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# WHOSE REASON IS REASONABLE? REASONABLENESS, NEGLIGENCE, AND THE MENTALLY ILL DEFENDANT

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“Reasonableness” underpins Lord Atkin’s famous judgment, but whose reason it is based on remains unclear. Subsequent judgments have assumed that the conduct of all defendants should be judged against an objective “reasonable person” standard, but “reason” is a presumed and ill-defined characteristic. Lord Atkin’s actual words place him in the defendant’s shoes, suggesting that he may have favoured a subjective test. That possibility has received little judicial consideration.

“Reason” is critical to the insanity defence, which is recognised in criminal law but not tort. For mentally ill or cognitively impaired defendants, whose reasoning capacity differs from that attributed to the “reasonable person”, the question of whose reason is of great significance.

Did Lord Atkin intend the test to be subjective? Did he have mentally ill defendants in mind when he formulated the “neighbour principle”? If so, did he intend that negligence law should break with tradition, and recognise a defence of impaired reason? This paper explores whether the current state of negligence law regarding mentally ill defendants deviates from Lord Atkin’s original concept of negligence law, and whether it is time to review negligence law relating to the mentally ill as a particular class of defendants.

## Introduction

Eighty years ago this year, Lord Atkin first introduced the test of “reasonable foresight” to the law of negligence, when he used it as the legal test for identifying neighbours—those to whom a duty of care is owed.<sup>1</sup> Since that time, “reasonable foresight” has become synonymous with the law of negligence—it is the legal test used to establish not only whether a defendant owes a duty of care (the question which occupied Lord Atkin’s mind in *Donoghue v Stevenson*),<sup>2</sup> but also whether the duty has been breached,<sup>3</sup> and whether the breach of duty caused the plaintiff’s harm.<sup>4</sup> Although the name of the test—reasonable foresight—remains the same at each level of enquiry, the focus of the test narrows from the general to the specific. Glass JA summarised the application of the test at each stage as follows: its application at the duty stage as demonstrates that “careless conduct of *any* kind on the part of the former (defendant) may result in damage of *some kind* to the person or property of the latter (plaintiff)”; at the breach stage as “a possibility that *the kind* of carelessness charged against the defendant might cause damage of *some kind* to the plaintiff’s person or property” and at the causation stage as “that *the kind* of carelessness charged against the plaintiff was foreseeable as a possible outcome of *the kind* of carelessness charged against the defendant”.<sup>5</sup>

Although the test of reasonable foresight has been the subject of extensive judicial discussion, the question of *whose* reason is relevant in determining the appropriate level of foresight has remained largely unexplored. Those judgments where the issue has been considered appear to have assumed that the relevant reason is that of the reasonable man. However this assumption is largely unsupported by Lord Atkin’s original statement, and has produced some questionable outcomes, particularly in the context of mentally ill defendants who, by definition, may be lacking in reason.

## Wherefrom the “reasonable man”?

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<sup>1</sup> *Donoghue v Stevenson* [1932] All E.R. Rep at 11. ( Note- page, not para, 11)

<sup>2</sup> *Donoghue v Stevenson* [1932] All E.R. Rep at 11. ( Note- page, not para, 11)

<sup>3</sup> *Wyong Shire Council v Shirt* (1980) 146 C.L.R. 40; also *Roads and Traffic Authority (NSW) v Dederer* (2007) 238 A.L.R. 761 at [69].

<sup>4</sup> *Overseas Tankship (UK) Ltd v Morts Docks & Engineering Co (The Wagon Mound)* [1961] A.C. 388 at 424.

<sup>5</sup> *Minister Administering the Environmental Planning and Assessment Act, 1979 v San Sebastian Pty Ltd* (1983) NSWLR 268 at 295–296.

The reasonable man is the objective standard against which the conduct of a defendant is judged when considering whether or not a breach of duty occurred. However, case law also indicates that the “reasonable man” lurks in the background of the test of reasonable foresight, as the owner of the reason to which foresight is attributed, making him indirectly relevant in establishing duty of care and causation, as well as questions of breach.<sup>6</sup>

The reasonable man and negligence have been inseparable since the reasonable man’s first reported appearance in the 1837 decision in *Vaughan v Menlove*.<sup>7</sup> The reasonable man has survived extensive re-conceptualisation of negligence since this time—firstly, when negligence was redefined as a single standard, rather than multiple standards, by Alderson B in *Blyth v Birmingham Waterworks Co*<sup>8</sup> in 1856, and then again when negligence was expanded beyond the narrow scope of bailment and specific activities, such as carriage of goods or passengers, and use of waterways, or transactions involving dangerous goods, in *Donoghue v Stevenson*.<sup>9</sup>

The centrality of the reasonable man to questions of negligence is evident from the words used by Alderson B in *Blyth v Birmingham Waterworks Co*, when he described negligence as

“the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do”.<sup>10</sup>

The reasonable man was not mentioned in any of the judgments in *Donoghue v Stevenson*. Whether this was an oversight, or an active attempt to extricate the cause of action from the standard of the reasonable man by omission is not entirely clear. Analysis of Lord Atkin’s words in the judgment seems to suggest that he favoured the latter. Nonetheless, the acceptance of the reasonable man’s importation into the modern tort of negligence is evident in the judgment of Jordan CL in *Levi v Colgate-Palmolive*,<sup>11</sup> where he states that the

“standard of the reasonable and prudent man appears to be the criterion for determining the existence of the duty to take care, as well as the standard of care which the duty calls for”.

