). *See also* KEETON ET AL., *supra* note 10, § 29.

⁶² *See* Walker v. Cardwell, 348 So. 2d 1049 (Ala. 1977); Goodrich v. Blair, 646 P.2d 890 (Ariz. Ct. App. 1982); Storjohn v. Fay, 519 N.W.2d 521 (Neb. 1994).

showing that the incapacitation was unforeseeable.”⁶³ This standard is similar to that applied to persons with physical disabilities; it is relaxed in that the unconscious person is not required to be conscious, but it is stricter in that the person cannot drive a car at all without liability if he is aware of the likelihood of losing consciousness.⁶⁴

Whether a defendant who lost consciousness was aware that he could lose consciousness is a question for the jury. In Alabama, a defendant was found not liable after losing consciousness and driving into an oncoming car, killing a child.⁶⁵ However, testimony by his father indicated that the defendant had been having fainting spells for a few years and had even sought medical attention.⁶⁶ Probably because it had been two years since his last fainting spell, the jury found that the defendant was not aware of the likelihood of losing consciousness, and the supreme court upheld the verdict.⁶⁷

In both the case of physical disability and sudden incapacitation, the law recognizes that a person should not be held liable for an action or situation over which he has no control.⁶⁸ Although he may be required to mitigate danger related to his disability where he is able, there must be some level of culpability before a plaintiff can recover.

D. No Exception for Persons with Mental Illness

The defense of mental illness began just as the defenses of infancy and physical disability did—unavailable in any circumstances.⁶⁹ In 1616, the British courts held that a defendant was liable for damages unless the incident “be judged utterly without his fault.”⁷⁰ However, in dicta, the court noted that “if a lunatick hurt a man, he shall be answerable.”⁷¹

⁶³ Cooke v. Grigg, 478 S.E.2d 663, 665 (N.C. Ct. App. 1996).

⁶⁴ See KEETON ET AL., *supra* note 10, § 32, at 175–76; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 (Proposed Final Draft No. 1, 2005).

⁶⁵ Walker, 348 So. 2d at 1050.

⁶⁶ *Id.* at 1051.

⁶⁷ *Id.*

⁶⁸ Anita Bernstein, *The Communities that Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 747–48 (2002) (“[A] court will make an allowance for infirmity [and] reject the unfairness of holding actors to rigors they are ‘incapable’ of meeting.”). See also Korrell, *supra* note 24.

⁶⁹ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005).

⁷⁰ Weaver v. Ward, (1616) 80 Eng. Rep. 284, 284 (K.B.).

⁷¹ *Id.*

Tort law developed into a fault-based system, requiring courts to determine whether an actor was in some way morally culpable for the outcome; at this time, the more subjective standards for children and adults with physical disabilities developed.⁷² In 1849, a treatise was published arguing that holding the mentally ill liable was like holding a defendant liable for an inevitable accident.⁷³ In fact, at the time that the subjective standard for children was being developed, articles were published discussing the irrationality of an objective standard of liability that did not distinguish children *and* mentally ill adults.⁷⁴

The *Restatement (First) of Torts* included a statement opening up the possibility of developing an alternate standard for defendants with mental illness, stating “[u]nless the actor is a child or *an insane person*, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”⁷⁵ However, in the comments, it explicitly states that, although there was a separate standard for children, the Restatement took no position regarding whether the reasonable person standard should apply to “insane persons.”⁷⁶ Ultimately, the subjective reasonable person standard for mentally ill persons was never considered or used in the courts.

The dicta from *Weaver v. Ward*, pronounced in 1616 when tort law was still governed by strict liability, has been cited as the existing rule for mentally ill defendants through the present day.⁷⁷ Courts continue to follow the precedent of disregarding a defendant’s mental illness in determining liability, even in the face of modern tort law’s emphasis on fault and the development of subjective standards for children and adults with physical

⁷² Kelley, *supra* note 39, at 181–82.

⁷³ THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, OR, AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE 456 (2d ed. 1852) (“In the case of the lunatic it may be urged, both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accidents.”).

⁷⁴ Kelley, *supra* note 39, at 193–95. See John H. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441, 446–48 (1894); Ames, *supra* note 13, at 99–101; Francis H. Bolen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1925).

⁷⁵ RESTATEMENT (FIRST) OF TORTS § 283 (1934) (emphasis added).

⁷⁶ *Id.*

⁷⁷ See *Polmatier v. Russ*, 537 A.2d 468, 470 n.6 (Conn. 1988); *Anicet v. Gant*, 580 So. 2d 273, 275 (Fla. Dist. Ct. App. 1991); *Vosnos v. Perry*, 357 N.E.2d 614, 615 (Ill. App. Ct. 1976); *Jankee v. Clark*, 612 N.W.2d 297, 312 (Wis. 2000).

disabilities.⁷⁸ Ultimately, in the *Restatement (Second) of Torts*, the rule was updated to explicitly exclude the exception for mentally ill persons to reflect the insistence of courts that the objective reasonable person standard apply to mentally ill persons as it does to other adults.⁷⁹

Although there is still strict liability with regards to mentally ill defendants, the law has shifted to allow mental illness as a defense to contributory negligence.⁸⁰ The majority of jurisdictions take the plaintiff's mental competence into account when determining contributory negligence.⁸¹ Allowing a defense for contributory negligence parallels the development of subjective standards for children and for persons with physical disabilities, indicating that perhaps the common law is moving towards allowing a subjective standard for defendants with mental illness as well.⁸² However, the proposed Restatement rejects this trend, which may suggest an impending shift toward strict liability even in the contributory negligence or comparative negligence context.⁸³ Such a shift would indicate

⁷⁸ Korrell, *supra* note 24, at 13 (“In spite of its crudity, the rule that mentally disabled adults are liable is currently so entrenched in case law that modern courts often apply the rule without discussion of its rationales.”); *Vosnos*, 357 N.E.2d at 615 (“However justly this doctrine may have been originally subject to criticism, on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed.”) (citing *McIntyre v. Sholty*, 13 N.E. 239, 240 (Ill. 1887)).

