THE TORT LIABILITY OF INSANE PERSONS FOR NEGLIGENCE: A CRITIQUE

I. INTRODUCTION

Although the plea of insanity has long been a defense to criminal prosecution in common law countries, whether it is a defense in civil actions is still an open question.[1] The first common law discussion of insanity in the context of a civil action occurs in the ancient case of *Weaver v. Ward*.[2] In that case the learned court commented:

> [I]f two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatic 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 no man shall be excused of trespass . . . except it be judged utterly without his fault. As if a man by force take my hand and strike you . . . .[3]

The *ratio decidendi* of *Weaver* relied on strict liability,[4] but the dictum in the case concerning lunatics has persisted despite the disappearance of the older concept of strict liability from modern negligence law. This comment will discuss the defense of insanity to a charge of negligence in tort law.[5] Although the emphasis will be on tort law in the United States, cases from other common law jurisdictions occasionally will be discussed.

---

1. F. HARPER & F. JAMES, 2 THE LAW OF TORTS § 16.8, at 928 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 135, at 1002 (4th ed. 1971) [hereinafter cited as PROSSER]. *See also* DeMartini v. Alexander Sanitarium Inc. 192 Cal. App. 2d 442 (1961); Johnson v. Texas & P. Ry., 16 La. App. 464, 135 So. 114 (1931) (Civil law recognizes insanity as a defense in tort actions.).

2. 80 Eng. Rep. 284 (C.P. 1616). An earlier case, *Cross v. Andrews*, 78 Eng. Rep. 83 (C.P. 1598), dealt with an insane innkeeper, but this case is grounded more on the strict liability of an innkeeper to keep safely the goods of his guest. Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333 (1921).

3. 80 Eng. Rep. 284 (C.P. 1616).

4. Tortfeasors were generally held strictly liable for their actions in ancient times. PROSSER § 4, at 17; HARPER & JAMES § 12.2. *But see* R. KEETON, VENTURING TO DO JUSTICE 149 (1969).

5. For discussion of the defense of insanity in the context of other torts, see PROSSER § 135; Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960); Wilkinson, *Mental Incompetency as a Defense to Tort Liability*, 17 ROCKY MT. L. REV. 38 (1944).

II. BACKGROUND

Before discussing the defense of insanity, the more fundamental concepts of negligence and contributory negligence must be considered. The following brief discussion is by no means complete but deals almost solely with those facets of negligence and contributory negligence that are particularly applicable to the overall theme of insanity defenses.

A. Negligence

Although the separate tort of negligence appears to be a comparatively recent innovation in the common law,[6] it is today the most frequent source of tort litigation. The concept of negligence is based primarily on the idea that one should be legally liable for unintended harms when he is in some way at fault.[7] The word "fault" is not necessarily meant to imply an individual subjective deficiency. In fact, the modern trend is to define fault in terms of public and social interest.[8]

The American Law Institute (ALI) indicates the basic elements of a cause of action for negligence as follows:

> The actor is liable for an invasion of an interest of another, if:
>
> (a) the interest invaded is protected against unintentional invasion, and
>
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
>
> (c) the actor's conduct is a legal cause of the invasion, and
>
> (d) the other has not so conducted himself as to dissolve himself from bringing an action for such invasion.[9]

Of these four elements the second is of primary importance for the purposes of this comment. Although this section of the *Restatement (Second) of Torts* refers simply to conduct which is negligent, the word "negligent" does not lend itself to a simple precise definition. A survey of the law clearly indicates that negligence is not to be

---

6. PROSSER § 28, at 139; HARPER & JAMES § 12.3.

7. *See generally* HARPER & JAMES §§ 12.1 to .4; *see also* PROSSER § 4.

8. PROSSER § 4, at 18. The modern trend towards strict liability without any fault whatsoever is an extreme example of this.

9. RESTATEMENT (SECOND) OF TORTS § 281 (1964) [hereinafter cited as RESTATEMENT 2d].

equated with carelessness.[10]

The ALI defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[11] This definition is necessarily couched in vague terms to encompass the myriad situations resulting from the infinite interactions of human beings.

Obviously the definition cannot be allowed to become too amorphous lest it become a matter of whimsy or caprice. In order to develop a uniform standard of behavior for people, the common law utilizes the concept of the "reasonable man."[12] This "reasonable man" is a concept—he has never existed in reality and never will. The primary purpose of this imaginary figure is to provide the law with an objective standard of conduct rather than a subjective one.[13] Although the "reasonable man" has been described as one who is always cool, prudent, and careful,[14] he is none the less capable of those errors that prudence could not forestall.

In determining whether a defendant acted negligently, a trier of fact will compare the defendant's actions on the particular occasion at issue with what the actions of the theoretical "reasonable man"

---

10. Dean Prosser warns that "[t]he almost universal use of the phrase 'due care' to describe conduct which is not negligent, should not be permitted to obscure the fact that the real basis of negligence is not carelessness, but behavior which should be recognized as involving unreasonable danger to others." PROSSER § 31, at 145.

11. RESTATEMENT 2d § 282. The *Restatement* definition of negligence also states that negligence "does not include conduct recklessly disregardful of an interest of others," but this further proviso is not material to the defense of insanity. *Id.*

12. The earliest judicial discussion of this concept refers to a "prudent man." Vaughn v. Menlove, 132 Eng. Rep. 490, 493 (C.P. 1738). *See* PROSSER § 32 for a good discussion of the "reasonable man" concept. *See also* RESTATEMENT 2d §§ 283, 283A, 283B, 283C.

