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THE TORTIOUS LIABILITY OF THE INSANE IN CANADA.... With a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative

By PAMELA PICHER*

INTRODUCTION

Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.¹

The struggle in studying the tortious liability of the insane has been to define a sufficiently small field of vision and resist the temptation of following each strand of the web to its natural conclusion beyond the chosen field.

To fully comprehend this area of the law, one should study the history of tort law as it originated in actions of trespass. Going back to how assaults were handled in local English courts prior to the thirteenth century and by communities before the introduction of courts would contribute to our comprehension of whether the existing insanity laws are derivative of a perverse understanding of ancient law. For this historical study the strand has reluctantly been cut, however, at the introduction of trespass into the king's court in England sometime after the twelfth century.

Recognizing that the common law and civil law have taken diametrically opposed approaches to the tortious liability of the insane, the temptation has been to wander back to the Roman civilization to discover why civil law jurisdictions developed a rule of immunity for the insane while common law jurisdictions did not. Such an inquiry would require understanding the jurisprudence of the time, not only the theory of tort law but the general theory behind the place of law in the Roman civilization. Comparing this philosophy to the jurisprudence of England between the seventeenth and nineteenth centuries when the insanity rule was solidified would yield an understanding of why the laws of the two civilizations are so different. Additionally, a study in both worlds of surrounding laws and practices of caring for the infirm and poor and compensating the injured would determine whether the end results for the two systems are as different as the diametrically opposed laws would lead one to believe. Such depth, however, is beyond the scope of this article which will accept the difference rather than probe the reasons for it.

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A natural question following a knowledge of how societies treat the insane is what principles control the tort liability of infants, the physically handicapped and persons struck with sudden physical incapacity, to find out whether the theories are consistent or whether there is a prejudice against the insane. If prejudice does exist, why? To this end the history of how the insane were treated in both England and Roman civilization would be instructive. Once again these questions are outside the scope of this article though passing reference is made to the tort liability of other types of persons with below normal capacity.

The problem of defining insanity is another matter which takes us beyond the chosen field of vision. No agreed upon medical definition exists, nor an agreed upon legal definition. Though a legal definition has been advanced in the context of criminal law, the term has been indiscriminately used in tort cases. Because the ultimate solution of the problem of the tortious liability of the insane suggested in Part VI of this paper does not involve a problem of definition, this article will ungracefully sidestep the debate with the statement that when the term "insanity" is used herein, it refers to the condition of that general and broad group of people who, due to disturbances of their mind or emotions, are unable to conform their conduct to that which is required by society.

Even the field of torts has been cut back in this study. Concentration is on two torts, assault and negligence, each representative of the two basic threads of tort law — direct, intentional injury and indirect, unintentional injury — derivative from the early actions of trespass and trespass on the case respectively. The basic ideas drawn from the study of these two fundamental torts may readily be applied to the others. Contributory negligence and the assessment of damages has also been left outside the scope of this study.

The task of this article is to study the history and development of an insane person's liability in tort. For the development of the law our attention will center on the Canadian common law though a comparison will be made with the law of the United States and civil law jurisdictions. Criticism of this development and a suggestion of an alternative method of dealing with the torts of the insane will follow.

It is the conclusion of this study that the situation presented by the commission of torts by the insane — by the struggle between two innocent parties within a vulnerable society — is a compelling example of why we should replace our present scheme of tort liability with a scheme of social insurance. The existing scheme of tort liability is unable to balance the rights

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and needs of the insane, the victim, and the society. To the extent that we accord proper treatment to one of the innocent parties, we are forced to deny it to the other, leaving society to pay the price of the neglect. If we grant compensation to the victim, we ignore the innocence of the insane; if we respect the innocence of the insane, we deny the victim compensation; society must then rectify the injustice by supporting either the ignored insane person or the uncompensated victim. A scheme of social insurance would require everyone in society to pay a fixed amount to a fund out of which all tort victims would be compensated. In this way the innocence of the insane would be respected, the victim would be compensated and society would not be charged with the responsibility of rectifying the injustice of our present tort system.

While the situation of the insane provides the most compelling example of the failure of our existing tort scheme to remedy a wrong, the shortcomings of the system, discussed herein, which affect the insane affect other torts as well. The only distinction between the torts of the insane and the torts of others is that where a tortfeasor is clearly at fault, the present system contains elements that can argue for its continuation to the extent that it provides a deterrent through punishment. It is submitted, however, that the torts of the insane should not and cannot be treated in a vacuum. Society cannot practically support a separate scheme of social insurance for the small group of the insane. The administrative problems involved in the existing tort law and the financial hardship befalling society and the tortfeasor clearly apply to all torts and not just the torts of the insane.

I. HISTORICAL BACKGROUND OF TRESPASS AND TRESPASS ON THE CASE

Under early English law the two purely tortious writs capable of bringing an action into the royal courts were trespass and trespass on the case. The writ of trespass on the case developed subsequent to the parent writ of trespass.\(^5\) Although the distinction between these two writs is not now formally maintained, most of our present tort law had its origin in these two causes of action. Early trespass actions developed into our present tort of assault while negligence arose out of trespass on the case.\(^6\)

The rise of trespass and case is an extremely complex area of law about which there appears to be little agreement; it is not the purpose of this paper to resolve or even to explain the full extent of the controversy. The point of interest relating to the tortious liability of the insane is the place of fault in the two actions. Whether an insane person is held liable for his torts turns on the degree of fault required to establish the torts in question. Whether our present laws concerning the insane in assault and negligence are an outgrowth or a perversion of the old law depends on the extent to which fault was considered in the old actions of trespass and trespass on


\(^6\) Id. at 29-30.
the case, and the extent to which the place of such fault has been accurately
reflected in the development of our present insanity rules. Unfortunately,
no agreement exists concerning the place of fault in trespass and trespass on
the case although two main theories which will be referred to as Theory A
and Theory B seem to have developed.

The conclusion of the more popular Theory A is that trespass was a
strict liability offence under early English law while trespass on the case
considered moral blameworthiness, but that by the nineteenth century strict
liability had vanished even from trespass. The conclusion of Theory B is
that trespass was not a strict liability offence under early English law and
the above distinction between trespass and case was imposed by lawyers and
judges looking for a distinction between the two.

A. Theory A: According to Prosser7 and Holdsworth8 trespass de-
veloped in the thirteenth century as a quasi-criminal proceeding, criminal to
the extent that its focus was forcible, serious breaches of the king's peace
with conviction resulting in the punishment of the defendant, and tortious
to the extent that the action was initiated by the action of the injured in-
dividual and could result in reparation to the plaintiff. During the time
before the distinction between crime and tort became clear, the theory of
liability was that an act causing damage should be paid for in the interest of
peace, the object of the law being to suppress revenge by promoting com-
promise through compensation.9 It was to the state of mind of the injured
attention was directed rather than the conduct of the wrongdoer. Few
exceptions existed to the general principle of paying for damage done; com-
ensation was generally required even if the injury was accidental or in self
defense.10 According to Harris the only restriction on liability was that the
act be voluntary, that it be a conscious act.11

In an action of trespass, therefore, liability was imposed without regard
to the moral blameworthiness of the defendant. Liability would follow all
direct injuries whether intended or not, the focus being on the causal rela-
tionship between the act and the injury, on whether the injury was the
direct, immediate result of the act rather than upon the subjective character
of the defendant's act.12 This principle of strict liability characteristic of the
early action of trespass was felt to be the logical outcome of a socio-legal

