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ASKING THE IMPOSSIBLE: THE NEGLIGENCE LIABILITY OF THE MENTALLY ILL

Elizabeth J. Goldstein*

[Due to the sudden onset of incapacity, the defendant lost control of his car.] He did not recall the accident but his last recollection before it, was leaving a stop light after his last stop, and his first recollection after the accident was being taken out of his car in plaintiffs' shop.1

Is the defendant liable for negligence? In most jurisdictions, the outcome of this hypothetical situation is contingent upon the nature of the illness. If the defendant was physically ill, he will prevail. If the defendant was mentally ill, he will lose. Under modern tort law, a mentally ill individual who cannot meet the reasonable person standard will be found negligent regardless of fault.

Many commentators have severely criticized this rule, arguing that the objective standard, created in the seventeenth century, is incompatible with modern views and treatment of the mentally ill.2 These commentators advocate that the mentally ill should be held to a subjective standard

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in negligence actions. Recently, however, a number of scholars have argued for the maintenance of the seventeenth century standard, asserting that this standard promotes important societal goals, is more efficient, and is consistent with the goals of therapeutic jurisprudence.

This article examines and rejects these theories for the objective standard. Instead, this article advocates the adoption of a limited objective standard which would relieve individuals of liability who, due to mental illness, cannot ex ante prevent their own negligence. Part I of this article introduces the origins of the application of the objective standard to the mentally ill in tort cases, documenting the internally contradictory case law that serves as the historical foundation for the objective standard. Part II presents the current state of the law. Part III, "Novel Rationales For The Objective Standard: Efficiency & Therapeutic Goals," examines recent justifications for the objective standard. Part IV, "Harmonizing Negligence Law: Youth, Physical Maladies, and Mental Illness," describes the negligence standards applicable to children and the physically incapacitated and proposes the creation of a subjective standard to apply to mentally ill people who are stricken with a sudden or untreatable mental illness.

I. THE HISTORICAL EVOLUTION OF THE OBJECTIVE STANDARD

A. Early History

The American rule, which holds the mentally ill to an objective standard in tort actions, originates from the dicta of a seventeenth century English case, Weaver v. Ward. In Weaver, the defendant accidentally wounded the plaintiff when the defendant misfired his musket during military exercises. The court found in favor of the plaintiff, stating:

[For though it were agreed, that if men tilt or turney in the presence of the King, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatick kill a man, or the like, because felony must be done animo felonico: yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatick


5. 80 Eng. Rep. 284 (K.B. 1616); Ague, supra note 2, at 212; Bohlen, supra note 2, at 13; Cook, supra note 2, at 337; Ellis, supra note 2, at 1082.
hurt a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification . . .) except it may be judged utterly without his fault.

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

Weaver has been relied upon by courts as the foundation for tort law's standard for the mentally ill. Reliance on this seventeenth century case, however, is misplaced for two reasons. First, the dicta in the case is inherently inconsistent. The court's paradoxical reasoning in Weaver lies in the statement that the actor who is without fault will prevail. However, the insane are accountable regardless of fault. The second problem in relying on Weaver is that the court based its rationale on the predominant tort theory of the day, strict liability.

The leading American case for the application of the objective standard to the mentally ill is Williams v. Hays. In Williams, the defendant was a captain and part owner of a brig. Soon after the commencement of the brig's voyage, a storm erupted requiring the captain to stay on deck continuously for two days. When the captain eventually became exhausted, he went back to his quarters, took quinine, and rested. The ship's rudder then broke, and the vessel's mate told the captain to return

8. Cook, supra note 2, at 337. Perhaps courts have unduly relied on Weaver because very few American tort cases have examined whether insanity could serve as a defense in negligence cases. Curran, supra note 2, at 64.
9. See Ague, supra note 2, at 212-13; Bohlen, supra note 2, at 16; Cook, supra note 2, at 335; Pamela Picher, The Tortious Liability of the Insane in Canada, 13 Osgoode Hall L.J. 193, 203 (1975).
10. See Ague, supra note 2, at 212; Bohlen, supra note 2, at 16; Picher, supra note 9, at 204; Casto, supra note 2, at 705.
11. 38 N.E. 449 (N.Y. 1894); rev'd, 52 N.E. 589 (N.Y. 1899); Casto, supra note 2, at 718. Williams v. Hays was "so frequently cited that mention of it [was] even made in the completely unrelated Palsgraf case." Ague, supra note 2, at 215 (footnote omitted); Palsgraf v. Long Island R. Co., 162 N.E. 99, 102 (N.Y. 1928).
12. Williams, 38 N.E. at 449.
13. Id.
14. Id. at 449-50.
to the deck.\textsuperscript{15} The captain came on deck, but refused to believe that the ship was in peril.\textsuperscript{16} Hence, he declined the assistance of two tug boats.\textsuperscript{17} The storm then demolished the ship which had drifted ashore.\textsuperscript{18} The insurance company paid for the damages, and its assignee sued the captain of the brig, alleging carelessness and misconduct.\textsuperscript{19}

During the trial, the captain asserted that he was insane during the voyage, and thus, not liable.\textsuperscript{20} The trial judge instructed the jury to find for the plaintiff unless they found the defendant insane during the voyage.\textsuperscript{21} After the jury found in favor of the defendant,\textsuperscript{22} the plaintiff appealed. In reversing the judgment, the New York Court of Appeals held that insanity was not a defense to negligence. The court stated: "The general rule is that an insane person is just as responsible for his torts as a sane person, . . . the actor is responsible, although he acted with a good and even laudable purpose . . . ."\textsuperscript{23} However, the court further explained:

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing; and, if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault.\textsuperscript{24}

The New York Court of Appeals then remanded the case for a new trial.\textsuperscript{25} The trial judge granted a directed verdict in favor of the plaintiff. According to the trial court, even if the defendant's condition "was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm, and the heavy dose of quinine which he took as a remedy," it would not present an "exception to the principle laid down by the court of appeals, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent."\textsuperscript{26}

\textsuperscript{15} Id. at 450.  
\textsuperscript{16} Id.  
\textsuperscript{17} Id.  
\textsuperscript{18} Id.  
\textsuperscript{19} Id.  
\textsuperscript{20} Id.  
\textsuperscript{21} Id.  
\textsuperscript{22} Id. at 449.  
\textsuperscript{23} Id. at 450.  
\textsuperscript{24} Id. at 452.  
\textsuperscript{25} Id. at 453.  
\textsuperscript{26} Williams v. Hays, 52 N.E. 589, 591 (N.Y. 1899).
On appeal, the Court of Appeals reversed the plaintiff's judgment. The court via Justice Haight explained:

[T]he defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible . . . . [T]here is no obligation to perform impossible things.