This was confirmed in *Bourhill v Young*,<sup>12</sup> when Lord Russell of Killowen stated:

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<sup>6</sup> See fnn.3 and 4, above.

<sup>7</sup> *Vaughan v Menlove* (1837) 3 Bing N.C. 468.

<sup>8</sup> *Blyth v Birmingham Waterworks Co* (1856) 156 E.R. 1047.

<sup>9</sup> *Donoghue v Stevenson* [1932] A.C. 562.

<sup>10</sup> *Blyth v Birmingham Waterworks Co* (1856) 156 E.R. 1047.

<sup>11</sup> *Levi v Colgate-Palmolive* (1941) 41 SR (NSW) 48.

<sup>12</sup> *Bourhill v Young* [1942] 2 All E.R. .

“In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation, not to culpability; but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability, not to compensation.”<sup>13</sup>

By way of support for this statement, Lord Russell quoted the judgment of Brett M.R. in *Heaven v Pender (t/a West India Graving Dock Co)*,<sup>14</sup> which was also relied on extensively by Lord Atkin in *Donoghue v Stevenson*:

“... whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.”<sup>15</sup>

Lord Russell’s judgment in *Bourhill v Young* provides a useful illustration of the rather confused way the early courts applied the standard of the reasonable man to negligence claims. He clearly states that the reasonable man standard is the appropriate legal standard: “In my opinion such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach”, having earlier identified the reasonable man as the holder of the requisite reason.<sup>16</sup> However he then goes on to consider the *subjective* foresight of the defendant:

“Can it be said that John Young could reasonably have anticipated that a person, situated as was the pursuer, would be affected by his proceeding towards Colinton at the speed at which he was travelling? I think not. His road was clear of pedestrians; the pursuer was not within his vision, but was standing behind the solid barrier of the tram-car; his speed in no way endangered her. In these circumstances I am unable to see how he could reasonably anticipate that, if he came into collision with a vehicle coming across the tramcar into Glenlockhart Road, the resultant noise would cause physical injury by shock to a person standing behind the tramcar. In my opinion he owed no duty to the pursuer, and was therefore not guilty of any negligence in relation to her.”<sup>17</sup>

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<sup>13</sup> *Bourhill v Young* [1942] 2 All E.R at 401( Note- page, not para, 401).

<sup>14</sup> *Heaven v Pender (t/a West India Graving Dock Co)* (1883) 11 Q.B.D. 503 at 509.

<sup>15</sup> *Heaven v Pender* (1883) 11 Q.B.D. 503 at 509.

<sup>16</sup> *Heaven v Pender* (1883) 11 Q.B.D. 503 at 509.

<sup>17</sup> *Heaven v Pender* (1883) 11 Q.B.D. 503 at 509.

Without consideration of whether the defendant was a reasonable man, and therefore interchangeable with the reasonable man standard, there is a logical disconnect in the reasoning linking the facts to the law in the judgment.

Just who is the reasonable man?

In *Glasgow Corp v Muir*,<sup>18</sup> Lord Macmillan described the reasonable man as being possessed of “ordinary intelligence and experience”, not “by nature unduly timorous” or “nonchalantly disregard(ing) even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence”.<sup>19</sup>

Others have described him less favourably: “This excellent but odious character”<sup>20</sup>; “having the agility of an acrobat and the foresight of a Hebrew prophet”<sup>21</sup>; while still others have sought to rely on his normalcy to give content to the legal standard he represents: “The man on the Clapham omnibus”<sup>22</sup>; “The man on the Bondi Tram”<sup>23</sup>; or “The man who takes the magazines at home, and mows the lawn in his shirt-sleeves”.<sup>24</sup>

Of course the obvious danger with drawing attention to his normality is the very real risk that the standard applied will not be that of the “reasonable” man, but instead the standard of the “normal”, or “ordinary” man. In her book *Rethinking the Reasonable Person*,<sup>25</sup> Mayo Moran argues that this is in fact what has occurred. A similar argument regarding substitution of the “reasonable” man for the “rational” man can also be made: while there is undoubtedly some overlap between the two, they are by no means identical.<sup>26</sup>

A man for all seasons?

At its highest level of generality, torts law deals with breaches of civil obligations by one party entitling another party to sue, which are not reliant on a contractual relationship for legal

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<sup>18</sup> *Glasgow Corp v Muir* [1943] A.C. 448.

<sup>19</sup> *Glasgow Corp v Muir* [1943] A.C. 448.

