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Critical Appraisal of the Civil Responsibility of the Insane Person Vis- A Vis Third Party Liability

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Abstract

The issue of non-responsibility for crime because of mental disorder has resulted in a series of judicial decisions. Conversely, the subject of non-responsibility for civil wrongs and third party liabilities to the mentally ill have received little attention. Jurisprudence examining the impact of impaired reasoning on legal liability has centered on criminal liability rather than civil liability. This article x-rays the fate of the mentally ill person in tort law under the defense of the insanity. It presents reasons advanced for the application of the "reasonable man" objective standard in determining the civil responsibility of insane persons. It recommends however that a more liberal rule should be provided in tort law to give the insane some sort of leverage bearing in mind that, since they are not in control of their acts, they are not at fault and consequently should not be held liable. This article critically examined the liability of third parties to the mentally ill person. It presents divergent opinions of legal scholars and judicial decisions on the subject. It concludes that unlike the criminal, the law of tort does not recognize mental illness in the defense of insanity and that the decision to declare liability or otherwise of third parties to the mentally ill person is at the discretion of the courts, depending on the circumstances of each case.

Keywords: *Insane person, civil responsibility and tort law*

1. Introduction

Most societies in the world have taken mental illness into account in their legal systems because the concept is a major factor in determining the criminal responsibility and the competence to face trial of mentally ill offenders.[1]The law of excuses is a deeply entrenched concept in Anglo-American jurisprudence which has persisted since the Middle Ages. The excusing conditions of necessity, duress, and diminished mental capacity laycredence to the accepted principle that a "person is not culpable and cannot be held criminally responsible if he had no control over his behavior.[2] An excuse is based on the assumption that the accused's behavior is damaging and condemnable and is to be deplored but internal or external conditions which influence the act deprived the actor of choice.

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[1] John & La. Fond, "Observations on the Insanity Defence and Involuntary Commitment in Europe" available at http://digital.commons.law.senttleu.edu/su/vol 7/iss 3/3 accessed on 26/5/2022.

[2] Godwin, O. L. Gostin, "Justifications for the Insanity Defence in Britain and the United States – the Conflicting Rationales of Morality and Compassion" Available at http://wwwjaapl.org,contnt/9/2/100.full.pdf. Accessed on 2/10/2022.

Excuse also provides a defence based on the fact that although a defendant committed a criminal or civil act, he or she is not considered responsible. In common law countries, although the plea of insanity has long been a defence to criminal prosecution, whether it is a defence in civil actions is still in doubt[3]. In torts, liability is premised on fault. Since the mentally ill are not in control of their acts, they should not be liable for their wrongs. But generally, the courts have rejected the mental illness defence to tort liability[4]. This is so because, the concept of fault in tort law has changed. Previously, a person was responsible for the damage he caused not only because he caused it, but also because he was morally to blame for it. At present, while the fault concept is still a part of tort liability, fault is interpreted in a more objective manner.[5] Culpability turns more as a "consideration of the societal judgment of the conduct than on the actor's motivation".[6] However, although there is a dearth of judicial decisions dealing with insanity in the context of negligence,[7]there have been authoritative scholarly presentations on the concept.

2. Tort Law and the Insane Offender

The first common law discourse of insanity in regards to a civil action occurred in the ancient case of *Weaver v. Ward*.[8] The court in this case held:

> *if two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatic kills 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…*[9].

The *ratio decidendi* in this case "relied on strict liability[10] which "does not depend on actual negligence or intent to harm, but that based on the breach of an absolute duty to make something safe".[11]

There have been "controversies and uncertainty regarding the appropriate standards" in determining tort liability for the mentally ill.[12] At common law, "an objective standard" is adopted to determine liability of mentally ill defendants", whereas, the "subjective standard is used to determine contributory negligence of mentally ill plaintiffs"[13].

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[3] William R. Casto "The Tort Liability of Insane Persons for Negligence: A Critique", *Tennessee Law Review, vol. 39, Hein Online – 39 Tenn. L. Rev. 705 1971-1972*. heinOnline (http://heinonline.org) p. 705.

[4] Alexander, G. J. and Szasz, "Mental Illness as an Excuse for Civil Wrongs" available @ http://digitalcommons.law.sces.edu/cgi/vuwcontent-egi?article11161 and content-facpubs accessed on 27/8/2022, p. 28.