13. RESTATEMENT 2d § 283, comment *c*.

14. *See* A. HERBERT, MISLEADING CASES IN THE COMMON LAW 12-16 (1930), quoted by Dean Prosser as follows: "He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen . . . . He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock; . . . who never mounts a moving omnibus and does not alight from any car while the train is in motion . . . and will inform himself of the history and habits of a dog before administering a caress; . . . who never drives his ball until those in front of him have definitely vacated the putting green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbors, his servant, his ox, or his ass; . . . who never swears, gambles or loses his temper; who uses nothing except in moderation and even while he flogs his child is meditating only on the golden mean. . . . In all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman." PROSSER § 32 n.21.

would have been. If the defendant's actions conform to the "reasonable man" standard, then he is not negligent, but if they fail to measure up to that standard, he is negligent. The ALI[15] and the United States law in general[16] indicate, however, two provisos to the "reasonable man" rule—one where the defendant is a child, the other where he suffers from a physical disability.

If the defendant is a child, he will be held to the standard of conduct of a "reasonable person of like age, intelligence, and experience under like circumstances."[17] This exception for children arises out of the "public interest in their welfare and protection."[18] It also has a pragmatic basis since it is unreasonable to expect a child to conform to the standard of conduct of an adult.[19] Children simply do not have the requisite experience to warrant such a high standard. In addition, the large number of children in the population makes it easier to know what is expected of them.[20] Thus, the fact that a child is mentally retarded or exceptionally bright will cause the standard to which he must conform to be either raised or lowered.[21]

If a defendant suffers from a physical disability, he will be held to the standard of a "reasonable man under like disability."[22] The rationale of this exception is that such physical disabilities are to be considered as one of the determinative circumstances that existed at the time of the alleged negligent act. Of course, the physically disabled defendant is required to take his infirmities into account in guiding his actions.[23]

No exception comparable to that made for the physically handicapped is made for mentally deficient defendants.[24] This is largely due

---

15. RESTATEMENT 2d §§ 283A, 283C.
16. PROSSER § 32.
17. RESTATEMENT 2d § 283A.
18. *Id.* at comment *b*.
19. *Id.*
20. *Id.*
21. *Id.*
22. RESTATEMENT 2d § 283C.
23. "A, a blind man, is walking down a sidewalk in which he knows that there is a dangerous depression. Without asking for assistance from anyone, A attempts to walk through the depression. A may be found to be negligent, although a normal person would not be negligent in doing so." RESTATEMENT 2d § 283C, illustration 2. But if he did not know of the depression he would not be negligent. *Id.*, illustration 1.
24. RESTATEMENT 2d § 283B; PROSSER § 32. *See also* O. HOLMES, THE COMMON LAW (1881). "The law takes no account of the infinity of temperament, intellect, and education which makes the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason." *Id.* 108.

to the fact that it would be impractical to take into account the infinite variations of intellectual capacity to be found among human beings.

B. Contributory Negligence

Like negligence, contributory negligence is a comparatively recent tort concept.[25] The effect of contributory negligence is to bar recovery by the plaintiff despite the defendant's negligence. The ALI defines contributory negligence as:

> conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.[26]

Contributory negligence differs from negligence in that it is used to describe the plaintiff's actions as opposed to the defendant's. In addition, the plaintiff is concerned with his own protection in contributory negligence while the negligent defendant is remiss in his duties toward a person other than himself. Thus, "the standard of conduct to which he [the plaintiff] must conform for his own protection is that of a reasonable man under like circumstances."[27] With the exception of some unusual factual situations,[28] conduct that would be negligent will also generally be contributorily negligent.[29] Of course, the theory of contributory negligence also recognizes exceptions for children[30]

---

25. PROSSER § 65.

26. RESTATEMENT 2d § 463.

27. *Id.* § 464. Professors Harper and James recommend a subjective standard for contributory negligence. HARPER & JAMES § 22.10.

28. For example, "A is driving an automobile in which B, a guest, is riding. There is no automobile guest statute in the State. A momentarily allows his attention to be diverted from the road by a call from a friend on the sidewalk. A car negligently driven by C darts out suddenly from a driveway, and because of his distraction A is unable to avoid a collision with it. In the collision A and B are injured. In actions brought by B against A, and by A against C, which are tried together, a jury may find A's diverted attention was negligence making him liable to B, but was not contributory negligence barring his own recovery against C." RESTATEMENT 2d § 464, illustration 2.

29. "In the great majority of cases it is probably true that the same conduct will constitute both negligence and contributory negligence, but it does not necessarily follow in all cases." *Id.* § 464, comment *f*.

30. "The standard of conduct to which a child must conform for his own protection is that of a reasonable person of like age, intelligence, and experience under like circumstances." *Id.* § 464(2). *See also Id.* comment *e*.

and persons suffering from a physical disability,[31] as in the case of negligence.