7Id. at 28.
Ltd. and Sweet & Maxwell Ltd., 1934) at 364-65.
9R. Harris, Liability Without Fault (1932), 6 Tul. L. Rev. 337 at 343; 2 Hold-
Maxwell Ltd., 1923) at 50-51. See also G. Woodbine, The Origin of the Action of
Trespass (1924), 33 Yale L.J. 799.
10Harris, supra, note 9 at 343-44; Holdsworth, supra, note 9 at 52 et. seq.; J.
Ames, Law and Morals (1908), 22 Harv. L. Rev. 97.
11Harris, supra, note 9 at 346.
12Id. at 343; Prosser, supra, note 5 at 29; F. Bohlen, Liability in Tort of Infants
See also Dean Wigmore's series of articles in (1894), 7 Harv. L. Rev. 315, 383, 441.
system whose primary object was to suppress blood feuds and keep the peace through compensation.\textsuperscript{18}

As society became more complex these early notions of strict liability were modified. In the dawn of the sixteenth century new social and moral values were appearing and gradually the law adjusted itself to their influence. An important creator and carrier of these values was the Church which attached more significance to a person's state of mind than to the factual outcome of his acts.\textsuperscript{14} Recognizing the early indivisibility between the Church and the State, it is not surprising that law and morality became synonymous.\textsuperscript{15} A tendency to consider fault in trespass cases thus slowly undermined the early, deeply entrenched principles of strict liability. In addition to the influence of the Church, the development of commerce and the industrial revolution further modified strict liability concepts for the practical, economic reason that to impose liability without fault would unduly penalize commercial activities believed to be essential to the advancement of civilization.\textsuperscript{16}

While respect for precedent inhibited the collapse of the strict liability foundation, defenses such as unavoidable accident, inevitable necessity and self defense slowly opened the door to basing trespass liability on the quality of the act causing the damage rather than on the act itself.\textsuperscript{17} The move from strict liability to no liability without fault, a process begun in the sixteenth century, was finally completed in the United States in 1851 through \textit{Brown v. Kendall}\textsuperscript{18} and in England in 1891 through \textit{Stanley v. Powell}\textsuperscript{19} though little authority supporting strict liability existed in England after \textit{Leame v. Bray}\textsuperscript{20} in 1803.

The proponents of Theory A state that trespass on the case, the source of modern negligence law, developed as a supplement to trespass to provide a remedy for indirect, unintentional injuries\textsuperscript{21} such as damage caused by the negligent shoeing of a horse. While trespass originated with a strict liability base, trespass on the case required from the start evidence of wrongful intent or negligence\textsuperscript{22} and thus did not need to go through a transformation to be placed in accord with the philosophy that espoused no liability without fault.


\textsuperscript{14} Harris, \textit{supra}, note 9 at 349; 2 Holdsworth, \textit{supra}, note 9 at 53.

\textsuperscript{15} Harris, \textit{supra}, note 9 at 349; R. Pound, \textit{An Introduction to the Philosophy of Law} (New Haven: Yale University Press, 1922) at 141.


\textsuperscript{17} Holdsworth, \textit{supra}, note 13 at 381.

\textsuperscript{18} Brown \textit{v. Kendall} (1850), 6 Cush. 292 (Mass.); Harris, \textit{supra}, note 9 at 347.

\textsuperscript{19} Stanley \textit{v. Powell}, [1891] 1 Q.B. 86; Harris, \textit{supra}, note 9 at 347.

\textsuperscript{20} Leame \textit{v. Bray} (1803), 3 East 593; 102 E.R. 724.

\textsuperscript{21} Prosser, \textit{supra}, note 5 at 28-29.

\textsuperscript{22} \textit{Id.} at 29. See also Ames, \textit{supra}, note 10 at 104.
B. Theory B: S.F.C. Milson, in a recent publication Historical Foundations of The Common Law, explains the rise of trespass and case differently, attributing greater significance to the role of fault in early trespass actions. Milson’s theories are explored in some detail because an understanding of his conclusion concerning fault is otherwise unlikely.

Originally trespasses, or wrongs which were not felonies, came to the royal courts if they were pleas of the crown. A common plea of the crown was contra pacem regis (breaking the king’s peace) which was originally a personal action on behalf of the particular king. It was common for writs of trespass to aver vi et armis (with force and arms) as well as contra pacem; the vi et armis probably was added just in emphasis of the vital contra pacem. If an action did not make these pleas it was not admitted into the royal courts and had to be heard by the local courts.

Artificiality flooded the trespass actions; plaintiff’s alleged contra pacem and vi et armis not because it explained what happened in their particular case, i.e. not because the wrong had been committed against the king’s peace or with force and arms, but in order to obtain the beneficial procedure emanating from the royal courts which was not available in the local courts. Because contra pacem originally involved a serious crime against the king, capias (arrest) and outlawry were a part of the process. Even when these proceedings in the royal court were taken by victims instead of the king himself, capias still issued to insure the presence of the defendant. A 1304 case noted by Milson exemplifies the artificiality of the pleas of contra pacem and vi et armis: the defendants were imprisoned even though the jury added to their finding of guilt that the trespass had not been done vi et armis. Because in a trespass action the defendant could only plead “Not Guilty”, he could not elaborate to challenge the jurisdiction, and no jury would deny an injured plaintiff damages simply because his loss was not factually contra pacem or vi et armis.

With time lawyers became more discreet and carefully camouflaged their illegitimate trespass cases. Milson gives an example to make this coverup obvious; an action was brought against a smith for professional negligence for carelessly driving nails into the horse’s hoof thus causing the horse’s death. In the local courts this kind of trespass for indirect injury would have had an easy, straightforward remedy, but to bring it under the jurisdiction of the royal courts the lawyer had to submerge the fact that the horse was lawfully in the hands of the defendant when the wrong occurred, because to be so is contrary to the notion of a violation of the king’s peace; he would also have to hide the fact that the injury resulted from negligence rather than direct violence. Thus, explains Milson, the pleadings would look something like this: “Why with force and arms the defendant killed

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24 Id. at 244-46.
25 Id. at 247.
26 Id. at 247-48.
the plaintiff's horse, to his damage and against the king's peace." The plaintiff would plead "Not Guilty" and the jury would make their finding of guilt. With this skeleton being all that was exposed to the record, the action looked like one for malicious injury by a stranger. Milson notes that the number of such cases like the above hypothetical might never have been known but for the fact that many of the cases for horse killing describe the defendants as smiths.

Milson's conclusion from this artificiality and camouflage is that trespass *vi et armis* was a much more sophisticated action than the records indicate. Given what trespass *vi et armis* was supposed to include — direct, forcible injuries against the king's peace — it is understandable how the popular Theory A dichotomy between trespass and trespass on the case developed. Given what trespass *vi et armis* did in fact include — negligent, indirect injuries as well as direct injuries — it is also understandable that the above dichotomy is an over-simplification.

In contrast to Theory A, Milson finds that trespass on the case developed more as an action different in form from what had traditionally been heard under trespass *vi et armis* than as a supplemental action different in kind. In 1370 the royal court upheld a writ in the form applicable to local courts, i.e. without an allegation of contra pacem or *vi et armis*, thus marking the beginning of actions on the case. These actions which did not allege contra pacem or *vi et armis* were "special" or "on the case." They were admitted to the royal courts not by virtue of the general avers but by virtue of the particular facts. Asserting that the difference between the two actions was one of form only, Milson notes,

Neither the liability nor its substantive enforcement in the royal courts was new. What was new was the honest straightforward way in which the case was put.