The assumption inherent in the strict adherence to a rule based purely on precedent is that the common law requires it. However, the development of subjective reasonable person standards for children and persons with physical disabilities clearly disproves this requirement. In fact, Prosser explains the common law system as “a rule once laid down is to be followed *until the courts find good reason to depart from it.*” KEETON ET AL., *supra* note 10, § 3, at 16 (emphasis added). There is no exception to courts’ ability to depart from precedent for a rule “too firmly supported by the weight of authority” or “entrenched in case law.” *Id.* In fact, Prosser further states that a court should overrule precedent when warranted. *Id.*

⁷⁹ RESTATEMENT (SECOND) OF TORTS § 283B (1965).

⁸⁰ *Noel v. McCaig*, 258 P.2d 234, 241 (Kan. 1953) (“Since knowledge and appreciation of the peril are essential elements of contributory negligence, it is obvious that an inquiry into the age, experience, and mental capacity of the plaintiff is material where contributory negligence is invoked as a defense.”) (citation omitted). *See also* *Ragle v. Beverly Enters. Inc.*, 198 F.3d 251 (8th Cir. 1999) (table decision; opinion available at 1999 U.S. App. LEXIS 29246, a *3).

⁸¹ Stephanie I. Splane, Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153, 157 (1983).

⁸² *See supra* notes 41–42, 55–57.

⁸³ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 cmt. e (Proposed Final Draft No. 1, 2005) (“The shift in tort doctrine from contributory negligence as a full defense to comparative responsibility as a partial defense weakens whatever arguments that otherwise might favor a dual standard that would treat the mentally disabled plaintiff more leniently than the mentally disabled defendant.”).

backward movement in the fair treatment of those defendants without moral culpability for their actions.

Distinguishing between the subjective standard of liability for children and the objective standard for adults in some circumstances is nonsensical. The subjective standard for children takes into account their intelligence and maturity.⁸⁴ As a result, if a person has severe developmental disabilities and has the capacity of a six-year-old child, that person will be judged as if he were six, even if he is defending a charge at seventeen. However, if an accident occurred one day later after his eighteenth birthday, that same defendant will have liability determined as if he were an adult of average intelligence. The legal ramifications for having severe developmental disabilities shift dramatically based only on physical age to no logical end.

In addition, advances in the study of brain chemistry and mental illness have changed our understanding of the causes of mental illness. It is well documented that mental illness such as schizophrenia is caused by differences in brain chemistry.⁸⁵ Because the symptoms of mental illness, such as hallucinations and delusions, are a result of physical abnormalities, the line between physical and mental illness is blurry. As a result, it becomes more difficult to hold, for example, that epilepsy is a defense to negligence, but schizophrenia is not.⁸⁶ The cause of both is physical disease of the brain, yet the law treats them differently.

IV. PURPOSES OF TORT LAW AND POLICY REASONS FOR THE REASONABLE PERSON STANDARD FOR MENTALLY ILL PERSONS

Two primary goals of tort law are “to minimize dangerous conduct and to provide compensation for those that suffer damages.”⁸⁷ In addition, our system of torts is a fault-based system, requiring liability only when the actor has acted below the standard of a reasonably prudent person, therefore

However, if a plaintiff is unable to comprehend the nature of his actions, it should be factored into his proportion of fault rather than ignored, to avoid the same unfair preclusion of damages as in a contributory negligence jurisdiction.

⁸⁴ See *supra* note 51.

⁸⁵ RAELE JEAN ISAAC & VIRGINIA C. ARMAT, *MADNESS IN THE STREET* 19 (1990).

⁸⁶ *Hammontree v. Jenner*, 97 Cal. Rptr. 739 (Cal. Ct. App. 1971); *Vinci v. Heimbach*, Nos. 73440, 73464, 1998 WL 895381, at *2 (Ohio Ct. App. Dec. 17, 1998).

⁸⁷ *Baldwin v. City of Omaha*, 607 N.W.2d 841, 850 (Neb. 1965). See also KEETON ET AL., *supra* note 10, § 4, at 20, 25. Often these goals come into conflict with one another. There is a split in tort scholarship between those who see tort liability as primarily a means of deterrence and those who believe tort liability is a means of compensating the plaintiff. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

showing some moral culpability.⁸⁸ The courts also take into account administrative efficiency and social policy in deciding tort liability.⁸⁹

Courts that follow the precedent of strict liability for mentally ill defendants have cited a number of policy arguments, each addressing a goal or other factor involved in determining liability.⁹⁰ As has been discussed in a variety of articles, the standard arguments for retaining a strict liability standard for mentally ill tort defendants do not hold weight.⁹¹ In fact, there have only been two articles in modern times written in support of the current state of the law.⁹² The existing policy reasons for holding mentally ill defendants to an objective reasonable person standard do not align with the goals and policies of our tort system.