Contributory negligence is viewed by many as an unnecessarily harsh concept, because the doctrine completely bars a plaintiff's recovery.[32] For this reason, many courts avoid the draconic effect of this doctrine by either letting the issue go to the jury where possible[33] or by the application of other tort concepts such as the last clear chance doctrine[34] or remote contributory negligence.[35]

III. THE DEFENSE OF INSANITY

A. Negligence

1. American Law Institute Position

In 1934, when the first *Restatement of Torts* was published, the ALI specifically excluded insane persons from the requirement of conforming to the "reasonable man" standard to avoid being negligent.[36] At the same time, however, the ALI added:

> The Institution 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.[37]

This somewhat equivocal position was explained by the dearth of cases dealing with the subject.[38] There was, however, authoritative scholarly work on the subject that recommended that insane persons not be held to the "reasonable man" standard,[39] and these scholars

---

31. PROSSER § 32, at 151. Although physical disability is not specifically mentioned in any section of the *Restatement* that deals with contributory negligence, the rationale behind this exception to the rules governing negligence is just as applicable to contributory negligence. This is the intent of the drafters of the *Restatement*. RESTATEMENT 2d § 464, comment *c*.

32. PROSSER § 65, at 418; HARPER & JAMES § 22.3, at 1207. Many legislatures have enacted comparative negligence statutes to offset the harshness of this rule. PROSSER § 67.

33. PROSSER § 65, at 420.

34. *Id.* § 66.

35. *See* McSween, *Remote Contributory Negligence: A Tennessee Concept*, 22 TENN. L. REV. 1030 (1953).

36. "Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." RESTATEMENT OF TORTS § 283 (1934).

37. *Id.* caveat, at 744.

38. RESTATEMENT OF THE LAW 654 (Supp. 1948).

39. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333 (1921); Hornblower,

undoubtedly influenced the ALI to take its original stance.

In 1948, however, the ALI reversed its original stance and deleted the words from the *Restatement of Torts* that specifically excluded insane persons from the "reasonable man" standard.[40] Finally, in 1965, the *Restatement (Second) of Torts* was published with a section that specifically dealt with insane persons. Section 283B reads as follows:

> Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.[41]

The ALI advanced four different policy factors for this new section: (1) the difficulty of delineating exactly what forms of insanity may be taken into account in determining negligence;[42] (2) "[t]he unsatisfactory character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned, the difficulties which the triers of fact must encounter in determining its existence, nature, degree, and effect; and some fear of introducing into the law of torts the confusion which has surrounded such a defense in the criminal law;"[43] (3) mental defectives should pay for the damage they cause rather than allowing this loss to fall on their innocent

---

Insanity and the Law of Negligence, 5 COLUM. L. REV. 278 (1905).

40. RESTATEMENT OF THE LAW 654-58 (Supp. 1948).

41. RESTATEMENT 2d § 283B.

42. The exact wording of the *Restatement* is: "The difficulty of drawing any satisfactory line between mental deficiency and those variations of temperament, intellect, and emotional balance which cannot, as a practical matter, be taken into account in imposing liability for damage done." *Id.* § 283B, comment *b*(1).

43. To this, the *Restatement* adds the idea that "[a]lthough this factor may be of decreasing importance with the continued development of medical and psychiatric science, it remains at the present time a major obstacle to any allowance for mental deficiency." *Id.* comment *b*(2). The fear of simulated insanity also appears in the case law. McIntyre v. Sholty, 121 Ill. 660, 13 N.E. 239 (1887); Seals v. Snow, 123 Kan. 88, 254 P. 348 (1927); Young v. Young, 141 Ky. 76, 132 S.W. 155 (1910); McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937); Williams v. Hays, 143 N.Y. 442, 38 N.E. 449 (1894); Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935); *In re* Meyer's Guardianship, 218 Wis. 381, 261 N.W. 211 (1935). *Cf.* Alexander & Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME LAW. 24 (1967). "This raises the specter of an avaricious family rushing to court to prove one of its members mentally ill in order to preserve the family fortune." *Id.* at 38. Dean Prosser says that there is "an unexpressed fear of introducing into the law of torts the confusion and unsatisfactory tests attending proof of insanity in criminal cases." PROSSER § 135, at 1001. This fear was expressed in McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937).

victims;[44] and (4) liability will stimulate the guardians of insane persons to "keep them in order."[45] Of these four reasons, the ALI is apparently most impressed with the third as is indicated in a later section of the *Restatement* dealing with contributory negligence,[46] where the ALI allows for the consideration of insanity. In a comment it is there noted that "[i]t is possible that the policy factors stated in Comment *b* under section 283B, and particularly the idea that the estate of the insane person should be taken to make good the harm to others which he has done, may not have the same force as applied to contributory negligence."[47]

The major factor that influenced the ALI to adopt the position of holding the insane person to the "reasonable man" standard in determining liability was an apparent trend in case law. Since insane persons are almost universally held liable for their intentional torts, it was thought that the same rule would apply to negligence.[48] Thus,

---

44. The exact wording of the *Restatement* is: "The feeling that if mental defectives are to live in the world they should pay for the damage they do, and that it is better that their wealth, if any, should be used to compensate innocent victims than that it should remain in their hands." RESTATEMENT 2d § 283B, comment *b*(3). This reasoning also appears in the case law. McIntyre v. Sholty, 121 Ill. 660, 13 N.E. 239 (1887); Seals v. Snow, 123 Kan. 88, 254 P. 348 (1927); Young v. Young, 141 Ky. 76, 132 S.W. 155 (1910); McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937); Filip v. Gagne, 104 N.H. 14, 177 A.2d 509 (1962) (citing the *Restatement*); Williams v. Hays, 143 N.Y. 442, 38 N.E. 499 (1894); Van Vooren v. Cook, 273 App. Div. 88, 75 N.Y.S.2d 262 (1947); Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573 (1848); Ward v. Conatser, 63 Tenn. 64 (1874); Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935); Karow v. Continental Ins. Co., 57 Wis. 56, 15 N.W. 27 (1883); *In re* Meyer's Guardianship, 218 Wis. 381, 261 N.W. 211 (1935).