[5] Ibid.

[6] Ibid.

[7] Ibid at p. 721.

[8] 80 Eng. Rep 284 (C. P. 1616)

[9] Ibid.

[10] Ibid.

[11] Bryan, A. Garner, Black's Law Dictionary, 9th edition, West Publishing Co. 2004, p. 998.

[12] Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *Yale Law Journal, Volume 93, Issue I, Article 5, 1983* at https//digitalcommons.law.yale.edu/yl, accessed on 14/09/2019, p. 154.

[13]Ibid.

In the early 1900s in the United States of America, there have been divergent views and conflicting authorities on the state of law on the issue of the tort liability of the mentally ill[14]. However, only one American case,*Williams v. Hays*[15],where the mentally ill person was held liable for negligence.

An attempt to determine a proper standard of tort liability for the mentally ill was made in 1934 by the American Law Institute (ALI). In its first *Restatement of Torts*published that year, the ALI excluded insane persons from the "requirement of conforming to the reasonable man standard"[16]. It stated:

> *The Institution expresses no option 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 interest of others.*[17]

This means that the *Restatement* expressed no opinion as to whether insane persons should be subjected to the objective reasonable person standard.[18] However, in 1948, the ALI reversed its first 1934 exclusionary position and held that while there were insufficient authorities in 1934 on which to base a definitive rule, enough authority existed now (1948) to hold the insane to an objective standard.[19] Finally, in 1965, the ALI, in the *Restatement (Second) of Torts*published a section that specifically dealt with insane persons. *Section 283B* read as follows:

> *Unless the actor is a child, his insanity or other mental deficiency does not relive the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.*[20]

The implication of this 1965 *Restatement* is that the "mentally ill were to be held liable for their torts and the courts have consistently adhered to this common law rule". However, the ALI advanced four "policy factors" for arriving at the 1965 *Restatement*and the courts have traditionally upheld these for holding the mentally ill to the "reasonable man" objective standard of tort liability[21]. According to the ALI, the factors include:

1. Mental defectives should pay for the damage they cause rather than allowing this loss to fall on their innocent victims;
2. Liability will stimulate the guardians of insane persons to "keep them in order";
3. The unsatisfactory character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned … and some fear of introducing into the law of torts the confusion which has surrounded such a defense in the criminal law; and
4. The difficulty of delineating exactly what forms of insanity may be taken into account in determining negligence.[22]

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[14]Ibid.

[15] 143 N. Y. 442, 38 N. E. 449 (1894), Later Mealed, 157 N. Y. 541, 52 N. E. 589 (1899). This case became the most frequently cited authority for holding the mentally ill liable for their torts.

[16] William R. Casto "The Tort Liability of Insane Persons for Negligence: A Critique", *opcit,* p. 710.

[17]Ibid.

[18] Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *op cit,* p. 155.

[19] Ibid, 155.

[20] William R. Casto "The Tort Liability of Insane Persons for Negligence: A Critique", *opcit,* p.

[21] Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *opcit,* p. 156.

[22] William R. Casto "The Tort Liability of Insane Persons for Negligence: A Critique", opcit, p. 711. See also Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions" opcit, p. 156.

A major factor which influenced the ALI to adopt the position of holding the insane persons to the "reasonable man" standard in determining liability is the fact that "since insane persons are almost universally liable for their intentional torts, it was thought that the same rule would apply to negligence".[23]

Another reason adduced by the ALI for the application or adoption of the "reasonable man" standard is the protection of innocent victims.[24]This is to the effect that if mentally ill persons 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 homes.[25] This reason is the most frequently cited by courts for the application of the "reasonable man" standard to insane persons, and probably the strongest rationale for this approach.[26]