A. Compensation

The goal of compensating the injured party accounts for the majority of arguments for strict liability for mentally ill persons. For example, courts

⁸⁸ KEETON ET AL., *supra* note 10, § 4, at 21–23; *Baldwin*, 607 N.W.2d at 850–51 (“These two goals, however, are held in check in a fault-based regime by the equally important aim of shifting the burden of an injury only if the one to whom the loss is to be shifted was at fault. . . . In determining liability, our fault-based regime considers not only a deviation from an established standard of conduct but also a plaintiff’s or defendant’s ability to comply with that standard.”).

⁸⁹ KEETON ET AL., *supra* note 10, § 4, at 23–24.

⁹⁰ Korrell, *supra* note 24, at 28.

⁹¹ See, e.g., Okianer Christian Dark, *Tort Liability and the “Unquiet Mind”: A Proposal to Incorporate Mental Disabilities into the Standard of Care*, 30 T. MARSHALL L. REV. 169, 180–86 (2004); John V. Jacobi, *Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA*, 33 U.C. DAVIS L. REV. 95, 110–14 (1999); Korrell, *supra* note 24, at 26–45; Grant H. Morris, *Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence*, 47 SMU L. REV. 1837, 1841–43 (1994).

⁹² Morris, *supra* note 91, at 1839 (citing Splane, *supra* note 81; George J. Alexander & Thomas S. Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME L. REV. 24 (1967)). The Alexander article is based on “labeling theory,” which was a movement during the middle of the twentieth century stating that mental illness was not real. Labeling theory proposed that all actions were deviant only by social forces that labeled them deviant. Because at that time mental illness was understood only in terms of behavioral symptoms, those subscribing to labeling theory believed that defining behaviors as mentally ill was merely a way for society to label and therefore control different groups of people. The behaviors were not inherently indicative of illness, but merely labeled that way, which in turn defined a person as mentally ill. PAUL S. APPELBAUM, *ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE* 4–7 (1994). With the current understanding of the physical causes of mental illness, labeling theory is no longer seriously considered. *Id.* The theoretical basis of the Alexander article is therefore no longer relevant.

have held that between two innocent people, the one who caused the injury and is mentally ill should bear the burden.⁹³ Further, courts have argued directly that the purpose of holding mentally ill defendants to a strict liability standard is to compensate the victim.⁹⁴

These are the same arguments used when the rule was established in the 1616 case *Weaver v. Ward*.⁹⁵ However, compensation is only part of the story since the development of our fault-based tort system. Although it is true that victims should be compensated, it is also true that in the case of an accident where a jury finds that the defendant acted reasonably, the burden shifts back to the plaintiff.⁹⁶ In the same vein, when a defendant acts as is reasonable for his disability or illness, liability for harm should not be placed arbitrarily in the lap of the actor with the illness. Such a fault-based standard is the basis of our tort law.

Courts have also argued that between two innocents, where one is a child at fault, the burden should remain with the injured party.⁹⁷ There is no clear reason why this standard is applied to children and not the mentally ill.⁹⁸ A

⁹³ *Vosnos v. Perry*, 357 N.E.2d 614, 615 (Ill. App. Ct. 1976); *Kuhn v. Zabotsky*, 224 N.E.2d 137, 141 (Ohio 1967); *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 624 (Wis. 1970).

⁹⁴ *See Delahanty v. Hinkley*, 799 F.Supp. 184, 186 (D.D.C. 1992) (“The primary purpose of such a rule is to *compensate* the victims for their loss.”); *see also Goff v. Taylor*, 708 S.W.2d 113 (Ky. 1986); RESTATEMENT (SECOND) OF TORTS § 283B (1965) (“[I]f mental defectives are to live in the world they should pay for the damage they do.”).

⁹⁵ (1616) 80 Eng. Rep. 284 (K.B.).

⁹⁶ KEETON ET AL., *supra* note 10, § 32, at 174–75.

⁹⁷ *See Deluca v. Bowden*, 329 N.E.2d 109 (Ohio 1975). The court states that children are not responsible for their actions until they understand that those actions may injure others. Indeed, the court chose “a rule which holds that members of society must accept the damage done by very young children to be no more subject to legal action than some force of nature or act of God.” *Id.* at 111. The finding shows that courts are capable of adjusting the reasonable person standard to effectively implement our fault-based system of torts. *See also Camerlinck v. Thomas*, 312 N.W.2d 260 (Neb. 1981).

⁹⁸ Prosser suggests in his discussion of the subjective reasonable person standard for children that “there is a sufficient basis of community experience, on the part of those who have been children or dealt with them, to permit the jury to apply a special standard.” KEETON ET AL., *supra* note 10, § 32, at 179. This is likely the unstated underlying cause of the discrepancy in standards between children and mentally ill defendants. Members of society and the legal community have first-hand experience with both being a child and being around children. However, most people do not have first-hand experience with severe mental illness within their community. It is extremely rare to find a member of the legal community who has experienced severe mental illness. As a result, there is an understanding of and empathy for children that does not exist for those with mental illness.

defendant experiencing psychosis may be equally or less capable of understanding reality than a child.⁹⁹ However, the courts still insist on unfairly burdening mentally ill adults with liability when they cannot control their illness or its effects. This burden runs counter to our fault-based system of tort.

B. Deterrence

In addition to compensation, courts hold defendants liable to deter others from acting with similar negligence.¹⁰⁰ Tort law often frames deterrence in terms of incentivizing efficiency, or limiting the risk that an actor takes to a socially acceptable level.