45. The exact wording of the *Restatement* is: "The belief that their liability will mean that those who have charge of them or their estates will be stimulated to look after them, keep them in order, and see that they do not do harm." RESTATEMENT 2d § 283B, comment *b*(4). This also appears in the case law. McIntyre v. Sholty, 121 Ill. 660, 13 N.E. 239 (1887); Seals v. Snow, 123 Kan. 88, 254 P. 348 (1927); Young v. Young, 141 Ky. 76, 132 S.W. 155 (1910); McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937); Williams v. Hays, 143 N.Y. 442, 38 N.E. 449 (1894); Van Vooren v. Cook, 273 App. Div. 88, 75 N.Y.S.2d 362 (1947); Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935); *In re* Meyer's Guardianship, 218 Wis. 381, 261 N.W. 211 (1935).

46. RESTATEMENT 2d § 464.

47. *Id.* comment *g*.

48. *Id.* § 283B, comment *c*. The Reporter's notes indicate that "[t]his section has been added to the first *Restatement*, which contained in § 283 an exception as to insane persons. . . . In the 1948 Supplement this exception . . . [was] striken out. This Section is now added to complete the change. The 1948 Supplement contained a lengthy note by the Reporter, discussing and explaining the change." RESTATEMENT (SECOND) OF TORTS § 283B (App. 1965). The note in the 1948 Supplement was based on the idea that since courts had made insane persons liable for their intentional torts, they would also hold them liable for their negligent torts. RESTATEMENT OF THE LAW 654-58 (Supp. 1948). *Cf.* McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937).

section 283B is basically a derivation by analogy of the existing case law dealing with intentional torts.[49] This does not mean, however, that a person's insanity is completely ignored by the ALI in determining his liability. Presumably punitive damages cannot be recovered against an insane person because the "purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage such person and others from similar conduct in the future."[50] Since an insane person is not culpable and by definition is incapable of being discouraged, punitive damages would be inappropriate. The case law is in accord with this position.[51]

2. Criticism of Section 283B.

In addition to the four policy factors previously mentioned, the ALI bases section 283B on a series of cases involving intentional torts. It is doubtful, however, whether these five reasons are sufficient to support section 283B in its entirety. They will be considered separately.

a. Delineating the Cutoff Point. The first explanation of the rule given by the ALI is "[t]he difficulty of drawing any satisfactory line between mental deficiency and those variations of temperament, intellect, and emotional balance which cannot, as a practical matter, be taken into account in imposing liability for damage done."[52] It is true that the word insanity does encompass many meanings,[53] and consequently defining insanity in the context of tort law has been

49. There are of course a few negligence cases holding the insane defendant to the "reasonable man" standard. *See* Jordan v. Lambotte, 147 Colo. 203, 363 P.2d 165 (1961); Williams v. Hays, 143 N.Y. 442, 38 N.E. 449 (1894); Sforza v. Green Bus Lines, Inc., 150 Misc. 180, 268 N.Y.S. 446 (N.Y. Mun. Ct. 1934); Ellis v. Fixico, 174 Okla. 116, 50 P.2d 162 (1935) (statute); Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935) (statute).

50. RESTATEMENT OF TORTS § 908, comment *a* (1934).

51. Parke v. Dennard, 218 Ala. 209, 118 So. 396 (1928); McIntyre v. Sholty, 121 Ill. 660, 13 N.E. 239 (1887); Phillips' Comm. v. Ward's Adm'n, 241 Ky. 25, 43 S.W.2d 331 (1931); Feld v. Borodofski, 87 Miss. 727, 40 So. 816 (1906); Jewell v. Colby, 66 N.H. 399, 24 A. 902 (1890); Krom v. Schoonmaker, 3 Barb. (N.Y.) 647 (N.Y. Sup. Ct. 1848); Moore v. Horne, 153 N.C. 413, 69 S.E. 409 (1910); Bryant v. Carrier, 214 N.C. 191, 198 S.E. 619 (1938); Ward v. Conatser, 63 Tenn. 64 (1874); *In re* Meyer's Guardianship, 218 Wis. 381, 261 N.W. 211 (1935).

52. RESTATEMENT 2d § 283B, comment *b*(1).

53. For an excellent discussion of the various types of insanity in the context of tort actions, *see* Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960). *See also* Alexander and Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME LAW. 24 (1967).

avoided by most courts.[54] It would seem, however, that while some types of insanity are not sufficient to relieve an actor from the rigors of the "reasonable man" standard, other more serious types of insanity should affect the question of liability.[55] The effect of completely excluding the defense of insanity is to deny some deserving persons a defense in order to insure that undeserving persons will not be able to utilize that defense—a result that is unjust and avoidable.