Accordingly, the court remanded the case and granted a new trial. Following this remand, the plaintiff finally dropped the suit.

While subsequent American courts have relied on Williams to stand for the bright line rule that the mentally ill will be judged by the reasonable person standard in negligence cases, the Williams case allowed the jury to consider whether the defendant's duties on the ship caused him to become mentally ill. In addition, the court based its reasoning upon a distinction without an understandable difference. The court never explained why becoming insane from tireless work on a ship is legally distinct from other causes of insanity unrelated to fault. The Restatement of Torts ("Restatement"), like the New York Court of Appeals, has provided equally enigmatic reasoning for its position on the negligence liability of the mentally ill.

B. The Evolution of the Restatement

The lack of clarity in the early cases may explain why the Restatement (First) of Torts failed to provide an appropriate standard for the mentally ill in negligence cases. It stated:

Unless the actor is a child or an insane person the standard of

27. Id. at 592.
28. Id. (emphasis added) (citation omitted).
29. Id.
30. Hornblower, supra note 2, at 293.
31. Campbell v. Bradbury, 176 P. 685, 687 (Cal. 1918); Seals v. Snow, 254 P. 348 (Kan. 1927) (citing Williams, 52 N.E. at 449) (providing that the great weight of authority is that an insane person is civilly liable for his torts); Sforza v. Green Bus Lines, Inc., 268 N.Y.S. 446, 448 (Mun. Ct. 1934); In re Meyer's Guardianship, 261 N.W. 211, 214 (Wis. 1935).
32. Ague, supra note 2, at 216; Hornblower, supra note 2, at 294.
33. Bohlen, supra note 2, at 25; Casto, supra note 2, at 719.
34. [The author's use of the word Restatement within the text of this article alludes to the legal theories articulated by the American Law Institute in the Restatement (First) of Torts (1934), the Supplement to the Restatement of Torts (1948), and the Restatement (Second) of Torts (1965) as a whole. Specific references to particular versions of the Restatement are also included within this text.]
conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.... Caveat: The institute expresses no opinion as to whether insane persons are required to conform to the standard of behavior which society demands of sane persons for the protection of the interests of others.\textsuperscript{35}

However, the 1948 \textit{Supplement to the Restatement of Torts} ("\textit{Restatement Supplement}") deleted the phrase "or an insane person" from Section 283 and deleted the entire caveat.\textsuperscript{36}

Commentators differ on the reason for this initial change. One commentator explains that the caveat was a tactful way of stating the \textit{Restatement}'s support for judging the insane by a subjective standard.\textsuperscript{37} In contrast, another commentator argues that the \textit{Restatement} refused to take a position on the subject until there was enough case law to merit the adoption of a standard.\textsuperscript{38} The \textit{Restatement Supplement} supports the latter opinion, stating that "[t]he original Caveat to this section . . . was inserted because '[t]here is no sufficient authority to make it possible to state a rule."\textsuperscript{39}

When the \textit{Restatement} adopted the reasonable person standard, the decision was based on very little case law.\textsuperscript{40} In fact, the \textit{Restatement} cited only one case that found an insane person liable for negligence.\textsuperscript{41} The \textit{Restatement} also provided ten cases holding the mentally ill liable for intentional torts.\textsuperscript{42} In explaining its illustrations, the \textit{Restatement} asserted

\begin{itemize}
  \item \textsuperscript{35} \textit{Restatement (First) of Torts} § 283 (1934).
  \item \textsuperscript{36} \textit{Restatement of Torts} § 283 (Supp. 1948).
  \item \textsuperscript{37} Curran, supra note 2, at 53. Curran, however, does not explain why the \textit{Restatement} would not directly state its position.
  \item \textsuperscript{38} See Ague, supra note 2, at 225.
  \item \textsuperscript{39} \textit{Restatement of Torts} § 283(ii) (Supp. 1948).
  \item \textsuperscript{40} According to Justice Qua, as of 1937, there was not a "full and adequate discussion" in the case law to decide whether the mentally ill should be held to an objective standard in negligence actions. McGuire v. Almy, 8 N.E.2d 760, 763 (Mass. 1937).
  \item \textsuperscript{41} \textit{Restatement of Torts} § 283 (Supp. 1948). The case law relied upon was a New York City municipal court decision. \textit{Id.} (citing Sforza v. Green Bus Lines, Inc., 268 N.Y.S. 446 (Mun. Ct. 1934)). The \textit{Restatement Supplement} also cited the dicta of several state court cases. \textit{Id.}
  \item \textsuperscript{42} \textit{Id.} at § 283(ii) (citing Roberts v. Hayes, 1 N.E.2d 711 (Ill. 1936); Teopffer v. Teopffer, 101 P.2d 904, 907 (Kan. 1940); Hackenberger v. Travelers Mut. Cas. Co., 62 P.2d 545, 547 (Kan. 1936); Seals v. Snow, 254 P. 348 (Kan. 1927); Phillips' Committee v. Wards Adm'r, 43 S.W.2d 331 (Ky. 1931); Yancey v. Maestri, 155 So. 509 (La. Ct. App. 1934); McGuire v. Almy, 8 N.E.2d 760 (Mass. 1937); Bryant v. Carrier, 198 S.E. 619 (N.C. 1938); Sweeney v. Carter, 137 S.W.2d 892 (Tenn. 1939); Shedrick v. Lathrop, 172 A. 630 (Vt. 1934)).
\end{itemize}
that if courts held the insane liable for intentional torts,\textsuperscript{43} it would also hold them liable for unintentional torts. It reasoned:

There seems to be no practical difference between the insane person deliberately throwing the match in order to fire the stack and his carelessly doing so, unmindful of the risk. In neither case does he appreciate the seriousness of what he is doing or evaluate its effect on others. He is equally free of moral blameworthiness in both cases and in both cases the same harm is suffered. It seems clear that a court which would hold him [liable] in the first case . . . would also hold him liable in the second. It also seems clear that courts . . . which have recently held an insane person . . . liable for intentionally injuring or killing another would not hesitate to hold an insane person liable for causing the same harm unintentionally.\textsuperscript{44}