Holding a mentally ill person liable for damages he may have caused due to his psychosis will not deter future similar action.¹⁰¹ If a person is not aware of what is real and what is not, requiring him to pay for injury he does not understand will not shape his actions in the future, especially if he continues to be psychotic.¹⁰² Further, a mentally ill actor is unlikely to consider the pecuniary effect of his actions, even if others have been held liable for the same negligent acts in the past.¹⁰³ For example, a defendant was found liable for damage done while driving recklessly after she escaped from a psychiatric hospital.¹⁰⁴ The court found that the defendant “did not have the required mental capacity to realize the risk involved to herself and others.”¹⁰⁵ By stating that the defendant did not understand that her actions

⁹⁹ See generally DSM-IV, *supra* note 3, at 297–302 (defining psychosis as including delusions, or “erroneous beliefs that usually involve a misinterpretation of perceptions or experiences,” and hallucinations); CONGRESS OF THE UNITED STATES, THE BIOLOGY OF MENTAL DISORDERS 47–53 (1992) [hereinafter MENTAL DISORDERS].

¹⁰⁰ KEETON ET AL., *supra* note 10, § 4, at 25 (“When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm.”).

¹⁰¹ Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL’Y 67, 89 (1995) (“[O]nly the mentally ill who have control over their actions can be deterred. When mental illness is sudden or nontreatable, deterrence is impossible.”). In addition, when treatment is not available, deterrence is also impossible.

¹⁰² KEETON ET AL., *supra* note 10, § 4, at 25 (stating that one reason for promoting liability is to incentivize people to avoid that harm). However, if a person does not understand the harm he is causing, that purpose of liability no longer applies. MENTAL DISORDERS, *supra* note 99.

¹⁰³ MENTAL DISORDERS, *supra* note 99.

¹⁰⁴ *Johnson v. Lambotte*, 363 P.2d 165, 165–66 (Colo. 1961).

¹⁰⁵ *Id.* at 166.

could have been harmful, the court itself found that the defendant could not have been deterred.

However, if a person with mental illness negligently stops taking his medication, he would still be considered liable under a subjective standard. Similar standards exist for defendants with physical disabilities and defendants limited by sudden incapacitation, which are both existing subjective standards.¹⁰⁶ In both cases, should an actor put himself in a situation which he knows is dangerous as a result of his illness or disability, he would be liable.

In *Eleason v. Western Casualty & Surety Co.*, the defendant was sued for wrongful death when he struck plaintiff with his car while having a seizure.¹⁰⁷ The court held that because plaintiff knew he had epilepsy and such a seizure was foreseeable, he was negligent for driving at all.¹⁰⁸ The reasoning would apply in a case where a mentally ill defendant discontinued his medication without medical advice; he would be found negligent even under the subjective standard used for people with physical disabilities.

Courts have also argued that holding a mentally ill defendant liable will deter negligent behavior by a mentally ill actor's caretaker, incentivizing the caretaker to ensure that the actor is not causing injury.¹⁰⁹ However, the argument has little weight because the current law does not punish the caretaker; it punishes the defendant. To effectively deter the caretaker from allowing a person in his care to act negligently, courts should make the caretaker of the mentally ill defendant directly liable.¹¹⁰

In addition, the premise of the argument is that the caretaker has control over the actions of the individual. This is unlikely the case, as caretakers of adults with mental illness cannot watch over them twenty-four hours a day.¹¹¹ If a caretaker could only escape liability by having full control of the mentally ill actor, the incentive to the caretaker is to totally confine the actor. As a result, the deterrent effect on the caretaker based on the strict liability of mentally ill actors, if it exists at all, only incentivizes the families of those with mental illness to institutionalize those individuals. Finally, such a theory of negligence ignores the large percentage of seriously mentally ill people without caretakers.

¹⁰⁶ See *supra* notes 55–68 and accompanying text.

¹⁰⁷ 35 N.W.2d 301, 302 (1948).

¹⁰⁸ *Id.* at 303 (“[B]ecause the injury might have been avoided by prudence and foresight it cannot be considered an act of God.”).

¹⁰⁹ *Schumann v. Crofoot*, 602 P.2d 298, 301 (Or. 1979); *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 624 (Wis. 1970).

¹¹⁰ Dark, *supra* note 91, at 183–84; Kelley, *supra* note 39, at 206.

¹¹¹ See Sarah Light, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381, 392–93 (1999).

C. Administrability

Although not a primary goal of tort law, administrability strongly impacts how courts make decisions.¹¹² Even if a legal rule may be the most just, if it requires more resources, such as time and money, than the case allows, it will not be effective. Administrability arguments may be the most commonly cited reasons for maintaining an objective reasonable person standard for those who are mentally ill.¹¹³ Courts have argued that it is impossible to determine whether a defendant is actually mentally ill or merely using bad judgment.¹¹⁴ In addition, courts have cited concern that defendants will falsely claim insanity to avoid liability for their negligence.¹¹⁵

Administrability arguments are unpersuasive for two reasons. First, not only is legal insanity effectively determined in the criminal context, but it is currently being used in the context of contract law, probate, health care, and family law.¹¹⁶ In addition, mental illness is determined in tort cases where plaintiffs are defending contributory negligence.¹¹⁷ The movement of states towards accounting for mental competence in determining contributory negligence not only shows that it impacts fault, but also that administrability concerns are less persuasive.