<sup>20</sup> Alan Herbert, “*Fardell v Potts*” in Alan Herbert, *Uncommon Law* (London: Capuchin Press, 2011), pp.21, 23.

<sup>21</sup> David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), p.1038.

<sup>22</sup> *Hall v Brooklands Auto Racing Club* (1933) 1 K.B. 205 at 224.

<sup>23</sup> *Papatonakis v Australian Telecommunications Commission* (1985) 156 C.L.R. 7.

<sup>24</sup> *Papatonakis v Australian Telecommunications Commission* (1985) 156 C.L.R. 7.

<sup>25</sup> Mayo Moran, *Rethinking the Reasonable Person: An egalitarian reconstruction of the objective standard* (Oxford: Oxford University Press, 2003).

<sup>26</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), pp.48–54.

recognition.<sup>27</sup> But not all wrongs are recognised. In *Fairchild v Glenhaven Funeral Services Ltd*, Lord Bingham of Cornhill stated that “the overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another”.<sup>28</sup> How does the law distinguish between those cases where it is “just” to hold one party liable to compensate the other, and those where it is not? In reaching their decision on this question, courts are influenced by their considerations of social factors—described as “policy considerations”, “common sense”, “ethics” or “values”. All of these implicitly require consideration of whether the “reasonable man”—as a member of the relevant society—would consider it “just” to award compensation under the circumstances.

In *The Common Law*, Wendell Holmes Jr referred to the theoretical desirability of the content of the standard against which the conduct of all persons is measured being fixed—anchored to the reference point of the “reasonable person”:

“It [the law] does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.”<sup>29</sup>

Holding those with “idiosyncrasies”, such as clumsiness or stupidity to this standard can, therefore, be justified on the basis that it provides certainty and uniformity to the standards of conduct expected from the majority of members of society, as well as recognising the general inconvenience these people can cause others. Apparently, the fact that society *says* it is not blaming the clumsy or stupid for being clumsy or stupid is sufficient to counteract the negative

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<sup>27</sup> Joanne Conaghan, “Reasonable Man” in Peter Cane and Joanne Conaghan, *New Oxford Companion to Law* (Oxford: Oxford University Press, 2008), p.1171.

<sup>28</sup> *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2003] 1 A.C. 32. Lord Bingham of Cornhill considered, in some detail, the approach taken to issues of multiple causation in other jurisdictions, including those where the formulaic application of recognised legal tests would have led to unsatisfactory outcomes. In one of the cases he referred to, *March v E&MH Stramare Pty Ltd* (1991) 171 C.L.R. 506 the High Court of Australia rejected the “but for” test (*causa sine qua non*) as the exclusive test of causation, instead recognising the role of “common sense”, “values” and/or “policy”, clearly establishing that legal recognition of a breach is determined by reference to societal standards, rather than purely legal ones.

<sup>29</sup> Oliver Wendell Holmes Jr, *The Common Law* (New York: Kaplan Publishing, 2009), p.122.



implications of being held liable at law to pay damages for the consequences of being clumsy or stupid. But does this theory withstand practical application? Even Justice Holmes, a proponent of the reasonable man standard, acknowledged the capriciousness of the standard when he stated:

“[A]ny legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men. The standard, that is, must be fixed. In practice, no doubt, one man may have to pay and another may escape, according to the different feelings of different juries. But this merely shows that the law does not perfectly accomplish its ends. The theory or intention of the law is not that the feeling of approbation or blame which a particular twelve may entertain should be the criterion. They are supposed to leave their idiosyncrasies on one side, and to represent the feeling of the community. The ideal average prudent man, whose equivalent the jury is taken to be in many cases, and whose culpability or innocence is the supposed test, is a constant, and his conduct under given circumstances is theoretically always the same.”<sup>30</sup>

Nor is this variation likely to be the exclusive domain of juries alone in applying the external standard: judges too are likely to view themselves as ‘average prudent men’, a factor which will influence their application of the standard to any defendant’s conduct. Lord MacMillan, who delivered the other famous majority judgment in *Donoghue v Stevenson*, revealed the dilemmas faced by judges in applying the standard in the later case of *Glasgow Corp v Muir*:

“[T]here is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.”<sup>31</sup>

The historically incapacitated: women, children, and the insane

The reasonable man dates from a time when judges and juries were predominantly, if not exclusively, male landowners, who were generally more prosperous and better educated than others in the community. The defendants whose behaviour they were being asked to judge were a far less homogeneous population. Unlike judges and juries, there were no minimum standards

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<sup>30</sup> Holmes, *The Common Law* (2009), pp.124–125.

<sup>31</sup> *Glasgow Corp v Muir* [1943] A.C. 448.



for defendants, and defendants belonging to categories traditionally identified as lacking capacity at common law—women, children, and the insane—along with adult competent males, were judged against the standard of the reasonable man.