The probable reason for this honesty, according to Milson, was plaintiffs wanting to bring cases into the royal courts which no amount of imagination could have construed under contra pacem.

With no substantive difference existing between the two forms of action in the fourteenth century, they could have been brought under one head. Unfortunately, however, the procedural distinction with respect to capias still existed and ultimately caused a substantive difference to arise. In 1352 a statute had extended capias to major personal actions like debt, but it was not extended to trespass generally because at that time only trespass *vi et armis* or contra pacem came into the royal court. Because of this accident over capias, the distinction between trespass *vi et armis* and trespass on the case had significant procedural results for plaintiffs and was thus perpetuated. By the sixteenth century the categories were solidified in legal minds;

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27 Id. at 249.
28 Id. at 250.
29 Id. at 251.
30 Id. at 250.
31 Id.
32 Id. at 262-63, 350.
thus the remedial statutory extension of *capias* to all trespass actions in 1504 had no impact on erasing the distinction. It was too late to reunite the law of wrongs. As Milsom ruefully remarks:

> It was certain that there was a distinction even if nobody knew what it was; and a distinction is never without a consequence in a court of law.\(^{33}\)

The difference was to be found in direct as opposed to consequential injury, in the skeletal event as opposed to the whole set of facts from which the injury resulted.\(^{34}\) The plaintiff would seek not to frame his action in common trespass when the cause of the injury was more complex than A assaulting B and involved a chain of events because of the risk that the defendant could plead "Not Guilty" and persuade the jury that he did not do the act actually directing the harm. This test of direct as opposed to indirect injury was finally established in the eighteenth century decision, *Scott v. Shepherd*.\(^{35}\)

With this background the place of fault in trespass is more readily understood and the contrast between Theory A and Theory B less surprising. Milson explains his departure from the popular theory of strict liability in trespass set forth in Theory A:

> In the whole of the year books there is no special plea of accident in trespass, and this has led most historians to think that liability was strict or absolute, that if the defendant had done the harm he was liable. Whether English society would have found such a state of things tolerable is the hardest kind of question to answer: it may be that it only became intolerable with the invention of gunpowder . . . so that harm can be done out of all proportion to what ordinary people regard as the degree of fault involved. Medieval man could more easily foresee what his own strength might do, or that of his horse.\(^{36}\) But speculation should be based upon the procedural possibilities.\(^{37}\)

In a *contra pacem* writ brought against two defendants in 1290, Milsom found an exception to the absence of a special plea of accident. As usual the court did not reveal any *contra pacem* wrong: the plaintiff alleged that while the defendants were guests in his house they caused him harm by foolishly allowing a candle to burn unwatched. The defendants pleaded accident and the special plea was put to the jury. Milsom could find no satisfactory answer to the question of why no special pleas of accident occurred after 1290 except that there is yearbook evidence that around that period teachers were telling their students not to plead accident. Unfortunately, reasons for the advice were not given.\(^{38}\) In any event, Milsom states that,

> [I]t . . . seems likely that accident was not irrelevant in the yearbook period, but had been pushed back into the general denial in trespass. It would then be discussed before the jury at *nisi prius*, and was of no interest to pleaders or their reporters.\(^{39}\)

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\(^{33}\) Id. at 265.

\(^{34}\) Id. at 269.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Note that this explanation for the possible strict liability of trespass actions is different from the explanation of theory A which asserts that it resulted from concentration on the appeasement of the victim.

\(^{38}\) Id., supra, note 23 at 254.

\(^{39}\) Id. at 255.
To support this statement Milsom mentions a 1368 case wherein the jury considered fault even though it was not alleged in the pleadings. The defendant pleaded “Not Guilty” to a writ of trespass *vi et armis* for burning the plaintiff’s house. The jury found that the fire started by accident and spread, and judgment was given for the defendant. Over three hundred years later the same haphazard throwing of fault to the jury is found in a 1695 action for assault. The defendant shouted a warning to the plaintiff when his horse bolted but the plaintiff didn’t move. The defendant pleaded in justification i.e. that his act was lawful, but was found guilty because his warning did not amount to a justification. The report of the court, however, mentioned that if he had pleaded “Not Guilty” to the general issue and given these facts in evidence he would have been found not guilty. Milsom concludes,

...juries were left to struggle with the question [of fault] as best they could...

Fault in trespass *vi et armis* so obvious a question to us, seems therefore to be another of those areas which were long protected from systematic thought by the primary of the general issue.

Walker supports Milsom’s theory that fault was considered in adjudication and specifically with respect to the insane. He quotes from the tenth century laws of Aethelred:

...if it happens that a man commits a misdeed involuntarily, or unintentionally, the case is different from that of one who offends of his own free will, voluntarily and intentionally; and likewise he who is an involuntary agent of his misdeeds should be entitled to clemency and better terms owing to the fact that he acted as an involuntary agent.

Further support comes from the *Legis Henrici Primi* which are believed to be statements of customs which survived the Norman Conquest. Winfield in his 1926 article, “The Myth of Absolute Liability,” cites a series of laws from *Legis Henrici* which formally support the concept of absolute liability. After quoting the laws, however, he adds the following comment:

If the passage stopped there, we should have good cause for saying that, so long as a man has done an act, the state of his mind when he did it is of small moment. But immediately after it is added that in these and the like cases, where a man intends one thing and a different thing occurs, ‘ubi opus accusatur, non voluntas’ the judges must fix a lighter compensation, according to the circumstances. We do not wish for one moment to deny that theoretical liability existed in the passages cited, but formal severity is constantly diluted by some such qualification as ‘The less you were in fault, the less you pay.’

Note that Winfield’s quotation from the laws of Henry I reflects a theory different from Milsom’s to the extent that it accepts the imposition of
liability without fault but finds that fault is considered in the assessment of damages while Milsom indicates that a lack of fault might have prevented the imposition of liability in the first place. From either approach, though, the conclusion is warranted that the rule of absolute liability did not control the practice of the early English courts.

Returning to the relationship between trespass and case, it becomes important to highlight the original lack of substantive difference in the two actions to show that it is inaccurate to state that originally fault was considered in trespass on the case while not in trespass vi et armis, as Theory A would lead one to believe. There was no initial separation concerning fault between trespass and trespass on the case but rather a difference in how fault was considered. In trespass on the case, the writs set out fault as a positive part of the case, e.g. that the defendant acted negligently or that he had failed to live up to a duty. With trespass, however, because of the artificiality of the pleadings, because of the suggestion of deliberate wickedness, the court could not hold the plaintiff to proof of his formal allegations. The pleadings became a skeletal assertion that the defendant had caused harm and the defendant's "Not Guilty" came to mean "I did not do it." If the defendant had done it but without fault it was for him to show accident to the jury. Ultimately, this formal artificiality in the pleadings of trespass vi et armis, which obscured the fact that fault was a circumstance considered by the jury though not pleaded by the plaintiff, came to dictate the reality. As soon as lawyers and judges found it important to distinguish trespass and trespass on the case for procedural reasons, the element of fault, so obvious a part of trespass on the case and so obscure a part of trespass vi et armis became a good point of distinction. Thus it came to be thought that fault had to be shown to establish trespass on the case while it did not have to be shown to establish trespass vi et armis, and that trespass vi et armis was an offence of strict liability.

Milsom describes the ultimate problem as follows:

The contra pacem fiction did its damage long after it had done its useful job: it excluded from the formalities of the plaintiff's case any genuine statement of fault, so that fault ceased to be an ingredient of his case.  