Second, psychiatry is more advanced today than during the initial development of tort law. Effectively identifying defendants with a mental illness that impairs their capacity for understanding negligent action is an existing and effective part of the justice system. In fact, states have created detailed manuals providing processes for determining the mental status of defendants.¹¹⁸ The courts should not unjustly place the burden of injury on a defendant who is not at fault to save resources. The resources required are

¹¹² KEETON ET AL., *supra* note 10, § 4, at 23–24.

¹¹³ Korrell, *supra* note 24, at 34–40 (discussing the “Burden on the Courts” rationale).

¹¹⁴ *E.g.*, Kuhn v. Zabotsky, 224 N.E.2d 137, 140 (Ohio 1967).

¹¹⁵ Vosnos v. Perry, 357 N.E.2d 614, 616 (Ill. App. Ct. 1976); Jankee v. Clark, 612 N.W.2d 297, 316 (Wis. 2000) (finding that courts must “[hold] the mentally disabled accountable for their torts to prevent defendants from simulating or pretending insanity to defend their wrongful acts”) (citation omitted); Breunig v. Am. Family Ins. Co., 173 N.W.2d 619, 624 (Wis. 1970).

¹¹⁶ *See supra* note 24. *See also* Korrell, *supra* note 24, at 35.

¹¹⁷ *See Jankee*, 612 N.W.2d at 29; *accord* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 cmt. e (Proposed Final Draft No. 1, 2005).

¹¹⁸ H. Patrick Furman, *The Definition and Determination of Insanity in Colorado*, 21 COLO. LAW. 693 (1992).

currently accessible to courts, as evidenced by the wide variety of settings in which mental competency is used.

In addition, recent studies have shown that tests have a very high rate of effectively distinguishing those offenders who have mental incapacity from those who do not.¹¹⁹ In fact, a New York court, in using a plaintiff's mental capacity to determine his contributory negligence, specifically stated that "it is possible and practical to evaluate the degrees of mental acuity and correlate them with legal responsibility."¹²⁰ The court's assertion of the appropriateness and success of determining mental incapacity has been cited in other jurisdictions.¹²¹ If the scientific community is confident that mental capacity can be effectively measured, and courts have found that mental capacity can be effectively measured specifically in the tort context, then courts can effectively measure defendants' mental capacities to determine whether imposing liability is fair under our current fault-based system of tort.

D. Public Policy

Public policy arguments have recently become more integral to tort decisions.¹²² The most significant and facially persuasive argument raised for retaining an objective reasonable person standard for mentally ill defendants is in support of the deinstitutionalization movement.¹²³ This argument has only appeared recently, as the movement against long-term institutionalization of mentally ill persons began in the middle of the last century.¹²⁴

In addition, the proposed *Restatement (Third) of Torts* disregards standard policy arguments, most likely because they are unpersuasive for the

¹¹⁹ Jill S. Hayes, David B. Hale & William Drew Gouvier, *Malingering Detection in a Mentally Retarded Forensic Population*, 5 APPLIED NEUROPSYCHOL. 33 (1998) (explaining that a battery of four psychological tests correctly identified mentally retarded members of a group from those pretending to be mentally retarded to escape prosecution); Richard Rogers, J. Roy Gillis & R. Michael Bagby, *The SIRS as a Measure of Malingering: A Validation Study with a Correctional Sample*, 8 BEHAV. SCI. & L. 85, 89 (1990) (finding 88% of those tested with a new scale successfully identified as malingering or clinical in the correctional population; rate would be higher using further techniques).

¹²⁰ *Mochen v. New York*, 352 N.Y.S.2d 290, 293 (N.Y. App. Div. 1974).

¹²¹ *Cowan v. Doering*, 522 A.2d 444, 449 (N.J. Super. Ct. App. Div. 1987); *Miller v. Trinity Medical Center*, 260 N.W.2d 4, 7 (N.D. 1977).

¹²² See KEETON ET AL., *supra* note 10, § 3, at 15 ("[I]t is only in recent decades that [public policy's] influence on tort law has been openly considered in judicial decisions.").

¹²³ See Korrell, *supra* note 24, at 40–42 (discussing the "For Their Own Good" rationale); see also Dark, *supra* note 91, at 185–86.

¹²⁴ See *Creasy v. Rusk*, 730 N.E.2d 659, 664–65 (Ind. 2000).

reasons already stated. The authors of the proposed Restatement have emphasized the argument that if a person with severe mental illness is to live in the community, then he should be held to the same standard as others in the community.¹²⁵ In this way, “deinstitutionalization becomes more socially acceptable if innocent victims are at least assured of opportunity for compensation when they suffer injury.”¹²⁶

The policy argument in favor of holding mentally ill persons liable because they need to be accepted into society is unpersuasive.¹²⁷ Most importantly, the standard is illogical considering the subjective reasonable person standard available to people with physical disabilities and children.¹²⁸ Certainly the courts would not require children to be institutionalized until they can be held to the same reasonable person standard as an adult. Such a standard would also be discriminatory towards people with physical disabilities.¹²⁹

In addition, with the current understanding of psychiatry, the line between physical and mental illness is increasingly blurry.¹³⁰ The Americans with Disabilities Act (ADA) requires the same protections for individuals with mental disabilities as it does for individuals with physical disabilities.¹³¹ Congress specifically endorsed the parity of treatment of those with physical and mental disabilities in the ADA when it defined disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”¹³² Therefore, holding an individual liable for

¹²⁵ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 cmt. e (Proposed Final Draft No. 1, 2005).

¹²⁶ *Id.*

¹²⁷ See, e.g., Dark, *supra* note 91, at 185–86; Jacobi, *supra* note 91, at 99–104; Kelley, *supra* note 39, at 205; Korrell, *supra* note 24, at 40–41.