Not surprisingly, this has led to some unjust outcomes, mostly affecting those idiosyncratic “eggs”—defendants who lack the capacity to reach the minimum standard of conduct prescribed by the reasonable person—have been disproportionately disadvantaged by the use of the standard, which has attracted criticism on those grounds.

The reasons underpinning its inappropriateness are twofold. Firstly, the *content* of the standard has been wrongly characterised. Rather than identifying what the “reasonable” man would do or foresee under a given set of circumstances, it has instead focussed on what the “ordinary” man—or the narrower subset of “ordinary”, the “rational” man—would do. Secondly, after identifying the wrong reference as the content of the standard, the legal systems have resolutely refused to recognise the injustices created by the error, and rectify them by broadly allowing modification of the standard to accommodate some of the challenges to capacity.

Feminists have criticised the standard for its failure to appreciate that men and women respond differently to different situations.<sup>32</sup> This criticism, and the broader feminist movement, led to the standard ultimately being re-badged as the “reasonable person”, although it remains unclear whether this was merely a cosmetic change, or more substantive in nature.

Children also appeared to be victims of the reasonable person standard, and in the decision of *McHale v Watson*,<sup>33</sup> the High Court of Australia finally formally recognised that it was unjust to hold a child to the standard of a reasonable person, instead preferring the standard to be adjusted to that of the “reasonable child of the defendant’s age and experience”. Kitto J justified the adjustment by stating:

“The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of

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<sup>32</sup> Joanne Conaghan, “Tort law and the feminist critique of reason” in Anne Bottomley (ed.), *Feminist Perspectives on the foundational subjects of law* (London: Cavendish Publishing, 1996), pp.51–58.

<sup>33</sup> *McHale v Watson* (1966) 115 C.L.R. 199.

humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard.”<sup>34</sup>

Taken out of context, Kitto J’s emphasis on a normal stage of development seems slightly odd. However, in making the point, the High Court was taking pains to ensure it could not be accused of overturning the common law position that mental illness does not provide a defence against torts, a position which was reflected in many of the cases and texts the High Court considered in *McHale v Watson*.

While the standard has been amended to recognise the capacity limitations of child defendants, and the nomenclature has been adjusted to recognise the legal capacity of female defendants, the law has resolutely refused to permit adjustments to the final category of involuntarily incapacitated defendants—the mentally ill.

Insanity defence in tort?<sup>35</sup>

As James Goudkamp, in his 2011 paper “Insanity as a Tort Defence”<sup>36</sup> pointed out, no major common law jurisdiction recognises a defence of insanity in tort, in direct contrast to the common law’s approach to dealing with mentally ill defendants in criminal matters. What is the reason for this different treatment at law? It seems illogical that, in the case of negligent driving, for example, an individual experiencing a psychotic episode can rely on an insanity defence to relieve them from criminal liability, but not an equivalent defence to relieve them from civil liability for damages arising from the same incident. And yet, this position has been maintained at common law for centuries, and all attempts to reform the law in this area have, to date, failed.

The Australian decision in *Carrier v Bonham*<sup>37</sup> is illustrative of the way the reasonable person standard is currently applied to mentally ill defendants.

On January 10, 1996, a 45 year old man walked out into a busy road in Brisbane in front of a bus. The road was in front of the Royal Brisbane Hospital, where the man had earlier in the day been admitted as a psychiatric patient. Mr Bonham was a chronic schizophrenic who was

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<sup>34</sup> *McHale v Watson* (1966) 115 C.L.R. 199 at 213.

<sup>35</sup> “

<sup>36</sup> James Goodkamp, “Insanity as a Tort Defence” (2011) 31(4) O.J.L.S. 727.

<sup>37</sup> *Carrier v Bonham* [2001] QCA 234.

the subject of an ongoing psychiatric treatment order, whose affairs had long been in the hands of the Public Trustee, who had been in and out of various psychiatric hospitals for the previous 20 years, and who had a history of both suicidal ideation and absconding. On this particular night, in keeping with both these behavioural tendencies, he walked out of the psychiatric ward of the Royal Brisbane Hospital, and directly into the path of an oncoming bus in a bid to commit suicide.

He did not succeed in his suicide attempt. Instead, he survived, and was sued in negligence by the driver of the bus, Mr Carrier, who suffered psychological harm as a result of the incident. Ultimately the court found that he was liable, and his sole asset, his home, was seized and sold in satisfaction of the judgment against him.

There is absolutely no definition of “reason”, legal or otherwise, that could be used to demonstrate that Mr Bonham was, at the time in question, capable of reasonable and rational thought, or “reasonable foresight”. Indeed, the cause of his emergency admission into the Royal Brisbane Hospital that day was that he had stopped taking his medication, because “voices” told him that “eating flowers” and “smoking leaves” would cure him of his mental illness. Instead of being cured by heeding those voices, however, Mr Bonham was admitted to hospital feeling suicidal and with disordered thought patterns. Perhaps unsurprisingly, admitting staff did not think he had any specific plans to suicide at the time. Hardly the characteristics of a man capable of foresight and rational thought in the hours after admission.