In light of the foregoing, it is worthwhile to examine the origins of the common law rule concerning the tortious liability of insane persons. This examination will reveal how these origins caused a perversion of the law which even now has been only partially erased in Canada while not at all in the United States.

II. THE ORIGIN OF THE INSANITY RULES IN TORTS

If the law is sometimes complex and if psychiatry is sometimes obscure, the area where these disciplines meet and overlap may, understandably, be less than completely clear...[F]or a legal system to function, it must be more than merely logical and reasonable. It must be definite. It must be based on precedent. It must rely on rules. And so in the course of time all functioning legal systems

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46 Milsom, supra note 23 at 347.
Tort Liability of the Insane

become legalistic, and in the process some of the logic and reason gets left behind... \(^{46}\)

*Weaver v. Ward*\(^{47}\) (1616) is the earliest case to mention specifically the tortious liability of an insane person for assault or negligence, albeit only in *dicta*\(^{48}\). *Weaver* is of great importance to a discussion of the insanity rules in torts because it has been used by England, Canada, and the United States as a legal basis for holding the insane liable for their torts. Although England and Canada have advanced from such an absolute stand, the United States has not.

In *Weaver* two soldiers were skirmishing in a military exercise. Ward involuntarily wounded Weaver when Ward fired his musket. Judgment was given for the plaintiff on the ground that the accident was not inevitable. Note that Ward did not plead insanity and thus anything said about insanity in the judgment is *dicta*. The often quoted portion of the two paragraph judgment which has come to direct the future course of an insane person’s liability for his torts reads,

... for though it were agreed, that if men tilt or turney in the presence of the King, or if two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatick kill a man, or the like, because felony must be done animo felonico: yet trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatick hurt a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass... except it may be judged utterly without his fault.

As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so it appeared... that it has been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.\(^{49}\)

For subsequent insanity cases to render an insane person liable for his torts on the basis of this *dicta* is unfortunate, not because the right of an insane person to make mistakes is greater than the victim’s right of compensation and not because fault should be the sole measure of liability, but because the reasoning of the decision is inconsistent, and it is contrary to the historical development of the law as seen through the perspective of either Theory A or Theory B.

The inconsistency of the reasoning is that on the one hand the court states that the defendant would escape liability if the wrong was judged to be “utterly without his fault,” while on the other hand it states that lunatics will be liable for their trespasses. If an insane person causes an injury from

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\(^{47}\) *Weaver v. Ward* (1616), Hobart 134; 80 E.R. 284.

\(^{48}\) *Cross v. Andrews* (1598), Cro. Eliz. 622; 78 E.R. 863 was an insanity case decided before *Weaver v. Ward* but dealt with the absolute liability of an innkeeper to keep safely the goods of his guest and is thus not relevant to our discussion of assault and negligence. Since the business was being carried on for the benefit of the lunatic he could not avoid responsibility.

\(^{49}\) *Weaver v. Ward, supra*, note 47 at 284.
the influence of his insanity rather than his will, is not the injury sustained "utterly without his fault?"

In addition, under either Theory A or Theory B Weaver furnishes a shaky basis for the common law rule. Theory A explains that although strict liability did apply to trespass actions in the thirteenth century, by the time of the Weaver decision in the seventeenth century it was disintegrating under the influence of the Church's concentration on moral blameworthiness and the development of commerce and industry.

That the Weaver court noted the possibility of inevitable accident as an excuse shows some reflection on the modification of the medieval rule of strict liability. Later cases, however, which relied on the lunatic dicta of absolute liability failed to recognize where Weaver was situated in this process of disintegration. Thus with every passing year the inconsistent reasoning provided even more of an insecure basis for the common law insanity rule. Two hundred years after Weaver was decided, Stanley v. Powell looked back on the same dicta of Weaver and concluded that the case stood, not for the perpetuation of strict liability, but for a principle that a man is not liable in trespass if the trespass is "utterly without his fault", thus using the case to support the conclusion that trespass is not actionable if it be neither intentional nor the result of negligence. Such an interpretation of Weaver would negative rather than reinforce the liability of lunatics for their torts.

Theory B would indicate that the use of Weaver as a basis for establishing a lunatic's liability in tort is the result of an insensitive reading of the law. As Milsom explains, the official formulations of the law were often different from the actual application of the law. Milsom describes early cases wherein the jury considered the matter of fault in trespass cases even though such was not a formal element in the case. That fault was considered at the time of the Weaver decision is stated by Holdsworth in his History of the English Law. While agreeing that Sir Francis Bacon accurately summed up the law of his day in his Maxims wherein he made a statement almost identical to the dicta in Weaver to the effect that lunatics were liable for their trespasses, Holdsworth added the important notation that in such cases "[t]he state might remit penalties." Thus for later cases to use the dicta to

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60 W.G.H. Cook expressed a similar idea in Mental Deficiency in Relation to Tort (1921), 21 Col. L.R. 333 at 335.
61 F. Bohlen expressed a similar opinion in his article, supra, note 12 at 16.
63 Bacon, Maxims Regula vii, Works (ed. Spedding) vii, 347 at 348, quoted in Holdsworth, supra, note 13 at 376-77: So if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course; but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished in the same as deeply as if he had done it of malice ... So if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof; but if he put out a man's eye, or do him like corporal hurt, he shall be punished in trespass.
64 Holdsworth, supra, note 13 at 376.
hold the lunatic liable without remitting the penalty constitutes an inaccurate reflection of the law. The current situation of juries regularly ignoring certain substantive laws such as the contributory negligence rule, lends further support to the probability that juries from the thirteenth century to the seventeenth century either ignored the strict canons of the law concerning lunatics through their assessment of damages (Winfield and Holdsworth) or that the matter of fault was openly left to the juries to decide although it was not a part of the plaintiff's case and it did not become part of the record (Milsom). In referring to the juries of the present day, Ulman says in his book, A Judge Takes the Stand,

... don't let any lawyer tell you that the law of contributory negligence is what I have just said it is ... For many years, juries have been deciding cases just as though there were no such rule of law. And all the time judges have been going on saying that there is. Anyone with open eyes ... can plainly see that on this point at least, the living law is jury-made far more truly than it is judge-made.56

To summarize, therefore, whether one looks at Weaver on its face alone noting the inconsistent reasoning, or through the eyes of Theory A emphasizing Weaver's place in the shift in legal principle from absolute liability to no liability without fault, or from the standpoint of Theory B concluding that Weaver is an inaccurate reflection of how the law worked in practice, Weaver is an inadequate basis for the development of a common law insanity rule and cases relying on its dicta are consequently tainted.

III. THE DEVELOPMENT OF THE INSANITY RULES IN CANADA

This section will be divided into two parts, intentional, direct torts represented by assault cases and unintentional, indirect torts represented by negligence cases. (Note that this division is just a perpetuation of what Milsom saw as an unnecessary and damaging division between trespass and trespass on the case). Because in Canada great weight is given to British decisions, these cases will be discussed to the extent that they have influenced the development of the Canadian law.