The Restatement's parity is unsound. The reasonableness of the defendant's actions is not an issue in intentional tort cases. Traditional intentional torts do not require the plaintiff to prove the unreasonableness of the defendant's action except as a defense. One commentator aptly explained the Restatement's view by stating:

\textquote{Negligence is a lesser tort and liability is more easily established. On the contrary, it seems to me a clear extension of the theory of responsibility. To hold an insane person [liable] . . . for an intentional tort, a court can examine the rudiments of his conduct, uncontrolled though it may be. To impose liability for negligence, however, the court must blindly apply the objective reasonable man standard. To apply the latter is in effect strict liability upon the mentally ill and mentally deficient imposed without examination of the circumstances of the act.}\textsuperscript{45}

Additionally, the Restatement analogy eschewed the problem that many cases based their decision, in part, on the premise that individuals should be held strictly liable in tort.\textsuperscript{46} This premise directly contradicts the fault-

\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} Curran, \textit{supra} note 2, at 65.
\textsuperscript{46} \textit{Seals}, 254 P. at 349 ("There is no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him, for, as is said in an early case, 'the reason is because he that is damaged ought to be recompensed.'") (citations omitted); \textit{McGuire}, 8 N.E.2d at 763 ("Fault is by no means at the present day a universal prerequisite to liability, and the theory that it should be such has been obligated very recently to yield at several points to what have been thought to be paramount considerations of public good."); \textit{In re Meyer's Guardianship}, 261 N.W. 211, 213-14 (Wis. 1935). "In respect to a lunatic, as he has properly no will, it follows that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the
based foundation of the negligence system. The Restatement failed to acknowledge that doctrinal deduction did not necessarily lead one to apply the objective standard in negligence cases. Instead, the decision was one of public policy. As one court explained:

This view [not holding the insane liable in tort] has plausibility, and it would be perfectly sound and unanswerable if punishment were the object of the law when persons unsound in mind are the wrongdoers. But when we find that compensation for an injury received is all that the law demands, the plausibility disappears. Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity . . . But the question of liability in these cases, as well as in others, is a question of policy; and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public . . . . If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other . . . .

In insisting that legal doctrine requires the mentally ill to be held to the reasonable person standard, the American Law Institute failed to provide any policy rationale for its new mode of analysis.

Section 283B of the Restatement (Second) of Torts again stated the strict rule that “[u]nless 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.” In addition, in Comment b to Section 283, the American Law Institute explained the reasons for the adoption of the objective standard stating: (1) it would be too difficult to create a standard for civil insanity; (2) insanity can be too easily feigned; (3) when two innocent persons are harmed, the one who occasioned the harm should be found liable; and (4) the objective standard would motivate those in charge of the insane’s estate to “look after them, keep them in order, and see that they do not do

party injured.” Id. (quoting Karow v. Continental Ins. Co., 15 N.W. 27, 28 (1883)). “[O]n the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned [the loss].” Id. (quoting Beels v. See, 10 Pa. 56, 61 (1848)).


harm." Courts, in turn, have relied on the reasoning of the 1965 Restatement, holding the mentally ill to a reasonable person standard in tort cases. Most commentators, however, have disagreed with the Restatement's position.

C. Early Commentators

Earlier commentators argued that the American Law Institute's reasons for establishing the objective standard were no longer legitimate. Reasons for dismissing the traditional doctrine are discussed below.

1. Between Two Innocent People, the One Who Occasions the Harm Should Be Liable for the Harm

As one commentator in 1956 explained, the American Law Institute's reasoning "is nothing more than strict (or absolute) liability dressed up in Sunday-go-to-meetin' garb. In the case of the lunatic, let's not drift back into that unmoral abyss once again!" It is unfair to require only the mentally ill to meet a strict liability standard while the average defendant is only liable when she is at fault. Indeed, if the law's primary focus was to compensate victims, then the doctrine of negligence should be discarded for everyone, not only for the mentally ill.

2. Insanity Will Easily Be Feigned

Fear of widespread feigning of mental illness is unfounded. In the criminal context, where there is arguably more incentive to feign mental illness, defendants rarely invoke the insanity defense. On average, criminal defendants invoke the insanity defense in one to two percent of felony cases. This statistic is consistent with the Institute of Mental Health's calculation that approximately one percent of the population of

49. Id. at ¶ 283B cmt. b.
51. Ague, supra note 2, at 222; Bohlen, supra note 2, at 17; Ellis, supra note 2, at 1084.
52. Casto, supra note 2, at 716.
the United States suffers from a chronic mental illness. Moreover, a majority of people who plead the insanity defense are seriously mentally ill. Ninety percent of those raising the criminal insanity defense are diagnosed with a mental illness, and a vast majority of these individuals have been previously hospitalized due to mental illness. While approximately fifty-five percent of individuals who plead the insanity defense are diagnosed with schizophrenia or another major mental illness, eighty-four percent who are acquitted possess these diagnoses. Accordingly, of those criminal defendants who raise the insanity defense, the majority who succeed with the defense are seriously mentally ill.

In addition, the mentally ill have every reason not to feign insanity. The defendant's testimony, relating to his or her mental illness, may be introduced at a civil commitment or incompetence hearing. Thus, a defense of mental illness in a negligence action may have a collateral effect on an individual's freedom to live within society. Additionally, defendants will be inhibited from using the insanity defense because of the social stigma attached to mental illness.

3. It Is Too Difficult to Create and Apply a Civil Standard for Insanity

Courts are reluctant to introduce into tort law the confusion and controversy surrounding criminal insanity tests. Nevertheless, the judiciary already applies a subjective standard to the mentally ill in issues of contributory negligence, guardianship, civil commitment, and testamentary

Plea and Criminality Among Mental Patients, 7 BULL. AM. ACAD. PSYCHIATRY L. 199, 201 (1979).