¹²⁸ Goldstein, *supra* note 101, at 85–87; Jacobi, *supra* note 91, at 100–05; Kelley, *supra* note 39, at 203–04.

¹²⁹ The Americans with Disabilities Act, 42 U.S.C. § 12132 (2000) (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

If the government, or public agencies, required people with physical disabilities to be held to the same standard of reasonable action as able-bodied people, there would be clear discrimination, even if based only on the resulting lack of accessibility as required in 42 U.S.C. § 12132.

¹³⁰ See Korrell, *supra* note 24, at 14.

¹³¹ 42 U.S.C. § 12102 (2000).

¹³² *Id.*

his disability, especially to further a goal of limiting access to public activities, is in conflict with the spirit of the ADA.¹³³

The assumption inherent in the proposed Restatement's argument is that deinstitutionalization is the cause of dangerous mentally ill people being set loose. This is a misunderstanding and an oversimplification of the current situation of mental health systems.¹³⁴ The purpose of deinstitutionalization is to serve people with mental illness effectively in the community on an outpatient basis. However, effective treatment is not being provided in the community for those with very serious mental illness.¹³⁵ By protecting the larger community from the affects of mental illness, the courts are camouflaging the true culprit—an underfunded and underperforming mental health system. The community needs to be aware of the de-compensating state of the country's mental health system in order to correct it.

Until the Warren Court began its tenure protecting individual liberties, the legal standard for involuntary commitment of mentally ill persons had been the same since the Civil War. At that time, if institutionalization could be helpful to a person with mental illness, the court allowed that person to be institutionalized involuntarily.¹³⁶ In 1972, in the case *Lessard v. Schmidt*, a three-judge district court panel interpreted Wisconsin's vague statute regulating involuntary commitment to include "a balancing test in which the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others."¹³⁷ The new test, which gained acceptance throughout the country, required dangerousness to self or others before a person could be committed.

¹³³ See Jacobi, *supra* note 91, at 125–54.

¹³⁴ See Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 80–94 (1991). The movement of people with serious mental illness from institutions into the community was prompted not just by humanitarian concerns regarding the state of those institutions, but also by financial concerns with the cost of maintaining so many beds. *Id.* at 84. In addition, the process of integrating previously institutionalized individuals into the community was meant to include a network of services that ultimately failed to materialize. *Id.* at 84 n.129.

¹³⁵ *Id.*

¹³⁶ APPELBAUM, *supra* note 92, at 20; *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (“[T]he court may order a patient involuntarily committed if it is ‘satisfied that he is mentally ill or infirm or deficient and that he is a proper subject for custody and treatment.’”) (citing WIS. STAT. ANN. § 51.02(5)).

At that time, asylums granted care to those whose family requested services, and who were “in need of or likely to benefit from services.” Over the next century, a process was developed similar to the process of the criminal justice system. In addition, like a pendulum, the ease with which mentally ill persons could be involuntarily committed swung back and forth. APPELBAUM, *supra* note 92, at 20–21.

¹³⁷ 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

The new dangerousness requirement was purportedly necessary to protect the liberty of people with mental illness. The authors of the proposed Restatement are focusing on deinstitutionalization as a result of the movement for individual rights and treating those mentally ill defendants as if they need to defend their freedom. However, the legal protections are likely not the reason that people with severe mental illness are not currently being served in psychiatric hospitals.¹³⁸

The negative impact of deinstitutionalization, as well as deinstitutionalization itself, is largely a result of inadequate funding.¹³⁹ During the 1960s, states began to rapidly close psychiatric hospitals, in part to save money.¹⁴⁰ But the plan to send mentally ill patients into a community with services available to support them was and still is severely underfunded.¹⁴¹ As a result, approximately 2.2 million people with severe mental illness do not receive treatment.¹⁴² The unintended outcome has been an

¹³⁸ APPELBAUM, *supra* note 92, at 35–41. A survey of studies, both aggregate and case studies, found only a few jurisdictions showing a change in the number of commitments or makeup of the committed population from the status quo before a state passed a stricter, dangerousness-based law to after. *Id.*

One particular study observed the commitment process after the implementation of California's Lanterman-Petris-Short Act, which was passed to tighten the requirements for involuntary commitment. The Act stated that, to be committed initially, the person must "as a result of a mental disorder, [be] a danger to others, or to himself, or gravely disabled." Carol A. B. Warren, *Involuntary Commitment for Mental Disorder: The Application of California's Lanterman-Petris-Short Act*, 11 LAW & SOC'Y REV. 629, 630 (1977). The findings indicated that the passage of the new commitment criteria did not change who the court was committing, merely how the outcome was labeled. The study found that, by and large, defense attorneys, psychiatrists, and judges were most concerned with what was best for the client rather than the letter of the statute. *Id.*

¹³⁹ See Dark, *supra* note 91, at 185–86; DAVID MECHANIC, MENTAL HEALTH AND SOCIAL POLICY: THE EMERGENCE OF MANAGED CARE (1969); APPELBAUM, *supra* note 92, at 50 (finding that the rapid reduction in inpatient population in the mid-1960s was a combination of "the opinions of community psychiatrists who disliked institutionalization and the underfunding of state facilities by penurious legislators."). The opinions of community psychiatrists referred to included those in the school of labeling theory, discussed *supra* note 92.

¹⁴⁰ APPELBAUM, *supra* note 92, at 50.