A. INTENTIONAL TORTS: ASSAULT

Taggard v. Innes (1862)57 is the earliest reported Ontario case concerning the tortious liability of the mentally ill. This assault case takes an even stricter position than Weaver. By allowing the plaintiff's demurrer to the defendant's plea of insanity, Chief Justice Draper held that insanity in whatever form and under whatever circumstances is not an answer to an assault action. Unlike Weaver the judge did not give even verbal recognition to the changing times. For authority Draper, C.J., cites Bacon's 300 year old Maxims58 which are identical to, and the basis of, the Weaver dicta concerning the insane. The Taggard decision is even more astonishing when

56 Winfield, supra, note 44. See accompanying text.
57 J.N. Ulman, A Judge Takes the Stand (New York: A.A. Knopf, 1933) at 31-32.
58 Taggard v. Innes (1862), 12 U.C.C.P. 77.
59 Bacon, supra, note 53.
one realizes that it was decided eleven years after the landmark case of *Kendall v. Brown* which supposedly marked the end of the strict liability principle of liability for trespass in the United States.

The same extreme insanity rule was established in England in the 1870 case of *Mordaunt v. Mordaunt* wherein Kelly, C.J., found that insanity was an insufficient defense to assault.

This hard line approach to the insane did not have the complete support of the English bench at this time, but it was not until years later that these more moderate views were accepted. In *Emmens v. Pottle* (1885) Lord Esher replied to a lawyer's assertion of the *Mordaunt* rule, "That depends on whether he is sane enough to know what he is doing." In the divorce action of *Hanbury v. Hanbury* (1892), Lord Esher had the opportunity to make his disapproval of the rule of absolute liability for the insane more explicit, but given the facts of the case his statement is mere *dicta*. The report states that he said,

... he was prepared to lay down as the law of England that whenever a person did an act which was either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law.

Given the lack of necessity coupled with his prudence, Lord Esher expressly refused to decide the reverse of this principle, i.e. whether insanity would be a good defense to charges of cruelty and adultery in a divorce action if the defendant because of his insanity did not understand the nature and consequences of his act. Accordingly, *Donaghy v. Brennan*, a new Zealand case decided in 1900, refused to follow Lord Esher's view and returned to the classical *Weaver-Bacon* stance that insanity is not a defense to trespass. Because Canada chose to follow *Donaghy v. Brennan* in allegiance to *Weaver* instead of the more forward looking views of Lord Esher, an examination of *Donaghy v. Brennan* will be helpful.

In *Donaghy v. Brennan* the defendant was acquitted of an attempted murder charge on the grounds that he was insane at the time of the shooting in that he did not understand the nature and quality of his act or know that it was wrong. The trial judge, ignoring all the textbook criticism of *Weaver*, said that with the exception of Lord Esher in *Hanbury* "no one has sug-
gested that *Weaver v. Ward* is in any way contradictory to the law of England. On appeal, the Supreme Court of New Zealand again ignored arguments that liability in trespass required fault. Chief Justice Stout concluded:

> It is not the function of this Court to say whether the common law of England should be altered; its business is to interpret and apply the law as it exists.

In addition to using *Weaver* and Bacon for support, the court relied heavily on the United States negligence case of *Williams v. Hays*, quoting Earl, J. as accurately stating the law:

> The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts except ... libel, slander, or malicious prosecution.

As will be discussed in detail in the comparative law section (Section IV) the judge in *Williams* does not actually apply to the facts of his own case this above stated principle. Thus for *Donaghy* to rely on *Williams* in support of such a rule illustrates a careless reading of the case.

The *Donaghy* decision came under severe criticism for ignoring the express holding in *Stanley v. Powell* in 1891 that for trespass to the person to be actionable it had to be the result of a voluntary act coupled with either intention or negligence. Sir Frederick Pollock said in criticism of *Donaghy*:

> Liability can be imposed in such a case only upon the obsolete theory that inevitable accident is no excuse.

Even in *Weaver* the court held that inevitable accident would provide a defense, and yet *Weaver* is the case from which the *Donaghy* court gets its support for holding the insane liable. Sir J.W. Salmond, then Solicitor General for New Zealand, agreed with Pollock’s criticism of *Donaghy*. He thought it was wrong in principle and felt the American rule in *Williams* was too absolute.

Turning back to Canada, *Stanley v. Hayes* (1904) demonstrates that at this point Canada was not very far ahead of New Zealand in its interpretation of the law. Boyd, C. opens his judgment with the memorable lines from *Weaver* and approves *Donaghy*. Instead of reviewing the law himself, he is satisfied with Chief Justice Stout’s evaluation in *Brennan* that the authorities cited by the defendant, e.g. *Stanley v. Powell*, discussed supra, and the concurring opinions of jurists and legal writers, are of no avail. As shown by the degree of criticism of *Brennan*, Stout, C.J.’s analysis of the

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60 *Id.* at 294.
61 *Id.* at 303.
law was neither accurate nor thorough. Instead of probing the merits of Brennan, Boyd, C. was satisfied to quote Stout, C.J.'s conclusion that "[i]t is not the function of the Court to say whether the common law of England should be altered; its business is to interpret and apply the law as it exists." As a result of Boyd, C.'s approach to the law, the mentally disturbed defendant in Stanley was held liable for burning the plaintiff's property. Perhaps a more analytically sound decision would have been forced upon Boyd, C. if the defendant's insanity had been more extreme; as it was, however, the judge was not convinced that the defendant was unconscious that he was doing wrong. By awarding damages on the low side perhaps he reached a point of actual justice in his case. Unfortunately, the decision left us with an adoption of the generalized hard line approach which could not guarantee justice in a more extreme case of insanity.

Thus with Weaver as its base, Canada established the general rule that insane persons are liable for their intentional torts. Though this rule has been modified today, judicial opinion has had to overcome the initial error of following Weaver instead of being able to develop freely without its inhibiting force. As will be discussed in more detail below, the method of reparation used by the courts is interesting: the initial court ignores the direct-indirect, intentional-unintentional dichotomy to establish a new rule, after which subsequent courts reimpose the old dichotomy over the new rule.

Although Slattery v. Haley (1922) is a negligence case rather than an assault case and although insanity is not alleged, it is necessary to discuss the case at this point since subsequent insanity and assault cases seeking to modify the old rule base their decisions on it.

In Slattery v. Haley the defendant suddenly became unconscious while driving his car as if suffering from a fit or a stroke. He ran into and killed a pedestrian. There were no prior attacks nor any earlier symptoms or warnings. The relatives of the deceased sued on the basis of negligence under the Fatal Accidents Act. As the Fatal Accidents Act gives a right to sue only when death results from a "wrongful act, neglect or default," the court concluded that a finding of intention was required to establish liability and that the defendant was not liable as he lacked the required intention. A decision put in these simple terms was all that was required to dispose of the case and would not have displaced the old insanity rule that insanity provides no defense in a trespass action. However, Middleton, J. in reaching his decision discussed the whole line of insanity cases and dismissed Weaver as bad law in light of the Stanley v. Powell decision. To discredit the applicability of Weaver, Donaghy and Williams to negligence situations, Middleton, J. quotes from Salmond who in referring to the Weaver dicta says,

These dicta are clearly sound in the case of intentional trespasses on a supposed justification. As to unintentional trespasses, however, they must be regarded as

73 Donaghy v. Brennan, supra, note 65 at 303, quoted in Stanley v. Hayes, supra, note 72 at 82.
75 Fatal Accidents Act, R.S.O. 1914, c. 151.
76 Id., s. 3.
based on the old and now obsolete idea that trespass is in all respects a wrong of absolute liability.\textsuperscript{77}

Middleton, J., thus partially discredits the \textit{Weaver} principle by considering it applicable to trespass but not to trespass on the case, to direct and intentional wrongs but not indirect and unintentional wrongs.