3. Criticism/Review of the Case Law

Since the inception of the application of the common law doctrine of holding the mentally ill liable for their torts actions, legal scholars and commentators have variously criticized the doctrine.[27] Existing English cases presented "conflicting authorities, and contemporary commentators had adopted divergent opinions on the state of the law".[28]In *Williams v. Hays*[29] *(supra),* the decision in this case gave rise to numerous appeals, referrals and retrials. In this case, the Captain of a ship 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 charged the captain with negligence in failing to acknowledge obvious damage to the ship's rudder post, and declining two offers of help from passing ships. The captain pleaded in response that he had remained continually on the bridge for 18 hours during the storm and that upon finally retiring, he had taken quinine for malaria. He claimed that exhaustion and quinine impaired his faculties and he could not be held responsible for his actions. At the trial, the captain "successfully pleaded insanity as a defence" but on appeal, it was held that lunatics must conform to the "reasonable man" standard[30]. However, the court made an exception to this rule thus:

> *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 uneasing, and if he thus become 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.*[31]

Critics of the rule claim that it was "inconsistent with justice and reason to hold the mentally ill liable for their torts" as such decision violates "the fault principle since the mentally ill could not

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[23] Ibid, p. 712
[24] Ibid, p. 715
[25] Ibid.
[26] Ibid.
[27] See Hornblower, Insanity and the Law of Negligence, 5 Colum L. Rev. 278, 278 (1905) that ("It a singular fact and one not altogether creditable to our jurisprudence… that in this twentieth century, the question of the liability of an insane person for tortious conduct… should semain to a large extent an open question")
[28] Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *opcit,* p. 154
[29] 143, N.Y 442. 38. N. E. 449 (1894).
[30] William R. Casto "The Tort Liability of Insane Persons for Negligence: A Critique", *opcit,* p. 718
[31] 143 N. 442. 38.N. E. 449 (1894(Id at 451-52, 38 N.E. at 402.

control their actions and thus were morally blameless.[32] They also believe that given "psychiatric and legal advances", it is no longer justifiable for society to hold the mentally ill to a tort standard impossible for them to meet. They argue further that since the mentally ill are in this view incapable of conforming to a "reasonable person" standard, holding them liable for their torts "violates the fault principle and imposes strict liability upon them without sound justification".[33]

However, most negligence cases involving insane defendants arise from automobile accidents.[34] For example, in *Sforza v. Green Bus Lines, Inc.*[35]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 (supra)* held that the bus company could not utilize the driver's insanity as a defence. In *Johnson v. Lambotte,*[36]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".[37] Subsequently, she escaped from the hospital, stole a car, and had an accident. The court held that the defendant must conform to the "reasonable man" standard.

But in *Buckley Toronto Transportation Company v. Smith Transport Ltd.,*[38]a Canadian case, in which the plaintiff's motor car was ran 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.[39] The Court, citing an earlier Canadian decision[40] 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.[41] The court limited its holding to those situations involving insanity "so extreme … as to preclude any genuine intention to do the act complained of…"[42]

Similarly, in a Wisconsin case, *Bruenig v. American Family Insurance Co.*[43], the defendant, 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 would fly because Batman does it".[44] In the words of the court, "to her surprise, she was not air-borne before striking the truck but at the impact, she was flying".[45]The court considered and rejected the *ALI Restatement* view because "…the statement that insanity is no defence 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

[32] Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *opcit*, p. 159
[33] Ibid.
[34] William R. Casto "The Tort Liability of Insane Persons for Negligence: A Critique", *opcit* p. 719.
[35] 150 Misc. 180. 268 N. Y. S 446 (N. Y. Mun. Ct. 1934)
[36] 147. Colo. 203, 363.P. 2d 165 (1961)
[37] Id at 204 363 p. 2d at 165.
[38] (1946) 4. D. c. R. 771
[39] 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". The driver was suffering from syphilis of the brain and died within a month of the accident from general paresis.
[40] *Slattery v. Haley* (1923) 3 D. L. R. 156 (1922)
[41] (1946) DLR 721, 728
[42] Ibid.
[43] 45 Wis. 2d 536. 173 NW. 2d 619 (1970)
[44] Ibid, 539, 173, N.W, 2d at 622
[45] Ibid.

of a reasonable man under like circumstances[46]" Citing Buckley (supra) with approval, the court reasoned that since people are generally not liable for actions brought about by sudden illness, such as epilepsy, neither should they be liable when the sudden illness takes the form of insanity.[47]