¹⁴¹ See NATIONAL ALLIANCE FOR MENTAL ILLNESS, GRADING THE STATES: A REPORT ON AMERICA'S HEALTH CARE SYSTEM FOR SERIOUS MENTAL ILLNESS 10 (2006), available at http://www.nami.org/Content/NavigationMenu/Grading_the_States/Full_Report/GTS06_final.pdf ("'Deinstitutionalization' . . . was the result of better medications and a better understanding that the best outcomes for individuals with serious mental illnesses occurred when they remained 'connected' to home communities. The failure of that transition was the result of a failure to invest adequately in community services.").

¹⁴² TORREY, *supra* note 19, at 10.

increase in homelessness and a rise in the number of mentally ill people in prisons.¹⁴³ This policy set forth by case law and the proposed Restatement rests on the assumptions that people are not in mental health facilities because that is their informed choice, and that they would have full access to treatment if they sought it. Both assumptions are implicit in the belief that incentives are all that is needed to provide an inpatient or effective outpatient setting for people with severe mental illness. Not only do many mentally ill individuals in the community suffer for lack of access to care, but the rules of tort provide almost no actual incentives.¹⁴⁴ As a result, the incentives provided by the existing law are not effective in decreasing “negligent” behavior.

The proposed Restatement claims that:

if a person is suffering from a mental disorder so serious as to make it likely that the person will engage in substandard conduct that threatens the safety of others, there can be doubts as to whether the person should be allowed to engage in the normal range of society’s activities.¹⁴⁵

There have been a variety of articles asserting that requiring people with severe mental illness to be institutionalized to avoid liability is inappropriate.¹⁴⁶ However, the argument need not even go that far. If everyone who was so seriously mentally ill as to engage in conduct that might be a liability to others chose to be treated in an inpatient setting, space would allow only a small percentage of those people to be served.¹⁴⁷ The

¹⁴³ Perlin, *supra* note 134, at 98; George B. Palmero, Maurice B. Smith & Frank J. Liska, *Jails Versus Mental Hospitals: A Social Dilemma*, 35 INT’L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 97, 103 (1991) (“The authors believe that the statistical evidence derived from the national census data corroborates their clinical observation that jails have become a repository of pseudo-offenders—the mentally ill.”). *See also* TORREY, *supra* note 19, at 13–42.

¹⁴⁴ *See supra* Part IV.B.

¹⁴⁵ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 11 cmt. e (Proposed Final Draft No. 1, 2005).

¹⁴⁶ Dark, *supra* note 91, at 185–86; Goldstein, *supra* note 101, at 87; Korrell, *supra* note 24, at 34.

¹⁴⁷ *See* TORREY, *supra* note 19, at 8–9 (“[A]pproximately 92 percent of the people who would have been living in public psychiatric hospitals in 1955 were not living there in 1994. . . . [A]pproximately 763,391 severely mentally ill people . . . are living in the community today who would have been hospitalized 40 years ago.”).

The focus of scholarship should not be whether or not people’s “freedom” is being curtailed in the sense of whether they are committed to a hospital, but whether there is the opportunity to be effectively served. In fact, if a person is so ill that he is acting in a hazardous way, chances are he may not be able to effectively care for himself or make logical decisions. In that case, freedom to decide for oneself can only be achieved with

policy that the Restatement sets forth—protection for innocent people from people with serious mental illness living in the community—should not punish those who have no control over their actions. Rather, as a community, we should encourage our mental health systems to take more responsibility for treating those in need, either through inpatient treatment or outpatient treatment, depending on the needs of the person.

Finally, by asserting that the public needs protection from those with mental illness and requiring strict liability from defendants with mental illness, the proposed Restatement perpetuates the stereotype that people with mental illness are dangerous.¹⁴⁸ Although people with physical disabilities may be more prone to accident in some sense, society and the courts have logically required them to take precautions based on their limitations, but not to act as if they were not disabled. By not allowing the same accommodations for people with mental illness, the court is validating the significant stigma associated with mental illness.

V. TOWARDS A REASONABLE “REASONABLE PERSON” STANDARD FOR MENTALLY ILL DEFENDANTS

To effectively account for an actor’s mental illness, a workable standard must be developed for determining its impact on the actor’s liability. Suggestions have been made such as the “reasonably prudent insane person” standard,¹⁴⁹ categorizing mental illness by its physical origin to include it in the physical disability standard,¹⁵⁰ and categorizing the act of an incompetent defender as equivalent to an act of God.¹⁵¹ All of these tests have their pros and cons; the goal is to find a fair solution that is usable by the courts.

The Model Penal Code provides a standard for determining mental disease or defect for purposes of criminal defense. Section 4.01 states:

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial

effective treatment. By receiving either inpatient or outpatient treatment, a person may regain control of his thoughts and make decisions for himself with his wise mind. See Dora W. Klein, *Involuntary Treatment of the Mentally Ill: Autonomy Is Asking the Wrong Question*, 27 VT. L. REV. 649, 660 (2003).

¹⁴⁸ See Edwin V. Valdiserri, Kenneth R. Carroll & Alan J. Hartl, *A Study of Offenses Committed by Psychotic Inmates in a County Jail*, 37 HOSP. & COMMUNITY PSYCHIATRY 163 (1986) (“[T]he increased number of mentally ill prison inmates does not reflect a greater incidence of serious criminal activity.”).

¹⁴⁹ Jacobi, *supra* note 91, at 115–25.

¹⁵⁰ Dark, *supra* note 91, at 205–09.