\textit{Wilson v. Zeron} (1941)\textsuperscript{78} concerns a direct, intentional wrong but it applied the \textit{Slattery} conclusions concerning unintentional wrongs. Zeron, an elderly man who required supervision because of his mental condition, struck and killed his caretaker, Wilson. The plaintiffs brought suit under the Fatal Accidents Act. Greene, J. found that because the Fatal Accidents Act requires intention as stated in \textit{Slattery} the action had to fail given the jury finding that Zeron was by reason of his mental illness incapable of appreciating the nature and consequences of his act. At this point in his judgment, which once again was sufficient for the disposition of the case, \textit{Weaver} could still be applied to assault cases which were not brought under the Fatal Accidents Act with its statutory requirement of intention. Greene, J. continued, however, to find further that the defendant could not have been held liable even in the absence of the Fatal Accident Act in light of Middleton's statement in \textit{Slattery} that where "lunacy of the defendant is of such an extreme type as to preclude any genuine intention to do the act complained of, there is no voluntary act and therefore no liability."\textsuperscript{79} Overlooked, however, is the fact that prior to making this statement in \textit{Slattery}, Middleton, J., had distinguished intentional from unintentional torts:

\begin{quote}
I think that it may now be regarded as settled law that to create liability for an act which is not wilful and intentional but merely negligent it must be shewn to have been the conscious act of the defendant's volition.\textsuperscript{80}
\end{quote}

By this subtle route of applying the \textit{Slattery} conclusion concerning unintentional trespass to a case of intentional trespass, the \textit{Wilson} court transformed the insanity laws of trespass. Although one can only speculate whether the wrongful application was a slip or a device to surmount the earlier hard line law perpetuated by continued reliance on \textit{Weaver}, the actual decision in \textit{Wilson} was legally sound given the statutory requirement of intention in the Fatal Accidents Act. In addition to being valid, it was a fair decision in light of the jury finding that prior to the attack Wilson knew and appreciated the danger that Zeron might cause him and that Wilson's conduct at the time of the attack was negligent. Thus, though principle was strained and proper reasons not necessarily given, a good solution was reached and the principle of liability in Canada for trespass became that an insane person could not be held liable if his insanity precluded an intention to do the act causing the injury, i.e. if it caused him not to know what he was doing.

\begin{itemize}
\item \textsuperscript{77} \textit{Slattery v. Haley}, supra, note 74 at 160.
\item \textsuperscript{78} \textit{Wilson v. Zeron}, [1941] O.W.N. 353.
\item \textsuperscript{79} \textit{Id.} at 354.
\item \textsuperscript{80} \textit{Slattery v. Haley}, supra, note 74 at 160.
\end{itemize}
Tindale v. Tindale (1949)\(^{81}\) shows signs of taking Canadian law two steps beyond the stage of requiring a simple intention to do the act by asking the defendant to know that the act was wrong. MacFarlane, J., adopts the test set out in an 1850 decision, *Pate's Case*, wherein it was stated that,

... you must have a disease of the mind, which makes the man, by reason of that disease of the mind, incapable of judging whether or not the act which he does at the time he does it is a wrong act for him to do.\(^{82}\)

MacFarlane, J., was unable to actually conclude that the mother who assaulted her daughter with an axe actually knew that her act was wrong at the time of the attack or was able to make a choice, i.e. whether it was even a voluntary act. But he concluded that the mother was liable to her daughter in damages because she had not discharged the burden of proof on her to show that she did not know what she was doing or that what she was doing was wrong. He was assisted in his conclusion by the belief that a mother has the responsibility of supporting her daughter anyway. As a result, though the case supports the principle that liability will not ensue if one didn’t know at the time of the act that the act was wrong even if one knew the nature and quality of one’s act, it doesn’t sufficiently delineate the distinction between knowing that an act is wrong and appreciating the nature and quality of one’s act to establish firmly the above principle in its positive form, i.e. that one will be liable only if one knew that the act was wrong as well as appreciated the nature and quality of the act.

This principle in its positive form was rejected in Canada in 1956 in *Phillips v. Soloway*\(^{83}\) leaving the Canadian law in its present form. Because *Phillips v. Soloway* relied on the English decision of *Morris v. Marsden* (1952)\(^{84}\) and rejected the Australian decision of *White v. Pile*\(^{85}\) (1950), it is necessary to look at these two decisions as well as their English predecessor *White v. White*\(^{86}\) (1949).

*White v. White* is an interesting case because the judges came to no agreement on an insanity test and in fact expressed in one case the most conservative as well as the most liberal possibilities. With such diversity later cases could find support for whatever position they were seeking to promote.

In *dicta* Lord Denning expressed the hard line approach to trespass:

In the case of torts such as trespass and assault it is also settled that a person of unsound mind is responsible for wrongful conduct committed by him ... even if the mental disease was such that he did not know what he was doing or

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\(^{82}\) *Pate's Case* (1850), 8 St. Tr. (N.S.) 1 at 48-49, quoted in *Tindale v. Tindale*, supra, note 81 at 365-66. Because this was a criminal case the test had not been cited in previous tort cases.


\(^{85}\) *White v. Pile* (1951), 68 W.N. (N.S.W.) 176.

that what he was doing was wrong. The reason is that the civil courts are concerned, not to punish him, but to give redress to the person he has injured.\textsuperscript{87}

For authority he cites Weaver, Bacon's Maxims, Taggard, Mordaunt, Williams, and Donaghy and applies his conclusion to negligence as well.

The case to be decided in \textit{White v. White} was not one of trespass \textit{per se} but rather one of cruelty, the alleged grounds of a pending divorce action, and the same issue under consideration in \textit{Hanbury v. Hanbury}.\textsuperscript{88} As in \textit{Hanbury}, the court concluded that insanity was not a satisfactory answer to the allegation of cruelty though the court split on the actual reasons. Lord Denning, following his conservative stance on trespass, said that subject to the possible qualification of the injured party being aware that the defendant was of unsound mind, insanity of whatever degree could afford no defense to a charge of cruelty. Lord Asquith and Lord Bucknill went far to the other side stating that insanity could be a defense if it was of such a degree as to meet the criminal law test for insanity set out in the \textit{M'Naghten} case.\textsuperscript{89} However, in \textit{White v. White}, as in \textit{Hanbury}, the court concluded that the defendant knew what she was doing and knew that what she was doing was wrong. As in \textit{Tindale v. Tindale}, the Ontario case decided a year earlier, the facts were not such as to force the court to choose between the competing theories or to require a precise differentiation between the two strands of the \textit{M'Naghten} test, i.e. between knowing one's act is wrong and appreciating the nature and quality of one's act. In both \textit{White v. White} and \textit{Tindale}, the pressure on the court was not to allow the insanity plea to destroy a finding of responsibility — in \textit{White v. White} because such would force the husband back into an intolerable situation with his insane wife, and in \textit{Tindale} because such would deny the child damages from her mother. Given the clear pressure to find responsibility in these two cases, it may be fortunate that the facts were easy enough to allow the courts to do so readily without setting down any binding principles. Such principles might better develop in a court where the interests were more evenly balanced between the victim and the insane as in \textit{White v. Pile}, Morriss v. Marsden and Phillips v. Soloway, although no case as yet has presented the ultimately balanced factual situation of the victim sustaining very serious physical injuries by a non-relative who knew the nature and quality of his act but did not know that his act was wrong.