The judge in the first instance,<sup>38</sup> District Court Justice MacGill, found that Mr Bonham was liable under the principle in *Wilkinson v Downton*<sup>39</sup> (wilful performance of an act calculated to cause harm to another and in consequence causing a mental injury, in the absence of lawful justification), but not in either trespass (assault or battery) or negligence. The State of Queensland, who, as the authority responsible for the Royal Brisbane Hospital had been joined as the second defendant, was also found not to have been negligent. That judgment was appealed.

In reaching its conclusion, the Court of Appeal found that the appropriate standard of care was that of the reasonable person, making no allowances for the psychosis the defendant was experiencing at the time, because

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<sup>38</sup> *Carrier v Bonham & Anor.* [2000] QDC 226.

<sup>39</sup> *Wilkinson v Downton* [1897] 2 Q.B. 57.

“the actions of an adult lacking capacity because of mental illness cannot be similarly judged by any objective standard of an ordinary reasonable person suffering from that mental illness”; and “if the mental illness has deprived the person of capacity then the person has also been deprived of rationality and reasonableness. The standard of care must be the objective standard expected of the ordinary person”.<sup>40</sup>

McPherson JA stated his view in the following terms:

“Unsoundness of mind is not a normal condition in most people, and it is not a stage of development through which all humanity is destined to pass. There is no such thing as a ‘normal’ condition of unsound mind in those who suffer that affliction. It comes in different varieties and different shades or degrees. For that reason it would be impossible to devise a standard by which the tortious liability of such persons could be judged as a class.”<sup>41</sup>

In reaching this position, the Court of Appeal relied heavily on the earlier case of *Adamson v Motor Vehicle Insurance Trust*,<sup>42</sup> the decision of a single justice of the Western Australian Supreme Court, made in 1956. *Adamson*, in turn, relied on the earlier cases of *White v Pile*,<sup>43</sup> and the American case of *William v Hayes*.<sup>44</sup>

In *Adamson*, the plaintiff was crossing the street at an intersection, when he was hit by a stolen car. The driver of the car, Burt, was subsequently charged, and was referred to a mental health treatment facility by the magistrate. There, he claimed that he had stolen the car in a bid to escape from some of his workmates, who were plotting to kill him. He was diagnosed with schizophrenia, and was found to be suffering delusions and hallucinations at the time of the accident. The criminal charges against him were withdrawn, and he disappeared, leaving the plaintiff to recover from the Motor Vehicle Insurance Trust as an insurer of the vehicle, whom Wolff SPJ held liable.

In his judgment, Wolff SPJ acknowledged that the question of liability of an insane person for a negligent act had never been satisfactorily decided. In the absence of specific authority on negligence, he considered authorities discussing the common law’s approach to dealing with actions in trespass against “lunatics and infants”. He rejected the earlier Australian decision of *White v Pile*, which extended the M’Naghten insanity criminal defence<sup>45</sup> to provide a deluded man with a defence to a civil action for trespass.

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<sup>40</sup> *Carrier v Bonham* [2001] QCA 234.

<sup>41</sup> *Carrier v Bonham* [2001] QCA 234 at [35].

<sup>42</sup> *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56.

<sup>43</sup> *White v Pile* (1951) 68 WN(NSW) 176.

<sup>44</sup> *William v Hayes*, 143 N.Y. 442 (1894).

<sup>45</sup> *M’Naghten’s Case* 8 ER 718, [1843] UKHL J16

Instead, he cited the US decision in *William v Hayes*, which established that an insane person is as responsible for his tortious acts as a sane one. *William v Hayes* may have resonated with Wolff SPJ because it allowed him to specifically avoid commenting on the purpose of torts law, a largely academic debate which is brought to a head by the issue of insane defendants.

The debate centres around which of three possible alternatives is the *raison d'être* for the law of torts. Some scholars argue that it is primarily about corrective justice, requiring those whose wrongful acts have harmed the plaintiff to make amends for their wrongdoing. Critics of this view point out that the plaintiff's ability to recover compensation is determined almost entirely by the financial solvency of the defendant, which is hardly a just outcome. Others argue that tortious liability serves as a deterrent, and encourages other contemplating similar acts or omissions to reconsider their options, or face the consequences experienced by those who have gone before. This argument is unpersuasive in the face of negligence claims especially, as it assumes that the potential tortfeasor has time to engage in reasoned reflection before deciding to act—clearly not the case in many motor vehicle accidents, or other cases where a moment's distraction leads to the act complained of. Similarly, the rise of insurance substantially dilutes the deterrent effect of tort law in many instances. Finally, a minority argue that the purpose of torts is punishment of those who are negligent. This argument is also not without flaws. It suggests a redundancy between criminal law and torts law, and raises the spectre of double punishment for the same offence. Alternatively, it supposes some sort of scale against which the culpability of certain conduct will be deemed to be tortious or criminal or both, but the criteria being used to make the assessment are left to the whims of each individual court.