55. Callahan et al., supra note 53, at 337.

56. Id.

57. Id. at 336; McGreevy et al., supra note 53, at 747-48.

58. Callahan et al., supra note 53, at 337.

59. See Siedelson, supra note 2, at 39.

60. Id.; see also William R. Dubin, M.D. & Paul J. Fink, M.D., Effects of Stigma On Psychiatric Treatment, in STIGMA AND MENTAL ILLNESS 1, 3 (Paul Jay Fink, M.D. & Allan Tasman, M.D. eds., 1992) ("While less than 3% of mentally ill patients could be categorized as dangerous, 77% of mentally ill patients depicted on prime-time television are presented as dangerous."); Linda A. Teplin, Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill, 39 AM. PSYCHOL. 794, 794 (1984) (finding police officers 20% more likely to arrest individuals showing signs of mental illness than individuals committing crimes).

For example, in *Mochen v. State*, a seventeen-year-old mental patient attempted to escape from a state mental hospital by lowering himself from a window with tied bed sheets. This failed attempt left the mental patient with serious leg injuries causing him to be paralyzed. The mental patient then sued the state. The trial court found in favor of the state, holding that the mental patient was guilty of contributory negligence. The appellate court reversed. According to the court, the defendant should be judged by a subjective standard of care because the objective standard prevents accident compensation. The court explained that a mentally ill person should not be "held to any greater degree of care for his own safety than that which he is capable of exercising." To determine whether the plaintiff met this standard, the court examined the hospital records and expert testimony. The plaintiff's medical records indicated that he had assaulted his mother, attempted to assault his father, and had been diagnosed by his personal physician as "sociopathic state vs. encephalopathic schizophrenia." The plaintiff's personal doctor testified at trial that the plaintiff was psychotic. He also revealed to the court that although the plaintiff could understand the risk of the escape, his mental condition made him unable to resist the temptation to escape. "The frustration from what [the plaintiff] considered unjust confinement was so intense that he reacted violently and impulsively and in his mind his elopement was an appropriate and reasonable exercise of judgment." The court, in applying a subjective standard, concluded that the plaintiff was not contributorily negligent.


62. Ellis, *supra* note 2, at 1089.
64. *Id.* at 292.
65. *Id.*
66. *Id.*
67. *Id.* at 295.
68. *Id.*
69. *Id.* at 293.
70. *Id.* at 294.
71. *Id.* at 294-95.
72. *Id.*
73. *Id.*
74. *Id.* at 295 (emphasis added).
75. *Id.*
The *Mochen* case illustrates that courts can successfully apply the subjective standard in negligence cases. The test created by the court, whether the plaintiff exercised the level of care of which he was capable, was applied by examining the plaintiff's medical records and analyzing expert testimony. In addition, as noted in *Breunig v. American Family Insurance Co.*, the court created a workable subjective standard in a negligence action. The court found that a subjective standard would be applied when "there [was] ... an absence of notice of forewarning to the person that he may be suddenly subject to ... insanity or mental illness." In the criminal arena, it has been shown that juries do understand how to apply the insanity test to the applicable facts. Indeed, it is not evident that jurors will understand less about mental illness than other substantive areas of knowledge needed to resolve a case (i.e., the correct way to build a bridge or deliver a baby).

4. **Liability Will Encourage Those in Charge of the Mentally Ill's Estate to Be More Responsible**

The idea that the mentally ill have guardians who will protect them in order to maintain the integrity of their estate has long been outdated. First, many mentally ill individuals have no estate to protect. A large number of mentally ill persons rely solely on public assistance alone, while others rely on handouts. Approximately twenty-five to thirty per-

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76. Id.
77. 173 N.W.2d 619 (Wis. 1970); see also infra notes 89-98 and accompanying text (providing an extensive discussion of *Breunig v. American Family Insurance Co.*).
78. Id. at 623.
81. Social scientists have found that social economic status is inversely correlated to mental disorders. One review of the literature found that "psychopathology is at least two and a half times more prevalent in the lowest social class than in the highest." Deborah Belle, *Poverty and Women's Health*, 45 AM. PSYCHOL. 385, 385 (1990).
82. JUDITH BELLIVEAU KRAUSS, R.N. & ANN T. SLAVINSKY, R.N., THE CHRONICALLY ILL PSYCHIATRIC PATIENT AND THE COMMUNITY 83 (1982) (stating that 70% of the 162 mental patients studied were dependent upon public funds within a year of hospital release).
cent of America’s homeless are seriously mentally ill. Second, if the courts truly desire to encourage guardians to be more responsible for their wards, they could hold the guardians directly liable. Third, guardians must be informed of the law in order to be motivated to protect their ward’s estate. It is likely that most guardians believe that insanity is a defense to a tort as it is in criminal law.

II. THE CURRENT STATE OF THE LAW

Prior to 1970, there was no American court, with the exception of courts in Louisiana willing to soften the unequivocal rule that the mentally ill should be held to an objective standard in negligence actions. Although courts created many formulations of the bright line rule, the reasons given for the objective standard almost always paralleled those listed in the Restatement (Second) of Torts.

In 1970, the Wisconsin Supreme Court in *Breunig v. American Family Insurance Co.* was the first court to hint that a subjective standard of care should be applied to the mentally ill, albeit in dicta. In *Breunig*, the defendant, Mrs. Veith, drove her car across a highway’s dividing line and into a pickup truck driven by the plaintiff. Mrs. Veith’s liability insurance company presented expert medical testimony demonstrating that Mrs. Veith had been suffering from schizophrenia and acute paranoia at the time of the accident and thus could not drive her car “with [a] conscious mind.” Mrs. Veith’s psychiatrist testified that Veith believed that God was controlling her car and when she saw the truck coming she ac-

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83. Dan Hurley, *Imminent Danger*, 27 PSYCHOL. TODAY, 54, 56 (1994) (The National Alliance for the Mentally Ill estimates that 30% of the homeless, 150,000 people, are seriously mentally disturbed.); John Q. La Fond, J.D., *Law and the Delivery of Involuntary Mental Health Services*, 64 AM. J. ORTHOPSYCHIATRY 209, 217 (1994) (“Current studies estimate that a quarter or a third of the homeless are seriously mentally ill.”).

84. Siedelson, supra note 2, at 38.

85. Ague, supra note 2, at 222; Casto, supra note 2, at 717.

86. Louisiana upholds the civil rule that mental illness may be a defense to a tort action. Yancey v. Maestri, 155 So. 509, 515 (La. Ct. App. 1934).