¹⁵¹ Ague, Jr., *supra* note 13, at 227.

capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.¹⁵²

This provision may be easily adjusted to fit a negligence action. In addition, it meets an appropriate standard for culpability, which takes into account which facts are beyond the control of the actor.

In a negligence action, the court would first determine whether the actor lacks substantial capacity to either appreciate the dangerousness or negligence of his conduct. As discussed above, an important basis of the reasonable person standard is that varying degrees of intelligence or thoughtlessness that may affect a person's ability to appreciate dangerousness will not be considered. However, the Model Penal Code language "lacks substantial capacity" indicates a more substantive delineation between a defendant with and without a mental disability.¹⁵³ The test requires that the mental illness of the defendant be such that he is incapacitated from making rational decisions. Therefore, if the defendant were unable to understand the reality of a situation, he would not be held liable.

For example, the Supreme Court of Wisconsin held a defendant liable for an automobile accident caused when she accelerated into a truck because she believed that she could fly.¹⁵⁴ It is obvious from the defendant's actions, as well as the expert testimony provided by her psychiatrist, that she lacked substantial capacity. By way of comparison, someone who may be a poor driver would perhaps drive too quickly, not pay attention, or not have much experience driving so as to have slow reflexes that may cause an accident. Such an accident may be caused by failure to see the truck, accidental use of the gas instead of the break, or other inadvertent action while driving. However, these are mere differences in ability rather than the lack of capacity to understand the reality of a situation.

Alternatively, if a defendant is unable to act as a reasonable person, or “conform his conduct to the requirements of law,”¹⁵⁵ he would not be held liable in tort. The Model Penal Code standard does not ask whether the defendant would find it difficult, or even extremely difficult, to act as a reasonable person. Like the standard for physical illness, this portion of the

¹⁵² MODEL PENAL CODE § 4.01 (2005).

¹⁵³ *Id.*

¹⁵⁴ *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 622 (Wis. 1970).

¹⁵⁵ MODEL PENAL CODE § 4.01 (2005).

test asks whether the actor “has the capacity”¹⁵⁶ at all. As a result, mere differences of ability will not be a factor, preserving the objective reasonable person standard in the vast majority of cases.

Subsection 2 of the Model Penal Code standard creates an exception to the mental deficiency defense for people with antisocial personality disorder. Although people with antisocial personality disorder are mentally ill and have a limited capacity to act with others in mind, this particular disorder will not be considered a defense.¹⁵⁷ As a result, people who are inherently dangerous, without the cognitive distortions present in a psychotic disorder, will not have the affirmative defense of mental disease or defect available.

Although the Model Penal Code provides a rule the courts can use to determine whether a person with mental illness should be liable for his negligence, there is still the concern of future dangerousness of the defendant. A woman who accelerates into the back of a truck is likely not safe to send home in her car. To continue with the comparison to criminal law, the consequence of finding a criminal defendant not guilty by reason of insanity is usually involuntary commitment.¹⁵⁸ Although there is no such precedent in civil actions, finding a defendant not liable due to his mental illness should result in involuntary commitment, or at the very least a commitment hearing.

The Supreme Court has held that the standard for involuntary commitment is whether the person is a danger to himself or others.¹⁵⁹ If a person is so ill as to be considered unable to understand the consequences of negligence, there is significant proof that he is a danger to himself or others. Indeed, if a defendant has been found negligent, but for his affirmative defense, that is per se proof of dangerousness. As a result, the logical

¹⁵⁶ *Id.*

¹⁵⁷ The *Diagnostic and Statistical Manual* defines antisocial personality disorder as having three of the following traits: unlawful behavior, deceitfulness, impulsivity, irritability and aggressiveness (getting into fights), reckless disregard for safety, consistent irresponsibility (cannot hold a job), or lack of remorse. DSM-IV, *supra* note 3, at 706.

¹⁵⁸ 21 AM. JUR. 2D *Criminal Law* § 79 (2007) (“Depending on the law of the jurisdiction and the facts of the particular case, a person who has been acquitted of a charge of crime by reason of insanity may be unconditionally discharged, conditionally released, or involuntarily committed for hospitalization. Some statutes provide for the automatic and immediate involuntary commitment of an insanity acquittee . . .”).

¹⁵⁹ *Kansas v. Crane*, 534 U.S. 407, 409–10 (2002) (“We have consistently upheld such involuntary commitment statutes when (1) the confinement takes place pursuant to proper procedures and evidentiary standards, (2) there is a finding of dangerousness either to one’s self or to others, and (3) proof of dangerousness is coupled . . . with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’” (citations omitted)).

outcome of finding a defendant not liable based solely on his mental illness is inpatient treatment. As in criminal cases, the defendant would be discharged at the suggestion of the treating psychiatrist.¹⁶⁰

VI. CONCLUSION

The purpose of the Restatement generally is to summarize the current state of the law. However, the proposed Restatement blames the lack of an affirmative defense for mentally ill tort defendants on a strained understanding of deinstitutionalization. In addition, the proposed Restatement suggests that the courts move backward and discount a defense of mental illness in contributory and comparative negligence as well. A fairer result, in keeping with our fault-based system of tort, would be to temper the objective reasonable person standard with a test for mental capacity to determine liability. By treating mental illness as a disability, similar to any physical disability or illness, the courts can help erode the stigma of mental illness.

¹⁶⁰ *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) (“We held, however, that ‘[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous,’ i.e., the acquittee may be held as long as he is both mentally ill and dangerous, but no longer.”) (citations omitted).