All of these arguments are particularly compromised in the context of mentally ill defendants. While insurance ensures that fewer plaintiffs miss out on compensation as a result of an insolvent defendant, there are many activities where insurance is not available. Even if it was available, statistical data indicates that people with severe mental illness traditionally struggle to obtain insurance, frequently as a result of perceptions, which may or may not be correct, about their employment status,<sup>46</sup> thereby leaving them more vulnerable to crippling levels of debt in the event that a judgment is recorded against them. So a mentally ill defendant is more likely to be uninsured, and less likely to be financially viable, than a defendant without mental

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<sup>46</sup> Beyondblue and the Mental Health Council of Australia, "Mental Health, Discrimination and Insurance: A survey of consumer experiences 2011" (Mental Health Council of Australia, 2011).

illness. Clearly, therefore, the plaintiff compensation rule cannot sustain the courts' failure to recognise a defence of mental illness in torts.

The deterrence theory is similarly flawed. Current social policy focuses on deinstitutionalisation, and has not been accompanied by an expansion in the liability of statutory authorities for the consequences of a mentally ill person becoming unwell while in the community. The state, acting as guardian of people with severe mental illness, is clearly not recognising any deterrent effect, as it bears no liability. An expectation that family and friends have a responsibility to prevent a mentally ill person from causing harm (outlined in *Adamson*) ignores the reality that many people with significant mental illness are homeless, and suffer from fractured familial relationships,<sup>47</sup> as well as denying them any type of autonomy. Mentally ill defendants, who lack the capacity to adhere to the standard of conduct of the reasonable person are, logically, also likely to struggle to foresee the consequences of their conduct in the way a "reasonable" man might, or more relevantly, to consider those consequences and apply them as a factor in their own decision making, as the deterrence theory requires.

The punishment theory is even more problematic. If tort law is punishing wrongful conduct which is either as culpable, or less culpable, than criminal wrongdoing, it is inconsistent to recognise a defence to wrongdoing associated with greater levels of culpability, but not less culpable wrongful acts. It creates the ridiculous situation where a mentally ill defendant who kills a person has a defence to murder, but may still be liable to the victim's estate for damages associated with his death. Richard Wright<sup>48</sup> explains this as reliance on an objective standard based on moral responsibility, rather than moral blameworthiness. Some scholars take this argument even further, saying that to deny the mentally ill responsibility is to deny them autonomy, a fundamental part of their individualism and humanity. Many would view the imposition of damages against a defendant as being punitive in the same way a court imposed fine or confiscation of assets is punitive, and as such would fail to appreciate Wright's distinction; nor can the issue of autonomy be divorced from the underlying issue of capacity, which is a fundamental requirement of autonomy.

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<sup>47</sup> Australian Bureau of Statistics, "4326.0—National Survey of Mental Health and Wellbeing: Summary of Results, 2007"; available at <http://agencysearch.australia.gov.au/s/search.html?collection=agencies&form=simple&profile=abs&query=4326.0> [Accessed July 20, 2013].

<sup>48</sup> Richard Wright, "The Standard of Care in Negligence" in David G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995).

*William* provided Wolff SPJ with an opportunity to avoid endorsing any one of these arguments, by providing its justification in the alternative. Under *William* an insane person is as responsible for his tortious acts as a sane one, because where both parties are “innocent”, the loss should fall on the actor (plaintiff compensation) or because public policy utilises it as an incentive for family members to “keep their lunatics under restraint”, and a disincentive for defendants to feign insanity (deterrence); or because the lunatic must bear losses arising from liability as “he bears other misfortunes” (punishment).

Ultimately, the Queensland Court of Appeal failed to distinguish *Adamson* from *Carrier v Bonham*, even though the availability of insurance (compulsory third party) in *Adamson*, and lack of insurance for the pedestrian Bonham would have entitled them to do so. Similarly, they could have referred to the sweeping changes in social policy regarding mental illness, particularly deinstitutionalisation, as justification for overturning *Adamson*. Instead, John Bonham was ultimately found to be liable for the psychiatric injury sustained by Keith Carrier, the bus driver. The finding that the Queensland Government—as operators of the hospital supposedly treating Mr Bonham at the time—were not negligent in the first instance was not appealed, despite the fact that Mr Bonham walked out of the hospital and into the path of an oncoming bus in a suicide attempt, while he was under a court ordered treatment order. Interestingly, no claim against the bus company or the workers compensation scheme appears to have been lodged either; instead, the entire of the damages, a little over \$113,000, were awarded against Mr Bonham.

Mr Bonham was not insured; he was a pedestrian. His affairs were managed by the Public Trustee, and had been for a long period prior to the case. He owned one asset, a house left to him by a family member. The final entry in the contents list of the file held by the Queensland Supreme Court is a seizure and sale order, in satisfaction of the judgment.<sup>49</sup> An unsatisfactory outcome both from the perspective of the defendant, who lost his home as the result of an act he had no control over due to his mental state, and the public, who were, presumably, left with the cost of maintaining and housing a seriously unwell man for the remainder of his life.