87. Fitzgerald v. Lawhorn, 294 A.2d 338, 339, is a 1972 intentional tort case where the Connecticut Court of Common Pleas wrote in dicta that the objective standard was outdated. *Id.* at 339. Accordingly, the court was unwilling to adhere to this view. *Id.* However, when a defendant asserted mental illness as a defense to a negligence action, a Connecticut court failed to follow the dicta of Fitzgerald. Turner v. Caldwell, 421 A.2d 876 (Conn. Super. Ct. 1980).

88. RESTATEMENT (SECOND) OF TORTS § 283 cmt. b (1965).

89. 173 N.W.2d 619 (Wis. 1970).

90. *Id.* at 622.

91. *Id.*
celerated in order to fly like Batman. The psychiatrist also testified that Veith had no notice of when her illness would occur, and further explained that:

The origin of [Veith's] mental illness appeared in August, 1965, prior to the accident. In that month Mrs. Veith visited the Necedah Shrine where she was told the Blessed Virgin had sent her to the shrine. She was told to pray for survival. Since that time she felt it had been revealed to her the end of the world was coming and that she was picked by God to survive. Later she had visions of God judging people and sentencing them to Heaven or Hell; she thought Batman was good and was trying to help save the world . . . .

After the jury found in favor of the plaintiff, the defendant appealed stating that, due to her mental illness, she should have been held to a subjective standard of care. The court rejected the defendant's argument, holding that the jury could have found that Veith's mental illness was foreseeable. The court, however, explained in dicta that there is no bright line rule. Instead:

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

Thus, the Wisconsin Supreme Court signaled its approval of the idea that if mental incapacity is sudden and unforeseeable, the insane should not

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92. Id.
93. Id. at 625.
94. Id. at 622-23.
95. The court stated:
The jury could find that a woman, who believed she had a special relationship to God and was the chosen one to survive the end of the world, could believe that God would take over the direction of her life to the extent of driving her car. Since these mental aberrations were not constant, the jury could infer she had knowledge of her condition and the likelihood of a hallucination just as one who has knowledge of a heart condition knows the possibility of an attack.

Id. at 625.
96. See id. at 623.
97. Id. (emphasis added).
be held to a reasonable person standard. Anicet v. Gant, an intentional tort case, echoed Breunig’s conclusion that when harm cannot be prevented there is no fault, and consequently, no liability. In Anicet, the defendant-appellant, Edgar Anicet, was a twenty-three-year-old man who had been involuntarily committed to a mental hospital for about two years. Anicet had suffered from lifelong mental illness which prevented him from controlling his acts of violence. He often threw rocks and other projectiles at people. The plaintiff-appellee, Preston Gant, worked in the mental hospital as an attendant. Gant worked in Anicet’s ward, the ward where the hospital’s most dangerous and lowest functioning individuals were placed. On the day in question, when plaintiff saw defendant Anicet throw a chair at another patient, Gant tried to calm Anicet down and threatened to put him in a quiet isolation room if he did not compose himself. While Gant was leaving the room, Anicet threw a heavy ashtray at his head. In trying to avoid the ashtray, Gant fell sharply to the ground and was severely injured.

In reaching its decision, the court explained that Florida law clearly held that all mentally ill individuals are liable “in the same generalized way as is an ordinary person for both ‘intentional’ acts and ‘negligent’ ones.” Nevertheless, the court refused to hold Anicet liable, finding that the reasons asserted for this general rule were inapplicable when the defendant was confined to a mental hospital.

The court held that public policy mandated a subjective standard in this case. First, it reasoned that the maxim, “where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it,” was inapplicable in this case. Gant was not an unsuspecting member of society; instead, he was paid to interact with dangerous mental patients. The court analogized this situation to the “fireman’s rule.”

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98. See id. at 624.
100. Id. at 274.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id. at 275 (citation omitted).
107. Id.
108. Id.
109. Id. (citation omitted).
110. Id. at 275-76.
Given that society compensated Gant for the dangers he encountered through his pay and workmen's compensation, he was not entitled to tort recovery for his injuries. Second, the court contended that imposing liability on Gant would not encourage Anicet's relatives to safeguard others from harm:

Anicet, his relatives, and society did as much as they could do along these lines by confining him [Anicet] in the most restricted area of a restricted institution that could be found. Hence, it would serve no salutary purpose to impose the extra financial burden of a tort recovery. As to the "fairness" issue, it is likewise clear that the imposition of liability would in fact counter our notions of what would be just to Anicet—who has no control over his actions and is thus innocent of any wrongdoing in the most basic sense of that term.

Although the Florida Appeals Court limited its holding to individuals confined to mental hospitals, the court's reasoning is equally persuasive in all negligence cases where the plaintiff could not \textit{ex ante} prevent the harm caused due to mental illness.

On the opposite end of the spectrum, a New Jersey trial court, in \textit{Stuyvesant Associates v. Doe}, established that failing to prevent a predictable psychotic episode constituted gross negligence. In this case, the defendant, a forty-one-year-old tenant who was diagnosed as a schizophrenic, had been receiving psychotropic injections (prolixine decanate) regularly since 1980. The injections were to be given every two weeks. However, the defendant missed one of his injections and subsequently became psychotic. In a delusional state he admittedly damaged the landlord's property by spray-painting the stove, radiator, and window sill in his apartment. He also took a hammer and damaged another ten-

111. \textit{Id.} at 276. The \textit{Anicet} court stated that the essence of the "fireman's rule" was that "a person specifically hired to encounter and combat particular dangers is owed no independent tort duty by those who have created those dangers." \textit{Id.} Thus, where a fireman's job is to deal with the hazards of fires, "he cannot complain of negligence in the creation of the very occasion of his engagement." \textit{Id.} (quoting Krauth v. Geller, 157 A.2d 129, 131 (N.J. 1960)).

112. \textit{Id.}

113. \textit{Id.}


115. In New Jersey, the difference between gross negligence and negligence is the level of severity. \textit{Stuyvesant}, 534 A.2d at 450.

116. \textit{Id.} at 449.