One possible answer to this problem would be to set up criteria that would relieve insane persons of the "reasonable man" burden when they are totally disoriented.[56] Certainly this is the type of defendant who should not be held to the "reasonable man" standard, and, furthermore, it has the advantage of being similar to the *M'Naghten* test in criminal law, thus making available a good deal of guidance for the application of this criterion.[57]

b. Evidentiary Problems. The second explanation of the rule given by the ALI is:

> The unsatisfactory character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned, the difficulties which the triers of fact must encounter in determining its existence, nature, degree, and effect; and some fear of introducing into the law of torts the confusion which has surrounded such a defense in the criminal law. Although this factor may be of decreasing importance with the continued development of medical and psychiatric science, it remains at the present time a major obstacle to any allowance for mental deficiency.[58]

---

54. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960).

55. "There is no doubt that in many cases a man may be insane and yet perfectly capable of taking the precautions and of being influenced by the motives which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse." O. HOLMES, THE COMMON LAW 109 (1881).

56. Slattery v. Haley, [1923] 3 D.L.R. 156 (1922); Buckley & The Toronto Transp. Comm'n v. South Transp. Ltd., [1946] 4 D.L.R. 726. *Cf.* Breunig v. American Family Ins. Co., 45 Wis. 2d 536, 173 N.W.2d 619 (1970).

57. "Under M'Naghten, an accused is not criminally responsible if, at the time of committing the act, he was laboring under such a defect of reasoning from disease of mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 37, at 274 (1972). The second arm of the test concerning whether the defendant knew he was doing what was wrong would not be utilized as it has no applicability in the context of negligence.

58. RESTATEMENT 2d § 283B, comment b(2).

As evidenced by the last sentence, this approach is based on the supposed inadequacies of modern science to properly diagnose insanity. The logic of this argument is, however, not satisfactory in the face of a disorientation rule. The distrust of medical and psychiatric science is based more on the trend to broaden the medical definition of insanity than on the ability of science to diagnose severe cases of disorientation. Here again the ALI is denying some deserving persons a defense in order to make certain that undeserving persons will not be able to utilize that defense. If the evidence is unsatisfactory in a particular case then there is no special problem—the defendant has failed to establish his insanity, as he may fail to establish any other defense.

The fear that insanity may be feigned is equally specious. It is impossible to ascertain to what extent this sham would actually be successfully attempted, and, in any event, it is not proper to penalize a large number of insane persons in hopes of preventing a handful of cheats from taking advantage of the system. Furthermore, those concerned with the possibility of feigned insanity entirely overlook the enormous stigma of insanity.[59] In our conformist, middle class society, to be branded a lunatic is one of the most dreaded occurrences. This fear should counterbalance to a great extent any tendencies to simulate insanity.[60]

c. Protection of Innocent Victims. The third explanation of the rule given by the ALI is "[t]he feeling that if mental defectives are to live in the world they should pay for the damage they do, and that it is better that their wealth, if any, should be used to compensate innocent victims than that it should remain in their hands."[61] This is the reason most frequently cited by courts for the application of the "reasonable man" standard to insane persons,[62] and it is probably the strongest rationale for this approach.[63] This, however, is nothing more than a modernized version of the dicta in the ancient case of *Weaver v. Ward*,[64] but the law has progressed from the seventeenth

59. Alexander & Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME LAW. 24 (1967).

60. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 65 (1960).

61. RESTATEMENT 2d § 283B, comment *b*(3).

62. *See* cases cited in note 44 *supra*.

63. *But see* Ague, *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211 (1956) (This reason has the "least merit.").

64. *See* text accompanying note 3 *supra*.

century idea of strict liability in torts. If the law is primarily interested in compensating innocent victims, then the concept of negligence should be eliminated and all torts should be placed on a strict liability basis. Furthermore, the argument overlooks the often present need to preserve assets of an insane person for expensive psychiatric treatment and care.

Insane persons, by definition, are incapable of conforming to the "reasonable man" standard. Thus, holding them to this standard comes very close to making them strictly liable for their actions since they have no way of preventing liability.[65] Certainly the policy of compensating innocent persons should be counterbalanced by the policy that the law should not require the impossible from human beings.

Of course, the concept of strict liability is presently undergoing a renaissance, but this rebirth is grounded on sound policy rather than medieval tort concepts.[66] This new strict liability concept is based on allocating losses to those who can best bear them.[67] Thus, if one engages in a dangerous enterprise he can expect, as a business expense, to be held strictly liable for damage which he may cause.[68] Similarly, the manufacturers of a product can better distribute losses than a consumer.[69] In applying this new idea, "[t]he courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is seeking a benefit or a profit of his own from such activities and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim."[70]

The modern view of strict liability does not support the position of the ALI for two reasons. An insane man has not voluntarily created his insanity; therefore he should not be required to conform to the "reasonable man" standard. Nor is there a better allocation of costs, for insane persons are not likely to be wealthier than the persons they injure; moreover, they have no way of distributing their

65. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960).