However, one of the reasons the objective standard is deemed appropriate in determining liability in negligence actions of the mentally ill person is the issue of community treatment. As a result of "deinstitutionalization and community treatment, most mentally ill persons in the United states spend most of their time in the Community.[48] The tremendous increase of the mental ill persons now living in the community increased the importance of holding them to an appropriate standard of care in order to meet the present requirements and aims of community treatment.[49] It is also argued that since the ultimate success of community treatment depends upon community acceptance and support, "holding the mentally ill to an objective standard of tort liability will facilitate this goal[50]. It is therefore believed that allowing a defence of mental illness to tort liability may increase public resistance to having the mentally ill in the community.[51]

One of the purposes of tort law is to encourage people to prevent accidents from occurring[52]. Therefore, just as holding average person's liable for their torts may make them behave more conscientiously, holding the mentally ill liable may have a similar effect, and if the mentally ill are not held responsible for their torts, the "community might become concerned that such community would result in an increased number of torts.[53]

Similarly, if the mentally ill were allowed to escape tort liability "there is a risk that the public might become outraged by the perceived injustice of denying compensation to innocent victims".[54] This is the compensation rationale most often cited by the courts especially in those cases where there is insurance to cover the judgment or where the defendant has the means to pay.[55]

4. Third Party Liability to the Insane Person

The extent of the liability of third parties for the act of the mentally ill has always been an issue in the judicial arena. In jurisdictions where mental illness is regarded as a "defence to tortious liability", the person legally or actually responsible for his or her care may be sued.[56] Similarly, in cases where the mentally ill person who wanders is in formal protective care such as a nursing

[46] Ibid at 543, 173, N. W. 2a at 624.
[47] 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.
[48] Out of an estimated 1,100,000 schizophrenias in the United States, Community. Finally, of the total number of severely mentally ill 3.1 million are living in the community.
[49] Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *opcit*, p. 163
[50] Ibid, p 165.
[51] Ibid.
[52] Originally, this was the principal objective of the tort law, although the law has increasingly tended to focus on the need to compensate victims.
[53] Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *opcit*, p. 167.
[54] Ibid.
[55] Ibid.
[56] Trevor Byan and Wendy Bonython, "whose Fault in an Aging World? Comparing Dementia – Related Tort Liability in Common Law and Civil Law Jurisdictions", Washington *International Law Journal, vol. 27, Wash. No.2, 407* (2018) p. 408.

home, the liability can also be borne by the nursing home or health facility "if its policies and practices for patient containment are found to be inadequate".[57]

In *Hill v. Chief Constable of West Yorkshire Police*[58], the House of Lords held that no liability attached to a Police Force which failed to arrest the serial killer, Peter Sutcliffe before he killed his last victim. This decision did not come upon whether there had been a negligent conduct or act, but upon public policy. The interests of the public as a whole are best served. It was argued in this case that those responsible for public safety and so on should be able to carry out their functions or duties unfettered by threat of litigation.

Similarly, the duty to provide the mentally ill person with adequate care was entrenched in the *Convention on the Rights of Persons with Disabilities (CPRD)* which came into force in 2008.[59] The Convention "applies to people with a broad range of disabilities including physical, mental, sensory and intellectual.[60] Article 1 of the CRPD provides that:

> *The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all person with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*[61]

The implication of this provision is that people with cognitive impairment including mental illness should have full and equal enjoyment of all human rights and fundamental freedoms. Article 12 of the CRPD interprets the phrase "equal recognition before the law" in the provision to mean that persons with disabilities "enjoy legal capacity in an equal basis with others in all aspects of life. In *Osman v. United Kingdom*[62], the so called immunity from suit in *Hill v. Chief Constable of West Yorkshire Police (supra)* was held by the *European Court of Human Rights* to be contrary to *Article 6.1 of the European Convention (The Protection of the Right to Fair Trial in both Criminal and Civil* cases).[63]The convention is now enacted into English law in the Human Rights Act 1998.[64]

However, a discourse on the liability of third parties to the mentally ill person is premised between the need "to compensate blameless victims and the injustice of holding an impaired defendant liable for the consequences of actions he or she may have no ability to control"[65].Imposing any