117. \textit{Id.}

118. \textit{Id.} at 450.
ant's door.¹¹⁹ The landlord then brought a summary action for eviction pursuant to New Jersey eviction law.¹²⁰ This law allowed eviction when the tenant caused damage to the landlord's property due to gross negligence.¹²¹

The psychiatrist who testified for the defendant at trial explained that if the defendant did not receive one of his injections, he would become psychotic and delusional in a week to ten days.¹²² The psychiatrist also testified that this transformation from rationality to psychosis happens gradually, without the patient even realizing that it is occurring.¹²³ As the psychiatrist explained, the patient "hears the bells, but doesn't realize the consequences."¹²⁴ The psychiatrist told the court that when the defendant is in this delusional state he cannot control his own behavior but is "driven by inner voices" and cannot distinguish between right and wrong.¹²⁵

The court, nevertheless, rejected the defendant's defense of mental illness, holding:

A reasonable person under the same circumstances as this defendant would be expected to get the injections as scheduled. Not having done so, he allowed himself to become psychotic, with the resulting damage done by his own hands. He is liable for the consequences of that conduct. Perhaps he did not intend to tempt the fate of becoming psychotic, or intend the damage that resulted as a consequence, but it is obvious that he was the person who allowed the condition to result, with the consequent damage.¹²⁶

Therefore, the court concluded that the defendant violated the reasonable person standard when he failed to prevent his impending psychosis.¹²⁷

These relatively recent cases support the conclusion that the mentally ill should be held to a reasonable person standard only when the mentally ill individual can control her illness ex ante (i.e., the illness is both foresee-
able and treatable). A subjective standard should be applied when the mental illness is either sudden or untreatable.

III. NOVEL RATIONALES FOR THE OBJECTIVE STANDARD: EFFICIENCY & THERAPEUTIC GOALS

While the traditional reasons for an objective standard appear to be discredited, recent commentators have proposed that the objective standard promotes economic efficiency and therapeutic results. These contemporary rationales are only persuasive, however, when the mental illness is both foreseeable and treatable.

A. The Goal of Economic Efficiency

William M. Landes and Richard A. Posner in their book, The Economic Structure of Tort Law, argue that the common law of torts promotes economic efficiency, thereby minimizing accident losses and prevention costs. Landes and Posner refer to their theory as the positive economic theory of tort law. The positive economic theory of tort law defines economic efficiency as wealth maximization. It occurs when "winners from the [policy] change could compensate the losers, that is, if the winners gain more from the change than the losers lose, whether or not there is actual compensation."

Landes and Posner advocate that the common law's treatment of mentally ill tortfeasors generally leads to economic efficiency. A contrary result will arise in one instance, when the mental illness appears suddenly and unforeseeably. In order to analyze Landes and Posner's reasoning, one must first understand their economic analysis of the objective and subjective standard of care.

According to Posner and Landes, the tradeoffs between the objective and subjective standards support two predictions:

1. When the cost of determining the individual's due care level is low, a departure from that level is more likely to be allowed. This cost is presumably a function of how far the individual's optimal care level deviates from the standard level: the wider

128. LANDES & POSNER, supra note 3.
129. Id. at 312-13.
130. Id. at 15.
131. Id. at 16.
132. Id.
133. Id. at 126-31.
134. Id. at 130.
the gap, the more easily discoverable it will be by the methods of litigation.

2. The more easily substitutable a reduction in activity is for an increase in care, the less likely is the tort system to allow departures from a single, uniform due care level.\(^{135}\)

The standard as applied to blind people exemplifies these tradeoffs.\(^{136}\) There are low information costs for the court to determine whether the individual is blind; that is, blindness is easy to determine and verify. When the activity is a daily activity like walking across the street or taking the bus, the blind person cannot easily replace this activity with a less risky one without incurring substantial costs. For instance, if the blind person became a recluse to avoid these activities, she would likely lose her job and social network while bearing additional costs such as hiring someone to do her grocery shopping. Presumably, the marginal cost of becoming a recluse would far exceed the marginal benefit of accident reduction. In the case of a blind individual walking to and from work, the court can easily determine that the plaintiff's optimal standard of care is below the reasonable person standard,\(^{137}\) and there is no readily available substitute for the activity in question. Thus, the positive economic theory of tort law would apply the subjective standard. On the other hand, when someone participates in an activity where a safer substitute is easily available, the positive economic theory of tort law would hold the person to an objective standard of care. For instance, if a blind person decides to drive a bus instead of ride the bus, the court is likely to hold the blind person to the reasonable person standard.

When Posner and Landes explain the appropriate due care standard for the mentally ill, they compare it to the level of due care required of children.\(^{138}\) The costs for the court to determine if one is mentally ill are rather high, especially in comparison to the information costs of determining if one is a child. Posner and Landes also argue that individuals whose mental illness is serious enough to affect their capability to avoid accidents are highly dangerous, and therefore, the costs to society of confining these people is lower than the costs of integrating them into soci-

\(^{135}\) *Id.* at 126.

\(^{136}\) *Id.* at 127.

\(^{137}\) The American Law Institute advocated differentiating between physical and mental disabilities. "The explanation for the distinction between such physical illness and the mental illness dealt with in § 283B probably lies in the greater public familiarity with the former, and *the comparative ease and certainty with which it can be proved.*" *Restatement (Second) of Torts* § 283C (1965) (emphasis added).

\(^{138}\) *Landes & Posner, supra* note 3, at 128-29.
In contrast, the cost of preventing children from participating in everyday activities (i.e., biking and playing on playgrounds) is greater than the benefits of reducing accidents. This is the case because almost all childhood activities present some risk of accident, and therefore, one would have to eliminate virtually all childhood activities in order to lower accident risk. The cost of this elimination would be very high. Posner and Landes conclude that an objective standard for children “would make sense only if the optimal care of children, as of the dangerously insane, involved constant restraint.”

However, Landes and Posner do not believe that the reasonable due care standard is appropriate when mental illness is sudden and unforeseeable. They contend that *Breunig* was correctly decided. Landes and Posner explain: “The difference between *Breunig* and the usual insanity is that when insanity comes on and causes injury without any warning, there is no opportunity to avoid the injury by restraining the insane person.” Where Landes and Posner are mistaken is that they fail to realize that the *Breunig* exception is also appropriate when mental illness is foreseeable and untreatable. Landes and Posner do not reach this conclusion because they work from two misguided assumptions.

First, they assume that persons with a mental illness severe enough to prevent them from meeting the reasonable person standard are confined to institutions. This assumption, however, ignores civil commitment laws. The Supreme Court in *O'Connor v. Donaldson* held that “[a] finding of ‘mental illness’ alone cannot justify a State’s locking up a person against his will and keeping him indefinitely in simple custodial confinement.” Using *O'Connor* as precedent, most lower courts have held that the state may only involuntarily commit an individual when it is found that she is dangerous to herself or others. Mere proclivity to commit torts is not enough.