Interestingly, neither Wolff SPJ in *Adamson*, nor the Queensland Court of Appeal in *Carrier v Bonham*, considered whether it was appropriate, or intended, that the common law on trespass

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<sup>49</sup> File 788/98 Queensland Court registry list of contents; available at: <http://apps.courts.qld.gov.au/esearching/Results.aspx?Filenumbr=788%2f98> [Accessed July 20, 2013].



by the insane should be extended to negligence. This paper will consider the latter question now.

Is it what Lord Atkin intended?

Lord Atkin's neighbour principle is as follows:

“You must take reasonable care not to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably have had them in contemplation when I am directing my mind to the acts or omissions which are called in question.”

Notably, the principle is expressed in subjective language, relying extensively on the first person. The statement does not read:

“One must take reasonable care not to injure one's neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by one's act that one ought reasonably to have had them in contemplation when directing one's mind to the acts or omissions which are called in question”.

Instead, it emphasises the role of the individual—clearly indicating a preference by Lord Atkin for a subjective, rather than objective, test. Nor could Lord Atkin's choice of words have been an oversight. As a man who prided himself on his legal drafting, and was highly critical of those whose efforts fell short, the judgment in *Donoghue v Stevenson* was the product of an iterative drafting process, which had been read (and commented on) by several of his peers.<sup>50</sup> It was quite deliberate—rather than seeking to hold defendants to an objective standard of conduct, the wording strongly indicates that Lord Atkin simply intended every person to meet the standard that could reasonably be required of them. It would have been entirely out of character for a man recognised for his pragmatism to expect everybody to achieve an ideal standard of conduct.

Lord Atkin was well acquainted with the concept of the “reasonable man”, having seen it applied liberally throughout his career in practice and on the bench, and, as his subsequent judgment in *Liversidge v Anderson*<sup>51</sup> demonstrates, he gave the concept considerable thought throughout his career. If he intended that the conduct of a defendant should be compared to

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<sup>50</sup> Geoffrey Lewis, *Lord Atkin* (Oxford:Hart Publishing, 1999), p.51.

<sup>51</sup> *Liversidge v Anderson* [1942] A.C. 206.

that of an ideal “reasonable man”, surely he would simply have said so? In which case, the principle would probably have been stated as follows:

“Persons who are so closely and directly affected by my act that a reasonable person ought to have had them in contemplation when directing their mind to the acts or omissions which are called in question”.

But it wasn't. Indeed, Lord Atkin didn't mention a “reasonable person” or “reasonable man” anywhere in his judgment. Instead, it is at least possible that Lord Atkin intended his principle to be applied in the same way as he subsequently applied the principle of “reasonableness” in *Liversidge v Anderson*.

In *Liversidge v Anderson*, the meaning of “reasonable” was pivotal. The regulation under consideration by the House of Lords empowered the Secretary of State to issue a detention order against any person of hostile origin and association the Secretary had reasonable cause to believe needed to be controlled.<sup>52</sup>

It was argued that the regulation gave the Secretary of State an absolute power to decide whether someone should be detained, provided the Secretary acted bona fide, and thought he had reasonable cause for his suspicions. Lord Atkin disagreed with this interpretation, pointing out that as it would be impossible for anyone to disprove whether the Secretary thought his suspicions were reasonable or unreasonable, the interpretation effectively granted the Secretary an unprecedented power which could never be challenged.

Lord Atkin's interpretation of the regulations required the Secretary to have a suspicion which an external observer would view as reasonable. It did not necessarily mean that the external viewer must think the Secretary was reasonable, or indeed, rational—merely that the external observer would agree that the Secretary's suspicions, in the circumstances, were justified, even if they themselves would not have held those views.

This test is far more subtle than the blunter instrument of the “reasonable person”, which simply requires every person to be a clone. Extending the logic of Lord Atkin's view in *Liversidge v Anderson*, it is possible, therefore, that in *Donoghue v Stevenson*, Lord Atkin was simply saying that the actions of the defendant should be reasonable when observed by an external observer.

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<sup>52</sup> The regulation in question was reg. 18B of the Defence (General) Regulations 1939, SI 1939/1681, which stated: "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

The test is not that the external observer would necessarily have acted in the same way, or that the defendant was reasonable (sane), but simply that the acts were reasonable. Therefore, the external observer, viewing the acts of a mentally ill defendant, would be entirely at liberty to consider the actions of a mentally ill defendant, and determine that the acts were reasonable for someone with that illness. This test would not bar courts from lowering the standard of care for a mentally ill defendant, and leading to a more flexible, and just, outcome. Under the *Liversidge* test, for example, it is entirely possible that in the case of Mr Bonham, an external observer would find it reasonable that a man in the defendant's position—mentally disordered and trying to kill himself—should throw himself into the path of a heavy vehicle on a busy road without considering the consequences to the driver.