66. PROSSER § 75; HARPER & JAMES § 14.3.

67. PROSSER § 75; HARPER & JAMES § 14.3.

68. The leading case is Fletcher v. Rylands, 159 Eng. Rep. 737 (Ex. 1865), *rev'g*, L.R. 1 Ex. 265 (1886), *aff'd*, L.R. 3 H.L. 330 (1868). *See* HARPER & JAMES § 14.2.

69. *See* Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957).

70. PROSSER § 75, at 495.

loss evenly on the public. In fact, they may have a greater need due to the expenses of psychiatric care and treatment.

d. Insuring Proper Guardianship. The fourth explanation of the rule given by the ALI is "[t]he belief that their [insane persons] liability will mean that those who have charge of them or their estates will be stimulated to look after them, keep them in order, and see that they do not do harm."[71] This approach is nothing more than a legal fiction. Guardians of insane persons and those interested in their estates are for the most part laymen. In all probability these people believe that insanity is a defense to a negligence action since it is a defense to a charge of criminal conduct.[72] Even if guardians are aware of the law, it is hard to believe that the prospect of possible tort liability to the estate of an insane person at some time in the future is going to encourage them to keep their insane person "in order" any more carefully than they would under their ordinary duties.

e. Cases Involving Intentional Torts. The fifth reason advanced by the ALI to explain the adoption of section 283B is that "[i]nsane persons are commonly held liable for their intentional torts."[73] This is not a justification of section 283B; it is simply a recognition by the ALI of the settled rule in cases involving intentional torts. All of these cases, however, are based on the previous four questionable policy factors, and the criticisms of these policy factors are equally valid in the context of either intentional or negligent torts.

At least one commentator has disagreed with the ALI's decision to extend the rule for intentional torts to negligent torts.[74] His reasoning is that in cases involving intentional torts "a court can examine the rudiments of his [the insane defendant's] conduct, uncontrolled though it may be, [whereas] to impose liability for negligence . . . the court must blindly apply the objective reasonable man standard."[75]

---

71. RESTATEMENT 2d § 283B, comment *b*(4).

72. *Cf.* "If you were to ask the average attorney, candidly, whether or not an insane person is liable for his torts, he would probably answer that he is not." Ague, *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211 (1956).

73. RESTATEMENT 2d § 283B, comment *c*.

74. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960).

75. *Id.* at 65.

3. Review of the Case Law

The first important American case dealing with the negligence of an insane person is *Williams v. Hays*.[76] That case involved the captain of a brig who became insane after remaining on constant duty for more than two days during a serious storm. As a result of the captain's subsequent actions the vessel was destroyed. The plaintiff, an assignee of an insurance company, brought a suit for negligence.

At the trial, the captain successfully pleaded insanity as a defense, but on appeal it was held that lunatics must conform to the "reasonable man" standard.[77] The court, however, made an exception to this rule:

> 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.[78]

The *Williams* court was faced with a difficult decision because "[u]ndoubtedly 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."[79] At the same time there was precedent for holding insane persons liable for their intentional torts. The court's decision was to equivocate. While paying lip service to the precedent, an exception was carved out that freed the defendant from the harsh "reasonable man" standard.[80]

The exception in *Williams* does not make much sense if insane persons are going to be held to the "reasonable man" standard. The court said that the defendant was not responsible for the storm that

---

76. 143 N.Y. 442, 38 N.E. 449 (1894). For an in depth discussion of the bizarre facts in this case see Hornblower, *Insanity and the Law of Negligence*, 5 COLUM L. REV. 278 (1905).

77. The court was extremely strict—holding that the standard to be followed "is not such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impotent could give . . . [t]he standard man is no individual man, but an abstract or ideal man of ordinary mental and *physical* capacity and ordinary prudence." 143 N.Y. at 454, 38 N.E. at 453 (emphasis added).

78. *Id.* at 451-52, 38 N.E. at 452.

79. *Id.* at 447, 38 N.E. at 450.

80. Subsequently the case was again tried, again appealed, and again remanded. 157 N.Y. 541, 52 N.E. 589 (1898). After this, the action was dropped by the plaintiff. Hornblower, *Insanity and The Law of Negligence*, 5 COLUM. L. REV. 278, 298 (1905).

caused his insanity, but insane persons are generally not responsible for the environmental factors that induce their sickness. Thus, it is difficult to see a rationale for this exception other than the idea that insane persons are not responsible for their illness and therefore should not be penalized for it.

Most negligence cases involving insane defendants arise from automobile accidents. In *Sforza v. Green Bus Lines, Inc.*,[81] a bus driver suddenly became insane and lost control of his bus, striking a parked ice truck upon which the plaintiff was chopping ice. The Municipal Court, citing *Williams*, held that the bus company could not utilize the driver's insanity as a defense.

In *Johnson v. Lambotte*,[82] the defendant was undergoing treatment in a hospital for a "chronic schizophrenic state of paranoid type." On the day of the accident she was "crying and begged to go home, insisting that she must leave the hospital."[83] Subsequently she escaped from the hospital, stole a car, and had an accident. The court, quoting *Corpus Juris Secundum*, held that the defendant must conform to the "reasonable man" standard.