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[57] Ibid.
[58] (1988) 2 All ER 238
[59] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515, U.N. T. 83. As of April 2016, the Convention has 162 parties.
[60] Trevor Byan and Wendy Bonython, "whose Fault in an Aging World? Comparing Dementia – Related Tort Liability in Common Law and Civil Law Jurisdictions", opcitp. 410.
[61] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515, U.N. T. 83. As of April 2016, the Convention has 162 parties.
[62] Ibid at Article 12.
[63] (1999) 1 FLR 193
[64] Gunn, Mand wheat K, "General *Principles of Law Relating to People with Mental Disorder*", New Oxford Textbook of Psychiatry, Vol. 2 (2nd edition), Oxford University Press, 2000, p. 2025.
[65] Trevor Byan and Wendy Bonython, "whose Fault in an Aging World? Comparing Dementia – Related Tort Liability in Common Law and Civil Law Jurisdictions", *opcit* pp. 409-410.

liability at all upon those considered with significant mental impairments "raises questions of injustice, principle and policy".[66]

Ryan and Wendy quote Assistant Professor Sarah E. Light to have derided the American Law Institute (ALI) view that "if mental defectives are to live in the world, they should pay for the damage they do.[67] According to the duo, Professor Light sees in this view "a fearful segregationist view of mental disabilities reflecting a long legacy of discrimination, prejudice, xenophobia, and coercion.[68]

In the United States of America for example, the basic position is one of personal liability on the part of persons with mental disabilities and there is a number of cases considering caregiver liability.[69]These cases fall within a "broader developing use of negligence law" in which a range of defendants including "vendors of weapons, spouses of sexual predators, schools, parents, police and employment referees have been argued to be liable for the harmful actions of a third party".[70] There are also cases that consider the duty of care an institution owes third parties harmed by a person currently in its care.[71] This typically involve the question of whether injuries inflicted on another patient or resident were foreseeable.[72]In *Carrison Retirement Home Corp. v. Hancock*[73], the Florida District Court of Appeals found an institution liable for failing to prevent a person with dementia from causing harm to an external third party by driving a car. The decision was based on the principle of the "duty to control conduct of third parties" in section 315 of the Restatement (second) of Torts.[74]The court interpreted the section to mean:

> *There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.*[75]

The court further held in this case, that the assumption of control by the institution over the patient constitutes a special relation with the patient and found the institution liable".[76] However, in *Emery v. Littlejohn*[77], the Washington Supreme Court found the defendant not liable after the plaintiff was shot by the defendant's adult son while he was under the defendant's care, having been released from a mental institution.Here, the court allowed room for a general duty to the public on the part of a private person having the legal custody and control of a violently insane person with homicidal tendencies" grounding liability for "want of care and restraint where there is clear

[66] Ibid at p.421.
[67] Ibid
[68] Ibid.
[69] Ibid at p. 423
[70] Ibid
[71] Ibid
[72] Ibid.
[73] 484 So. 2d 1257, 1262 (Fla. Dist. Ct. App. 1985)
[74]Restatement (Second) of Torts, 283B cmt. B (3) (AM. Law Inst. 1965)
[75] Garrison Retirement Home, 484, So. 2d at 1261.
[76] Ibid at p. 1259
[77] 145, p. 423, 428 (Wash. 1915)

evidence that dangerous behavior was foreseeable"[78] Similarly, in *Alva v. Cook*[79], the California Court of Appeals found two sisters not liable when their mentally ill adult brother shot and killed the plaintiff. The court noted that:

> *In the absence of ultimate facts that (the brother) was dangerous to himself and others at least sufficient to warrant a reasonable assumption that a petition for evaluation or commitment would be granted, we are not ready to equate respondents' assumption of a moral obligation to a guarantee and indemnification agreement in respect of (the brother's) conduct on or off respondents' premises as if he were a dog and to hold that respondents' are their brother's keepers but at their risk*[80].

In *Irons v. Cole*[81], a caregiver was found liable for harm to a third party when a mentally impaired adult family member accessed a gun on the caregiver's premises. The argument between *Alva v. Cook (supra)* and *Irons v. Cole (supra)* is that a caregiver, no matter "his or her altruistic motives, only deserves immunity if it can be established that he or she in no way contributed to the harmful act occurring".[82]

Unlike the common law, civil law jurisdictions tend to base responsibility for torts in "mental capacity".[83]For example, in Germany, this is premised on *section 825 of the German Burgerliches Gesetzbuch (BGB) Civil Code, 827 (as amended)* which provides that:

> *A person who, in a state of unconsciousness or in a state of pathological mental disturbance precluding free exercise of will, inflicts damage on another person is not responsible for such damage unless the person has temporarily induced such a state…*[84]

In the late nineteenth century, Japan had adopted the provisions of the German BGB.[85]*Section 713* of the Civil Code says:

> *A person who has inflicted damages on others while he/she lacks the capacity to appreciate his/her liability for his/her own act due to mental disability shall not be liable to compensation for the same; provided, however, that this shall not apply if he/she has temporarily invited that condition, intentionally or negligently.*[86]

Also, Japan's *section 714(1)* imposes "liability for third party harm upon a person with a legal obligation to supervise" a person without mental capacity. A "person with obligation to supervise included a person with parental authority, an adult guardian, or a spouse".[87] In December 2007, a ninety-one year old man who suffered dementia left his residence in Aichi Prefecture unnoticed

[78] *Emery v. Littlejohn*, 145 p. 423, 428 (Wash. 1915), p. 350.
[79] 123 cal. Rptr. 166, 171, (Cal. Ct. App. 175)
[80] Alva v. Cook, 123 cal. Rptr. 166, A1 (Cal. Ct. App. 175)
[81] 734. A 2d 1052 (Comm. Super. Ct. 1998)
[82] Trevor Byan and Wendy Bonython, "whose Fault in an Aging World? Comparing Dementia – Related Tort Liability in Common Law and Civil Law Jurisdictions", *opcit* p. 427.
[83] Ibid at p. 429.
[84] Burgerliches Gesetzbuch (BGB) (Civil Code), 827 as amended by Article 2 (16) of the Statute of 19, February 2007.
[85] Trevor Byan and Wendy Bonython, "whose Fault in an Aging World? Comparing Dementia – Related Tort Liability in Common Law and Civil Law Jurisdictions", *opcit* p. 430.
[86] MINPO [CIV. C.] art. 713, translated in (Japanese Law Translation [JLT DSI]
[87] Ibid.

by his daughter-in-law, who was engaged in housework, and his wife, who had momentarily dozed off. An hour later, the old man managed to board a train at a nearby station. He entered the grounds of another railway station and made his way through an unlocked gate to the tracks where he collided with a passing train and was killed. In 2013, a single judge of the Nagoya District Court held that the man's eighty-five-year-old wife and his adult son were liable for economic harm (¥7.1 million) caused to the railway.

In 2014, a three-member panel of the Nagoya High Court upheld the earlier ruling "albeit only with regard to the appellant wife's liability, which was reduced by fifty percent due to contributory negligence" on the part of the respondent railway company".[88] The court held that "the wife was remiss in her duty and was thus liable".[89]

In 2016, a five-member 3rd Petty Beach of the Supreme Court of Japan "overruled these judgments, finding neither the wife nor son liable"..[90] The joint judgment of Justices Kiuchi, Yamazaki, Ohashi, Otani and presiding Justice Okbe held that a "spouse has no legal duty to supervise, mainly because this duty cannot be founded in a spouse's duty to provide mutual support which is not directed at third parties"[91]. The court, per Justice Kiuchi further held that "the legal framework attributing a legal duty to supervise to a spouse (or for that matter, on adult guardian) has changed, which justifies a departure from precedent on this point"[92].

However, mental health professionals may be sued for failure to control aggressive out-patients for their discharge of violent patients. They may be sued for failing to protect society from the violent acts of their patients if it was reasonable for mental health professionals to have known about the plaintiff's violent tendencies and could have done something that could have safeguarded the public.[93] In the landmark case of *Terasoff v. Regents of the University of California*[94], the California Supreme Court held that mental health professionals have a duty to protect "identifiable endangered third parties" from imminent threat of serious harm made by their out-patients. The court further added that the duty to protect patients and endangered third parties should be considered primarily a professional and moral obligation, and secondly, a legal duty. The principles of common law of negligence apply to the treatment of psychiatric patients. If it can be shown that those treating potentially suicidal patients failed to supervise, then the claimant will succeed.[95]

The liability of doctors and nurses to supervise suicidal patients was considered in the case of *Self v. Ilford Hospital Management Committee*[96], where damages were awarded when there was found to be an unacceptable level of supervision. But in *Knight v. Home Office*[97], a mentally disturbed prisoner who was an in-patient and known to have suicidal tendencies hung himself despite close