But there are also other aspects to Lord Atkin's judgment in *Donoghue v Stevenson* and his life that suggest he may not have intended or foreseen outcomes like *Carrier v Bonham*. Elsewhere in his statement, he refers to negligence as a "species of culpa"—"a general public sentiment of moral wrongdoing for which the offender must pay".<sup>53</sup> Clearly, therefore, he favoured the view that torts serve some punitive purpose. However he was also the man who chaired the Committee on Insanity and Crime which reported in 1923,<sup>54</sup> a committee which was tasked with determining what changes needed to be made to the law regarding insanity please in criminal matters. That committee's findings, which were never adopted, found that the M'Naghten defence<sup>55</sup> was sound, and maintained that insane persons should not be given verdicts such as "guilty but insane", because guilt conveyed criminality which was absent in insanity.<sup>56</sup> Indeed, in the report Lord Atkin quotes from many of the sources subsequently quoted by Wolff SPJ in *Adamson*, although to substantiate a different argument.

Lord Atkin had strong background as a judge of the criminal courts—and several sentences he issued were overturned on appeal for "harshness"<sup>57</sup>—yet there is no evidence to suggest that he thought the "punitive" nature of criminal law was sufficient to override considerations about mental illness providing a defence to crimes. It seems unlikely, therefore, that he would have thought common law principles about trespass, with a different focus on mindset and intention,

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<sup>53</sup> *Donoghue v Stevenson* [1932] A.C. 562.

<sup>54</sup> Committee on Insanity and Crime, *Report of the Committee on Insanity and Crime* (HMSO, 1924), Cmd.2005.

<sup>55</sup> M'Naghten's Case 8 ER 718, [1843] UKHL J16.

<sup>56</sup> Committee on Insanity and Crime, *Report of the Committee on Insanity and Crime*, (HMSO, 1924), Cmd.2005 pp.11–12.

<sup>57</sup> Committee on Insanity and Crime, *Report of the Committee on Insanity and Crime*, (HMSO, 1924), Cmd.2005 pp.158–159.

and a lower level of culpability than criminal law, provided a better basis for the development of negligence law than a long-recognised defence relieving defendants of more severe forms of liability.

*Carrier v Bonham* is a good example of why unquestioning adherence to the law of precedent, without pause to consider the context of decisions, can lead legal development down the wrong path. *Adamson* was, in itself, a flawed decision; its reasoning was outdated by the time of *Carrier v Bonham*, as social policy on mental illness had changed significantly in the preceding 50 years; modifications to the standard for children had occurred long before *Carrier* was heard, debunking the myth that the standard was fixed; and none of the precedent cases dealing with mentally ill defendants, or negligence claims more generally, appear to have actually considered Lord Atkin's words in *Donoghue v Stevenson*.

Windeyer J famously once described law as "marching with medicine, but in the rear and limping a little".<sup>58</sup> That statement was made in the context of mental harm in plaintiffs, but is equally applicable to mentally ill defendants. Cases of this type are rare. In many instances, it simply will not be worth the financial costs of pursuing the defendant for compensation. Nonetheless, their relative infrequency is not justification for failing to reform this area of the law. The use of the reasonable person test in negligence exposes its shortcomings in sharp relief, more so than other areas where it is applied, such as criminal or administrative law, simply because in those areas there are other social and legal barriers designed to protect mentally ill people from finding themselves in situations where they may have to rely on it. Either legal mechanisms exist to relieve them from the burden of obligations they may not have capacity to fulfil to the standard of the reasonable person, such as guardianship orders; or they may not be engaged in areas of commercial activity where it is relevant while they are unwell, by virtue of the fact that they are unwell; or they only need to rely on it as a response to an act precedent, as in the criminal defences. No such mechanism to protect mentally ill defendants from the liability arising from actions they have no control over exists in negligence.

Australian governments, like others the world over, have embraced deinstitutionalisation and the cost benefits it brings. However when implemented in an inconsistent fashion, without providing the mentally ill with adequate access to care and support, and the assistance they need to be safe from committing negligent acts of the type seen in *Carrier v Bonham*, deinstitutionalisation can simply make an already vulnerable group even more vulnerable, and

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<sup>58</sup> *Mt Isa Mines v Pusey* (1970) 125 C.L.R. 383 at 393.

states remain reluctant to assume liability for the consequences of this policy on those vulnerable people. While the immunity granted to health authorities is doubtless founded in sound principles of public policy, it is unjust to hold the victims of the authorities' inadequate care provisions personally liable for the inevitable consequences of the failures of the system. A better response would be to consider extending existing no-fault statutory insurance schemes to provide compensation for people injured by mentally ill defendants under these circumstances.

The opportunity for the courts to right this wrong may be a long time coming, given the rarity of these types of cases. However, Australia is currently implementing a national disability insurance scheme, which may be a first tentative sign that broadening existing no fault insurance compensation arrangements to cover injuries caused by mentally ill defendants may be achievable. Mentally ill defendants cannot, in good faith, be held to be at fault for the negligent acts they commit when they fail to achieve a standard of care they never had the capacity to achieve.