These cases and others conform to the *Restatement* view, but they are not necessarily proper precedent for requiring an insane defendant to conform to the "reasonable man" standard. The *Sforza* case is distinguishable on the ground that it was the bus company that was invoking the defense of the bus driver.[84] To hold the bus company liable would be a proper allocation of loss since the company—unlike the driver—could distribute that loss among the general public. In addition, there is no indication of the extent of the driver's insanity and whether he was capable of exercising care. The *Johnson* case is also a poor precedent because it is not a well reasoned opinion—without discussing any policy factors or cases, the court blindly based its decision on *Corpus Juris Secundum*. Other cases are distinguishable on the ground that they are based on statute rather than common law.[85]

The better view is illustrated by *Buckley & Toronto Transporta-*

81. 150 Misc. 180, 268 N.Y.S. 446 (N.Y. Mun. Ct. 1934).

82. 147 Colo. 203, 363 P.2d 165 (1961).

83. *Id.* at 204, 363 P.2d at 165.

84. HARPER & JAMES § 16.8 n.19. Professors Harper and James also distinguish *Sforza* on the ground that it is based on *Williams v. Hays*, which they consider "obscure." *Id.*

85. Ellis v. Fixico, 175 Okla. 116, 50 P.2d 162 (1935); Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935).

tion Com'n v. Smith Transport, Ltd.,[86] a Canadian case in which the plaintiff's motor car was run into by one of the defendant's trucks. The driver of the truck was under the delusion that the truck was being remotely controlled from the defendant's headquarters by an electric beam.[87] The court, citing an earlier Canadian decision,[88] held that the defendant was not liable because "to create liability for an act which is not willful and intentional but merely negligent it must be shown to have been the conscious act of the defendant's volition."[89] The court limited its holding to those situations involving insanity "so extreme . . . as to preclude any genuine intention to do the act complained of . . . ."[90]

Bruenig v. American Family Insurance Co.,[91] a recent Wisconsin case, involves a factual situation very similar to *Buckley*. In *Bruenig*, the defendant's insured, while driving a car, came to believe that God had seized control of the steering wheel. When she saw an oncoming truck, she stepped on the gas in order to fly over the truck—"she knew she could fly because Batman does it."[92] In the words of the court, "[t]o her surprise she was not air-borne before striking the truck but after the impact she was flying."[93] The court considered and rejected the *Restatement* view because "the statement that insanity is no defense is too broad when it is applied to a negligence case where the driver is suddenly overcome without forewarning by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances."[94] Citing *Buckley* with approval, the court reasoned that since people are generally not liable for actions brought about by sudden illnesses such as epilepsy[95] neither should they be liable

86. [1946] 4 D.L.R. 721. Dean Prosser cites this case with approval. PROSSER § 135, at 1002.

87. In a conversation with an official of the company, the driver said, "That machine was under remote control and when you people put the power on I could not do anything." [1946] 4 D.L.R. 721, 729. The driver was suffering from syphilis of the brain and died within a month of the accident from general paresis. *Id.* at 723.

88. Slattery v. Haley, [1923] 3 D.L.R. 156 (1922).

89. [1946] 4 D.L.R. 721, 727.

90. *Id.*

91. 45 Wis. 2d 536, 173 N.W.2d 619 (1970).

92. *Id.* at 539, 173 N.W.2d at 622.

93. *Id.* Actually the car stayed on the road for about another mile.

94. *Id.* at 543, 173 N.W.2d at 624.

95. *See* PROSSER § 29.

when the sudden illness takes the form of insanity.[96]

Although *Bruenig* does not precisely follow *Buckley*, the underlying logic of the two decisions is the same. Under *Bruenig*, a person who becomes aware that he is subject to intermittent periods of insanity is required to take certain precautions, such as not driving an automobile. If, however, there is no forewarning, the person will not be liable. The very essence of this line of analysis is that only those who are capable of exercising reasonable care will be required to conform to the "reasonable man" standard. Thus, one who has been insane for some time should logically be covered by the *Bruenig* rationale. Certainly a sane man on the brink of insanity cannot foresee future acts of negligence and guard against them. Likewise, if a person suffering from intermittent periods of insanity were told by his doctor that he was no longer ill, then he should not be required to guard against insanity, at least not in the near future.

B. Contributory Negligence

1. American Law Institute Position

The position of the ALI in regard to the contributory negligence of insane plaintiffs has remained the same in both *Restatements:* "Unless the plaintiff is . . . an insane person, the standard of conduct to which he should conform is the standard to which a reasonable man would conform under like circumstances."[97] As in the ALI's original position on negligence, there is an equivocal caveat that "[t]he Institute expresses no opinion as to whether insane persons are or are not required to conform for their own protection to the standard of conduct which society demands of sane persons."[98] In a comment to this caveat, the ALI notes the dearth of cases dealing with insanity in the context of contributory negligence and states that the policy factors behind section 283B may not be applicable to contributory negligence.[99] Certainly the idea that a tortfeasor should compensate his innocent victims can be eliminated where only the insane plaintiff is an apparently innocent party, and the unhandicapped de-

96. The court went on to say that there was sufficient evidence to find that the driver was aware of her insanity in advance and therefore should not have driven the car. 45 Wis. 2d at 545, 173 N.W.2d at 625.

97. RESTATEMENT OF TORTS § 464(1) (1934); RESTATEMENT 2d § 464(1).

98. RESTATEMENT 2d § 464, caveat.

99. *Id.* at comment *g*.

fendant has been found negligent.