139. *Id.*
140. *Id.*
141. *Id.* at 129.
142. *Id.*
143. *Id.* at 130.
144. *See id.*
145. *Id.*
146. “[P]eople whose insanity is severe enough to affect their ability to avoid physical injury to themselves and others are generally kept under restraint.” *Id.* at 128.
147. 422 U.S. 563 (1975).
148. *Id.* at 575.
Studies confirm that most seriously mentally ill individuals are not institutionalized. ¹⁵⁰ As one commentator explains, "[m]any of our modern institutions for the mentally ill exist in the open air: parks, alleys, vacant lots, [and] steam grates on our city pavements."¹⁵¹ Since the deinstitutionalization movement began in 1963, the number of individuals in mental hospitals has fallen from 552,150 in 1952 to 68,000 today.¹⁵² This may explain why more than twice as many schizophrenics and manic depressives reside in homeless shelters or on the street than live in state mental hospitals.¹⁵³ A landmark study has found that only 900,000 of the 1.7 to 2.4 million chronically mentally ill individuals¹⁵⁴ in this country are institutionalized at any time.¹⁵⁵ Approximately 1.5 million of the chronically mentally ill live in the community.¹⁵⁶

Second, Landes and Posner assume that the optimal arrangement for the mentally ill is confinement. However, society, through its civil commitment laws and funding for psychiatric institutions, has expressed a consensus that it is only optimal to confine someone if she is a danger to herself or others. Mental health professionals also reject Landes and Posner's assumption that total institutionalization provides the optimal mode of treatment.¹⁵⁷

In conclusion, it is economically efficient to hold the mentally ill indi-

¹⁵⁰ See, e.g., Alexander Gralnick, M.D., L.F., Future of the Chronic Schizophrenic Patient: Prediction and Recommendation, 40 AM. J. PSYCHOTHERAPY 419 (1986) (arguing that the seriously mentally ill are often neglected because they do not meet the legal standard for commitment).


¹⁵² Hurley, supra note 83, at 56.

¹⁵³ Id.

¹⁵⁴ The study defines "the chronically mentally ill" generally as persons who suffer certain mental or emotional disorders (e.g., organic brain syndrome, schizophrenia, recurrent depressive and manic-depressive disorders, and paranoid and other psychoses, plus other disorders that may become chronic) that erode or prevent the development of their functional capacities in relation to such primary aspects of daily life as self-care, interpersonal relationships, and work or schooling, and that often necessitate prolonged hospital care. Howard H. Goldman et al., Defining and Counting the Chronically Mentally Ill, 32 Hosp. & COMMUNITY PSYCHIATRY 21, 22 (1981).

¹⁵⁵ Id.

¹⁵⁶ Bloche & Cournos, supra note 54, at 388.

¹⁵⁷ Splane, supra note 4, at 161 ("Community treatment is thought to reduce the time patients spend hospitalized; to reduce readmission rates by providing alternate services in the community; and to allow chronic patients to return to the community, where they are likely to be happier and better adjusted.") (citations omitted).
vidual to a reasonable care standard only when their disease is both treatable and foreseeable. In all other cases, the actor is incapable of avoiding injury. Therefore, imposing liability cannot lead to efficiency.

B. Therapeutic Jurisprudence

The school of therapeutic jurisprudence contends that the mental health disciplines should be consulted in order to design laws that promote positive therapeutic results. It examines whether substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic results. The ultimate goal of therapeutic jurisprudence is to empirically test whether the law leads to therapeutic outcomes.

According to commentator Stephanie Splane, the reasonable person standard acts as a therapeutic agent and therefore should be maintained. She contends that the objective standard encourages community acceptance of the mentally ill and promotes their self-sufficiency. With an objective standard, the public will be encouraged to provide the mentally ill with housing, licenses, and employment because they know that the mentally ill will not be absolved of tort liability. ideally, this integration of the mentally ill into mainstream society will decrease the social stigma of mental illness. "Correspondingly, if the mentally ill were allowed to escape tort liability, there is a risk that the public might become outraged by the perceived injustice of denying compensation to innocent victims." This integration theory assumes that individuals are willing to incur tortious injury as long as they are assured that they will be monetarily compensated for this injury. However, actors may rationally choose to forgo the possibility of harm by not interacting with the mentally ill.


159. Wexler & Winick, supra note 158, at 8.
160. Splane, supra note 4, at 153.
161. Id. at 164-66.
162. Id. at 163-64.
163. Id. at 167 (footnote omitted).
164. Studies on whether the mentally ill are more likely to be in accidents are inconclusive. Matthew J. Edlund et al., Accidents Among Schizophrenic Outpatients, 30 Comprehensive Psychiatry 522, 525 (1989) ("The relative risk of a motor vehicle accident per mile appears to be about double for those schizophrenic patients who drive [compared to the control group."); J.L. Armstrong and F.A. Whitlock, Mental Illness and Road Traffic
integration theory rests on the improbable scenario that individuals will choose harm and potential tort recovery over \textit{ex ante} avoidance of the harm.

Secondly, Splane argues that a uniform objective standard would encourage the mentally ill to become responsible, full members of society. As evidence, the commentator cites research indicating that the mentally ill are afraid to go to court. Thus, Splane hypothesizes that the mentally ill would become more conscientious to avoid court. Yet, only the mentally ill who have control over their actions can be deterred. When mental illness is sudden or nontreatable, deterrence is impossible. Consequently, the second prong of Splane's analysis fails.

It is unclear why Splane argues for a uniform rule. The first prong of Splane's analysis is based on a questionable assumption and the second prong has only limited applicability. Indeed, it would appear that Splane's analysis is better suited to support the rule that an objective standard should apply when the mentally ill have control over their actions and thus can be deterred.