\textit{White v. Pile},\textsuperscript{90} an Australian case, involved a trespass action for assault wherein the defendant, described at trial as a hebephrenic schizophrenic, assaulted the plaintiff under the delusion that the plaintiff was his wife. The injuries sustained were more emotional than physical; physically the plaintiff had only a few bruises but her nerves were severely disrupted by the attack. As O'Sullivan, O.C.J. had no binding precedent to decide the case for him, he reviewed the judicial authority and relied heavily on the

\textsuperscript{87} \textit{Id.} at 351.
\textsuperscript{88} \textit{Hanbury v. Hanbury}, supra, note 63.
\textsuperscript{89} \textit{M'Naghten's Case} (1843), 10 Cl. & Fin. 200; 8 E.R. 718.
\textsuperscript{90} \textit{White v. Pile}, supra, note 85.
judgments of Lords Asquith and Bucknill in White v. White as well as textbook commentators. He concluded,

... it seems to me that the general current of opinion in more recent times favours immunity in this class of action where the mental disease is such, at any rate, as to bring the case within rules analogous to the M'Naghten rules as applied in the criminal jurisdiction.91

He adds further on,

To my mind... it is more in accord with reason and the common sense of the thing to allow immunity from the civil consequences of the tort of assault committed by an insane person where the nature and degree of his insanity are such as would establish a defense if the assault were the subject of a criminal charge.92

Respect is due this liberal judgment since, unlike the situation in White v. White, medical testimony established here that the defendant knew the nature and quality of his act but did not know it was wrong. It is only this kind of factual situation regarding the defendant's state of mind that will force judges to face carefully the distinction between the two branches of the M'Naghten test and to determine the weight each should be given in a civil action for assault. The respect due the decision on this front however, should be tempered by the fact that the woman was not physically harmed; the consequent pressure on the court was to be sympathetic to the plight of the defendant, and the interests of the parties were thereby not perfectly balanced. It should be underlined that White v. Pile is the only decision wherein the M'Naghten test has been applied in a civil action for assault.

The fact situation in Morriss v. Marsden,93 a case decided in England two years later, is almost identical to White v. Pile and yet the court refused to apply the M'Naghten test. Because the Morriss decision was adopted in Canada in Phillips v. Soloway (1956) it is worth tracing the disconcerting route by which Morriss came to the conclusion that an insane person would be liable for his torts if he knew the nature and quality of his act even if he did not know that what he was doing was wrong. Even recognizing that White v. Pile was decided in a lower court in Australia, it is difficult to understand how the Morriss court could neglect to mention a decision so directly on point.

Instead of looking to White v. Pile for guidance the court relied heavily on the divorce action of Astle v. Astle (1939).94 Because the Astle court refused to adopt the popular position that insanity could never provide a defense to a change of cruelty in a divorce action, Judge Henn Collins allowed the respondent to amend his answer to assert that he had a disease of the mind and did not know the nature and quality of his acts. Collins, J., allowed the divorce, however, upon the finding that the husband knew the nature and quality of his acts, i.e. that he knew he was uttering threats

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91 Id. at 179.
92 Id. at 180.
93 Morriss v. Marsden, supra, note 84.
against his wife. There is no evidence that the court was confronted with the harder situation wherein the person knows the nature and quality of his acts but does not know that what he is doing is wrong. Thus the relationship of the two states of mind was not discussed in Astle, and it is unlikely that Collins, J., directed his mind to the problem.

With this background it is distracting to see Stable, J., the judge in Morriss, use Astle to support his conclusion that to be held liable it is not necessary for him to know that what he is doing is wrong. Stable, J., points to the fact that Collins, J. in allowing the respondent to amend his pleadings mentioned only the matter of not knowing the nature and quality of the act and said nothing of not knowing that the act was wrong. From this omission he concludes that Collins, J. also believed that liability would lie if one knew the nature and quality of one's act even if he didn't know what he was doing was wrong. Stable, J. failed to recognize, however, that Collins, J.'s main intention was to establish the bare rule that insanity could be a defense in a divorce court and not to draw fine distinctions between varying states of mind. Henn Collins, J.'s words were,

If there be a degree of insanity which affords an answer to a matrimonial suit, how is it to be safely measured except by the test applied in all other courts.\textsuperscript{9a}

Because Collins, J. had been referring to the \textit{McNaghten} case just prior to the above stated quotation, it is possible that in referring to "other courts" he was including criminal courts and was thus adopting the entire \textit{M'Naghten} test though his words had only mentioned half of it. If "other courts" refers only to civil courts in England then since, as we have seen above, the English civil courts had not decided the question of the relationship between knowing the nature and quality of an act and knowing that the act is wrong, Collins, J. was clearly not deciding the point. Thus for Stable, J. in Morriss to rely on Collins, J.'s judgment in Astle to decide that knowledge of wrongdoing is immaterial is reading more into the Astle decision than is actually there. Perhaps the end result in Morriss was more just as it was than if it had applied the full \textit{M'Naghten} test pursuant to \textit{White v. Pile}; it would have been more convincing, however, in the eyes of the contemporary jurisprudence of purposive legal reasoning if Stable, J. had given sound policy reasons for such a decision instead of relying on a judgment whose support for his conclusion is obscure and ignoring the well reasoned case of \textit{White v. Pile} which was directly on point.

Of all the cases thus far reviewed, the Canadian case of \textit{Phillips v. Soloway} (1956)\textsuperscript{96} is perhaps the most balanced in that the interests of the two parties were almost equal. Without the slightest provocation or assumption of risk, the plaintiff was attacked with a knife so violently that he had to have his eye removed; his hands were also badly cut and injured. The defendant, on the other hand, was extremely ill. Medical experts agreed that he was depressed and delusional and that he had repeatedly attempted suicide. At the time of the attack, however, he was not under psychiatric\

\textsuperscript{95} \textit{Id.} at 970-71.

\textsuperscript{96} \textit{Phillips v. Soloway}, supra, note 83.
care and he was thought to have recovered from his problems. Chief Justice Williams was obviously not bound by the Morriss decision, but without giving supporting reason he followed the Morriss decision concluding that the M'Naghten rules were not applicable to a civil action for assault. He said,

It makes no difference whether the defendant was or was not capable of knowing that his act was wrong . . . Knowledge of wrongdoing is an immaterial averment, and that, where there is the capacity to know the nature and quality of the act that is sufficient although the mind directing the hand that did the wrong was diseased.\textsuperscript{97}

Since Williams, C.J.G.B. expressed the opinion that the defendant did know that his act was wrong, perhaps the ultimate test will have to come in a fact situation wherein the defendant clearly knew the nature and quality of his act, but clearly did not know that what he was doing was wrong. At present, however, Phillips v. Soloway is the last civil assault/insanity case on record in Canada.

B. UNINTENTIONAL TORTS — NEGLIGENCE

There are few Canadian or English decisions dealing with the liability of insane people in negligence actions.

\textit{Slattery v. Haley} (1922),\textsuperscript{98} discussed above, is Canada's earliest decision in the area. To review the facts, the driver of a car suddenly and without warning lost consciousness and his car killed a pedestrian. Because this case is about a sudden loss of consciousness rather than insanity and because the action was brought under the Fatal Accidents Act, it is not determinative of the Canadian common law on the subject. Even so it provides the rough beginnings of that law because the judgment discusses insanity cases and draws helpful conclusions in \textit{dicta}. Middleton, J., says

Upon the precise point, the liability of a lunatic for an unintentional wrong, there is, as put by Salmond, 'no adequate English authority,' but the views of text-writers are clear. Salmond himself says, 5th ed., p. 75: 'If . . . the lunacy of the defendant is of so extreme a type as to preclude any genuine intention to do the act complained of, there is no voluntary act at all, and therefore no liability.'\textsuperscript{99}

\textit{Baron v. Whalen} (1938),\textsuperscript{100} on the other hand, deals directly with insanity; the case arose out of an automobile accident to which the defense was insanity. The defendant was suffering from arteriosclerosis at the time of the accident and was afterwards sent to a mental institution. Baron held the defendant liable even though he was judged insane by the criminal standard, thus establishing the rule that for negligence actions, as with assault actions, the insanity required to exempt one from civil liability is greater than the insanity required for criminal immunity, although the exact extent of the civil standard was not defined.