2. The Case Law

The ALI's equivocal position on contributory negligence appears to be too conservative in the light of the case law on the subject. An overwhelming majority of cases hold that an insane plaintiff will not be held to the "reasonable man" standard for his own protection.[100] *Noel v. McCraig*[101] is illustrative of these cases. In that case the plaintiff, while undergoing treatment in a mental hospital, walked into a nearby street and was struck by one of the defendant's trucks. The court held that "a person who is so absolutely devoid of intelligence as to be unable to apprehend apparent danger and to avoid exposure to it cannot be said to be guilty of negligence."[102]

The different treatment by the courts of negligence and contributory negligence can be attributed to various factors. As indicated by the ALI, the policy factors behind holding insane persons to the "reasonable man" standard are not particularly applicable in a contributory negligence context. In addition, the harshness of the doctrine of contributory negligence is widely questioned, and courts often seek to ameliorate its effects.[103]

---

100. Baltimore & Potomac R.R. v. Cumberland, 176 U.S. 232 (1900) (minor plaintiff); Seattle Elec. Co. v. Hovden, 190 F. 7 (9th Cir. 1911) (low mentality); Snider v. Callahan, 250 F. Supp. 1022 (W.D. Mo. 1966); Lange v. U.S., 179 F. Supp. 777 (N.D. N.Y. 1960); Worthington v. Mencer, 96 Ala. 310, 11 So. 72 (1892) (low mental capacity); De Martini v. Alexander Sanitorium, Inc., 192 Cal. App. 2d 442, 13 Cal. Rptr. 564 (1961); Emory University v. Lee, 97 Ga. App. 680, 104 S.E.2d 234 (1958); Chicago & Alton R.R. v. Becker, 76 Ill. 25 (1875); Riesbeck Drug Co. v. Wray, 111 Ind. App. 467, 39 N.E.2d 776 (1942); Noel v. McCraig, 174 Kan. 677, 258 P.2d 234 (1953); Avey v. St. Francis Hosp. 201 Kan. 687, 442 P.2d 1013 (1968); Lynch v. Rosenthal, 396 S.W.2d 272 (Mo. App. 1965) (low mentality); Johnson v. Texas & P. Ry., 16 La. App. 464, 135 So. 114 (1931); La Cava v. New Orleans, 159 So. 2d 362 (La. App. 1964); Gaccione v. State, 173 Misc. 367, 18 N.Y.S.2d 161 (Ct. Cl. 1940); Gould v. State, 181 Misc. 884, 46 N.Y.S.2d 313 (Ct. Cl. 1944) (defendant suffered from manic depressive psychosis, manic type); Zajaczkowski v. State, 189 Misc. 299, 71 N.Y.S.2d 261 (Ct. Cl. 1947); Hill v. Abram Smith & Son, 176 Mich. 151, 142 N.W. 565 (1913); Johnson v. St. Paul City Ry., 67 Minn. 260, 69 N.W. 900 (1897) (low mentality); Feldman v. Howard, 5 Ohio App. 2d 65, 214 N.E.2d 235 (1966); Eckerd's, Inc. v. McGhee, 19 Tenn. App. 277, 86 S.W.2d 570 (1935). *But see* Georgia Cotton Oil Co. v. Jackson, 112 Ga. 620, 37 S.E. 873 (1901) (statute); Criez v. Sunset Motor Co., 123 Wash. 604, 213 P. 7 (1923) (statute).

101. 174 Kan. 677, 258 P.2d 234 (1953).

102. *Id.* at 686, 258 P.2d at 241.

103. Professors Harper and James' contention that a subjective standard be utilized in determining contributory negligence goes very well with the idea of not holding insane persons contributorily negligent. HARPER & JAMES 41 (Supp. 1968).

IV. CONCLUSION

As man's knowledge of the mind increases his ideas concerning such concepts as insanity change. The growing tendency to broaden the definition of insanity leaves the law in a quandary. While fifty years ago it was easy to state that insane persons are not responsible for their actions, today some scientists claim that the concept of responsibility is obsolete and that a person's actions are determined by his environment. If this is true, the theoretical basis of tort law needs to be revamped with a much greater emphasis on strict liability. At the present time, however, such a theory of determinism is not generally accepted by science and certainly not by the law. Therefore, the concepts of responsibility and fault must be retained.

Although the view that holds insane tortfeasors liable for their actions is supported by the ALI and to a certain extent by the case law, it ignores the concepts of responsibility and fault. Unfortunately for insane persons, this view is so firmly entrenched in the field of intentional torts that it probably cannot be changed. That is no reason, however, to repeat the error in the field of negligent torts by holding insane persons to a standard that they are incapable of meeting.

It is difficult to decide exactly what degree of insanity is necessary to relieve a person from the "reasonable man" standard. Rather than apply that standard to all insane persons, it would be preferable to utilize some type of test that would protect those persons who clearly are disoriented with their surroundings. A *M'Naghten* type test would be preferable to none at all, but with the aid of modern psychiatry, a rule separating the gravely insane from those with mental illness not clearly indicating inability to use due care is needed and practicable. Consequently, section 283B of the *Restatement of Torts* should be rejected as not being based on sound policy factors. Furthermore, the ALI's position on contributory negligence should be liberalized in favor of seriously insane persons in order to reflect the present case law and arrive at a clearcut rule of a rational and humane character.

WILLIAM R. CASTO