[88] Ibid at p. 432
[89] Ibid at p. 433.
[90] Ibid.
[91] Ibid at p. 434.
[92] Ibid.
[93] Simon, R. I., "Ethics and Forensic Psychiatry: Legal Issues in Psychiatry" in Kaplan and Sadock's Comprehensive Textbook of Psychiatry opcit p. 3277.
[94] (1992) 4 ALL ER 907.
[95] Stauch S. Wheat K and Tingle J, Source Book on Medical Law, (2nd edition) (London) Cavendish Publishing Ltd, (2002) p. 544.
[96] (1970) 119, S. J. 935.
[97] (1990) 3 All E. R. 239.

supervision at 15 minutes intervals by staff in the hospital wing. In his judgment, the presiding Judge Pill, J, held that the defendants were not under a duty to maintain the same degree of surveillance on the patient as would be expected in a specialized psychiatric hospital where the deceased ought to be.[98] Also, in the case of *Claris v. Crimden and Islington Health Authority*[99], the English Court of Appeal had to consider the liability of the health authority for the criminal act of a mentally disordered man when he murdered a man in an unprovoked attacked. Claris had been charged with murder, but the prosecution had accepted a plea of manslaughter on the grounds of diminished responsibility. Claris subsequently sought damages from the health authority alleging that they had failed to treat him in accordance with their common law duty of care, and that if he had been treated, he would not have carried out the killing and would not have been subjected to the lengthy period of detention he was now facing. The Court invoked the legal maxim of *"ex turpi causa non oritur artio"* which means that they found that "he could not establish a duty when it stemmed from the plaintiff's own wrong-doing".[100]

Another issue which arises is the liability of bodies that provide services pursuant to statute as authorities or institutions can be both primarily or vicariously liable for acts of negligence.[101]The English leading case here is *X v. Bedfordshire Country Council.*[102]In this case, the court had to consider the claims of plaintiffs who alleged damage as a result of the negligence of social workers and psychiatrists involved in child protection cases, and teachers and others involved in the provision of education to children with special education needs. Applying a threefold test, the court found that the first two elements were satisfied, that is, "foreseeability of damage and proximity of relationship between the parties".[103] On the third element however, the finding was that it would not be "just and reasonable to impose a duty of care".[104]

However, the Nigerian Lunacy Act, 1958 (as amended) also provided for the liability of officers maltreating lunatics or violating rules. Under Offences, *section 29* provides that:

> *Any officer or servant employed in an asylum who strikes or ill-treats or willfully neglects any lunatic confined in such asylum or willfully violates or neglects any rule or regulation made under this ordinance, shall be guilty of an offence and shall be liable on conviction thereof before the Superintendent to a fine of two pounds, which may be recovered by deductions from the offender's salary and allowances, or, on conviction before a magistrate, to a fine of ten pounds or imprisonment for one month or both.*[105]

On offences committed by persons in charge of lunatics on trial, *section 30* of the Act provides:

Any person who accepts the charge of a lunatic allowed to be absent on trial and who –

[98] Odigie Dennis, Law of Torts: Texts and Cases (Benin City) Ambik Press Ltd, 2008, pp.148-149.
[99] (1998) 2 WLR 902.
[100]Gunn, M. and Wheat K, "General Principles of Law Relating to people with Mental Disorder" opcit, p. 2025.
[101]*Ibid*.
[102](1995) 2 AC 633.
[103]Gunn, M. and Wheat K, "General Principles of Law Relating to people with Mental Disorder" opcit, p. 2025.
[104]*Ibid*.
[105]The Nigerian Lunacy Act, 1958 (as amended).