A second advocate of therapeutic jurisprudence, Daniel W. Shuman, contends that a limited objective standard can encourage utilization of the mental health system. Shuman asserts that the objective standard promotes therapeutic outcomes by informing the mentally ill that their mental illness will not excuse them from liability. To encourage the initiation of treatment, Shuman proposes to apply the subjective standard to defendants who have started treatment prior to committing the tort. He states, "[i]f obtaining treatment is a reasonable response to notice of the mental illness, then obtaining treatment should be factored into the

\begin{quote}
\textit{Accidents}, 14 AUSTL. & N.Z. J. PSYCHIATRY 53, 56-57 (1980) ("Apart from the diagnosis of schizophrenia, none of the other categories of illness showed a significantly greater or lesser [traffic accident frequency."); Robert C. Eelkema, M.D. et al., \textit{A Statistical Study on the Relationship Between Mental Illness and Traffic Accidents—A Pilot Study}, 60 AM. J. PUB. HEALTH 459, 462, 468 (1970). "Psychotics and psychoneurotics tend to have better [driving] records than their matched comparison on group after discharge." \textit{Id.} at 468. Individuals with personality disorders had a higher traffic accident rate than their matched counterpart. \textit{Id.} at 462.
\end{quote}
measurement of the reasonableness of the defendant’s conduct.”170 Shuman envisions a two-tier test to effectuate his theory:

[T]he first conjunctive element of the test is that the defendant must have instituted treatment in good faith prior to the injury-producing conduct. If the defendant did not initiate treatment prior to the injury-producing conduct, the defendant would not be judged on the modified standard of care, but instead, on the traditional objective standard of care—no therapeutic efforts, no special therapeutic jurisprudence standard.171

If the fact-finder determines that the first part of the test is satisfied, then she should consider “whether the defendant performed as well as society is entitled to expect such person to behave, considering their mental or emotional problem and the treatment obtained.”172

In support of his limited objective standard, Shuman cites case law, including Breunig, which applied the subjective standard when the defendant’s negligence was caused by a sudden and unpredictable episode of mental illness.173 Nevertheless, Shuman does not address why his own test would hold those inflicted with a sudden, unexpected mental illness to the reasonable person standard. Furthermore, individuals whose mental illness is not amenable to treatment are held to the objective standard. If Shuman’s goal is to encourage therapeutic results, why must he punish those who cannot be helped by therapy?174 The problems with Shuman’s limited objective standard can be rectified by eliminating the first prong of his test. The limited objective standard should be based upon whether the defendant performed as well as society is entitled to expect such person to behave considering her mental or emotional problems and the treatment obtained.

IV. HARMONIZING NEGLIGENCE LAW: YOUTH, PHYSICAL MALADIES, AND MENTAL ILLNESS

A. Children

Children and those who suffer sudden physical illness are readily excused from the reasonable person standard. The same standard, how-

170. Id. at 425.
171. Id. at 426 (footnote omitted).
172. Id. at 428.
173. Id. at 425.
174. Research has found that most individuals with long-term psychiatric illnesses experience periods of remission and exacerbation regardless of whether treatment is employed. Krauss & Slavinsky, supra note 82, at 131.
ever, is not applicable to the mentally ill. Children are generally held to a subjective standard in negligence actions.\textsuperscript{175} Children’s actions are measured against those of a reasonable child of like age, intelligence, and experience.\textsuperscript{176} In \textit{Dorais v. Paquin},\textsuperscript{177} the New Hampshire Supreme Court explained that “[c]hildren generally do not have the same capacity to perceive, appreciate and avoid dangerous situations which is possessed by the ordinary, prudent adult.”\textsuperscript{178} Thus, the law should recognize by analogy that when a mentally ill individual is incapable of exercising reasonable care, it would be inconsistent to require them to compensate others.\textsuperscript{179}

\textbf{B. Sudden Physical Illness}

When stricken suddenly with a physical illness, one is not held to a purely objective standard. In \textit{Hammontree v. Jenner},\textsuperscript{180} for example, the court refused to hold an epileptic driver on medication\textsuperscript{181} liable when he had a seizure while driving.\textsuperscript{182} The court’s reasoning in \textit{Hammontree} resembled Oliver Wendell Holmes’ criticism of strict liability:

The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune . . . . If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical consequences ending in damage . . . . Nay, why need an act at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There

\begin{center}
\textsuperscript{175} Children are held to a reasonable care standard when they participate in activities normally conducted by adults such as driving a car. \textit{Restatement (Second) of Torts} § 283A cmt. c (1965).
\textsuperscript{176} \textit{Id.} at § 283A.
\textsuperscript{177} 304 A.2d 369 (N.H. 1973).
\textsuperscript{178} \textit{Id.} at 371 (citations omitted).
\textsuperscript{179} Bohlen, \textit{supra} note 2, at 31; Cook, \textit{supra} note 2, at 349; Ellis, \textit{supra} note 2, at 1102-06.
\textsuperscript{180} 97 Cal. Rptr. 739 (Ct. App. 1971).
\textsuperscript{181} Note that in the civil setting, the courts predicate liability based on failure to take medication. Thus, the courts could predicate civil liability on the fact that a psychiatric patient does not take her psychotropic drugs. Although in a criminal setting the state may not require one to take mind altering drugs, it is fully consistent for tort law to predicate liability on this failure.
\textsuperscript{182} \textit{Hammontree}, 97 Cal. Rptr. at 742.
\end{center}
is no such power where the evil cannot be foreseen.\textsuperscript{183}

It is difficult to think of a reason to differentiate sudden physical illness from sudden mental illness.\textsuperscript{184} Indeed, a large group of psychiatrists believe that mental illness is biologically based just as physical illness. In this day and age, when mental illness is sudden, one should not be held to the objective standard of care.

V. Conclusion

Originally, tort law was predicated on strict liability. In the eighteenth and nineteenth centuries strict liability was replaced with liability predicated on fault. The last remnants of seventeenth century strict liability law remains with us in the area of mental illness. Mentally ill individuals whose disease is sudden or untreatable are liable for the negligent harm that they occasioned even when they cannot avoid the harm. To close this area of strict liability, a subjective standard should be applied to mentally ill individuals who cannot avoid causing negligent harm due to their mental illness. Clearly, mentally ill individuals whose disease is sudden or untreatable cannot \textit{ex ante} prevent the harm and thus should not be found culpable.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{183} O. W. Holmes, Jr., The Common Law 94-95 (1881).
\item \textsuperscript{184} Similarly, psychic harm is well accepted in the psychiatric community; however, tort law maintains skeptical of what it cannot physically see.
\end{enumerate}
\end{footnotesize}