(a) ill-treats or neglects to provide such lunatic suitable lodging, clothing, food, medical attention when required, or other necessaries, or fails to exercise proper care and control over such lunatic, or

(b) refuses to allow such lunatic to be visited by any administrative officer, or the Superintendent of any officer or servant or visitor of the asylum in which such lunatic was confined; or

(c) refuses or neglects to answer according to the best of his knowledge, information and belief any question put to him by an administrative officer or such Superintendent or visitor or to attend and conform to any directions of a medical officer; or

(d) without reasonable excuse, the proof of which shall lie upon such persons, fails duty to return such lunatic to such asylum, shall be liable to a fine of twenty pounds or imprisonment for three months.[106]

5. Conclusion

Various jurisprudence examining the effect of mental illness and legal liability of the mentally ill person have typically centered on criminal liability rather than in civil liability.[107] In Criminal Law, many jurisdictions have adopted or modified the provisions of the M'Naghten Rules in determining the culpabilityor otherwise of the insane offender.[108] Conversely, jurisprudence concerning liability for tortuous harms caused by the mentally-ill offender is less developed resulting in the relatively small body of law in this area.[109] Reasons may be that potential cases are resolved through out of court settlements, or that defendants may choose not to raise their impairments as factor in mitigation for fear of stigmatization.[110] This is, perhaps, responsible for the dearth of judicial decisions dealing with the subject.

One of the purposes of tort law is to encourage people to prevent accidents from occurring, although the law has not increasingly tended to focus on the need to compensate victims rather than punish the actor.[111] It is well established that people who commit crimes while "lacking reason" cannot be punished for those crimes. But tort law's position of holding the mentally ill person to the "reasonable man" objective standard is that since insane persons are almost universally held liable for their torts, it was thought that the same rate principle or rule would apply to negligence.[112] This greatly influenced the American Law Institute (ALI) in adopting this position.

Similarly, tort law is of the view that if the mentally ill are not held responsible for their torts, the community might become concerned that "such immunity would result in an increased number of torts.[113] It was further submitted that if the mentally ill were allowed to escape liability, there is the risk that the public might become outraged by the perceived injustice of denying compensation

[106]*Ibid*.
[107]Trevor Byan and Wendy Bonython, "whose Fault in an Aging World? Comparing Dementia – Related Tort Liability in Common Law and Civil Law Jurisdictions", opcitp. 409.
[108]Ibid.
[109]Ibid.
[110]Ibid.
[111]Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *opcit*, p. 166.
[112]William R. Casto "The Tort Liability of Insane Persons for Negligence: A Critique", *opcit* p. 712.
[113]Stephanie I. Splane, "Tort Liability of the Mentally Ill in Negligence Actions", *opcit*, p. 167.

to innocent victims – which is the most often rationale cited by the courts.[114] It can be argued however, that this situation is unsatisfactory as a person should not incur liability in tort in respect of acts committed while insane. It would be preferable to utilize a rule that would give the insane some sort of leverage. It is recommended therefore that a more liberal general applicable affirmative defence should be put in place for the defence of insanity in tort law. An affirmative defence to a civil law suit or criminal charge is a factor set of facts other than those alleged by the plaintiff or prosecutor which if proven by the defendant "defeats or mitigates the legal consequences of the defendant's otherwise unlawful conduct"[115]. Thus, the present Law of Torts disregards the mental condition of the actor in civil wrongs in the defence of insanity.

On its part, although the commission of common law and statutory offences against the mentally ill are rare, judicial decisions show that third parties, such as caregivers could be liable to their mentally ill patients. The onus to declaring liability or otherwise is discretional to the courts – depending however, on the circumstances of each case.

Reviewer's Comment:
The paper is publishable.

There were some minor mistakes which were corrected and others that are highlighted for your consideration. In addition to the above, it is recommended that the author should do the following:

i. Italicise all Latin words including '*ibid'* and' *op cit'*.

ii. Write *'op cit'* at two words and not one word –'*opcit'*

iii. Review the citation of journal articles, book, internet materials, etc. as contained in the footnote in consonance with the NALT guidelines for citation. Especially as it relates to the how to write an author's name. There are instances where the writer wrote the author's first name first and separated it with a comma before writing initials and surname. See for instance footnote 11 – 'Bryan, A. Garner, Black's Law Dictionary, 9th edition, West Publishing Co. 2004, p. 998.'.

Finally, it is observed that this work has failed to identify the position of Nigerian law on the issue of the liability of an insane person. This is an omission considering the fact that this work is authored by Nigerians in Nigeria.

[114]Ibid.

[115]James Goudkamp "Insanity as a Tort Defence" (2011) *Oxford Journal of Legal Studies*, available at http://ro.ouw.edu.au/law.papers/319 accessed on 9/3/2022.