\textsuperscript{97} Id. at 579.
\textsuperscript{98} \textit{Slattery v. Haley}, supra, note 74.
\textsuperscript{99} Id. at 162.
\textsuperscript{100} \textit{Baron v. Whalen}, [1938] 1 D.L.R. 787.
In Buckley and the Toronto Commission v. Smith Transport Limited, the most recent negligence-insanity case in Canada, the test was carried closer to the M'Naghten test although phrased quite differently. While driving a tractor-trailer the defendant became seized with the insane delusion that his transport unit was under a remote electrical control system headquartered in his employer's office. Under the influence of this delusion he believed he was unable to stop or control his vehicle when he came to an intersection and collided with the plaintiff's streetcar. At the time of the collision, Buckley was suffering from syphilis of the brain and he died one month later. He had had, however, no prior warning of the insanity. After approving the test for responsibility set out in dicta in Slattery (that the act must have been "the conscious act of the defendant's volition"), Roach, J. carried the test further by describing it in the following terms:

In my opinion the question of liability must in every case depend upon the degree of insanity . . . Did he understand the duty to take care, and was he, by reason of mental disease, unable to discharge that duty? Though he statements it in the terms of "duty to take care" and ability to "discharge duty" instead of knowledge of wrongdoing, it seems that Roach, J. has reached a test which is similar in result to the full M'Naghten test. If a person is unable to appreciate and discharge the duty he is under to maintain control of his car, it is similar to not knowing that one's actions are wrong.

If the equation is accurate, the next obvious question is whether it makes sense to use only the first half of the M'Naghten test for direct, intentional torts such as assault while using both halves for indirect, unintentional torts such as negligence. Note the following similarities: in both cases damage results; thus if the concern of tort liability is compensation no distinction should be drawn. In both cases the insane defendant is blameless; therefore if culpability is the concern no distinction should be drawn. Since in both cases there are difficult problems of proving insanity, evidentiary problems do not support a distinction. History provides one explanation for the illogical distinction. As discussed supra, it is commonly believed that trespass was inherently a stricter offense originating with notions of strict liability; trespass on the case, on the other hand, is commonly believed to be an inherently less strict offense which originated with notions of moral blameworthiness. Given the above mentioned similarities, it may be apparent now that Milson was right when he said that the two wrongs of trespass and trespass on the case should have been united in 1504 if not in 1370 instead of being allowed to perpetuate an artificial dichotomy.

The only forward direction that can be taken within the present legal framework is to unite the two causes of action by adopting a similar test of liability for both negligence and assault, whether that be the full M'Naghten test, half of it or something entirely different. Because it is the view of this study, however, that none of the above alternatives will provide an adequate solution, Section VI of this paper is devoted to the discussion of an alter-

102 Id. at 805-6.
native scheme of an entirely different nature. In order to give deeper understanding of the reasons why such a radically new approach to the problem is needed, our attention will shift to a brief comparison of two different approaches taken to the problem within the present legal framework — that of the United States and that of the civil law jurisdictions — after which will follow a discussion of the underlying policy reasons advanced for choosing one system over another and an evaluation of which of those policies should be preserved and why the meritorious policies cannot be fully realized within any one of the three divergent schemes as long as the present legal framework is maintained.

IV. A BRIEF COMPARISON OF THE RULES IN THE UNITED STATES AND CIVIL LAW JURISDICTIONS

To recapitulate, in Canada an insane person is liable for his intentional torts if he understands the nature and quality of his act although it is not necessary that he know that the act is wrong. As well, an insane person in Canada is liable for his unintentional torts if he knows what he is doing is wrong, i.e. if he appreciates the duty upon him to act in a particular way and is able to discharge that duty. Generally speaking, the United States' common law is stricter than the Canadian common law while the civil law in both jurisdictions is more lenient. As will be seen in subsequent sections either approach necessitates unwarranted sacrifice.

A. THE UNITED STATES

1. INTENTIONAL TORTS — ASSAULT:

Although there are some jurisdictional variations, the consensus of opinion in the United States courts is that the law imposes upon the insane the same standard of liability that rests on the sane, i.e. for assault the only requirement is an intention to commit the act which caused the injury. In conformity with this principle, it is generally agreed that insanity might be introduced to show the lack of the requisite mens rea for those torts for which malice is a particular element of the tort such as libel and slander (normally in the instance of qualified privilege), malicious prosecution, fraud or deceit. The American courts dispose of the Canadian question of


whether the defendant understood the nature and quality of his act as having no legal consequence. Factors that can be introduced as possible defences are contributory negligence, assumption of risk or consent to the assault but these are defences which are not peculiar to the insane; they are the natural result of the general rule that the insane shall be treated like the sane. In defiance of these defences, however, courts have consistently held that a custodian of the insane is not chargeable with contributory negligence or with inviting or consenting to the risk by virtue of carrying out his duty of managing the insane. The only restriction on the general rule is that the insane shall not be held liable for punitive damages.

The following case exemplifies the typical judicial reasoning in the situation of assaults. In *McGuire v. Almy* (1937) the plaintiff nurse was assaulted by the insane defendant when she tried to quiet the defendant during a violent spell. In response to the defendant's plea of insanity the court stated:

... where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable ... But the law will not inquire further into his peculiar mental condition with a view to excusing him if it would appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it.

Thus under *McGuire* an insane person need only intend to strike the victim in order to be held liable. In other words he need only direct his mind toward the act of striking the victim; further concern for the defendant's understanding of the attack does not exist. The court recognizes that the rule is of uncertain stability but justifies it in the following manner:

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal mediaeval conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault. Notwithstanding these criticisms, we think, that as a practical matter there is strong force in the reasons underlying these decisions. They are consistent with the general statements found in the cases dealing with the liability of infants for torts ... Fault is by no means at the present day a universal prerequisite to liability ... Finally, it would be difficult not to recognize the pervasive weight of so much authority so widely extended.

The later decisions of *Van Vooren v. Cook* (1947), *Mullen v. Bruce*
(1959) and Albicocco v. Nicoletto (1960) support this same principle of strict liability. To the very large extent that these decisions have their grounding in the Weaver dicta, they are subject to the criticism of Weaver discussed in Section II. As will be suggested in the next section the policy reasons for such a Weaver-like stance in McGuire run deeper than those expressed above, deeper than an allegiance to the outmoded concept of absolute liability.

2. **UNINTENTIONAL TORTS — NEGLIGENCE:**

In the field of negligence the law is equally strict in that it requires the insane to conform to the standard of the reasonable man.

An early case of widespread recognition and approval is the fascinating case of Williams v. Hays. Because it was relied on in the New Zealand case of Donaghy v. Brennan, which was in turn relied on in the Canadian case of Stanley v. Hayes, the inconsistency in the judgment will be discussed in detail. The defendant in Williams v. Hays was the captain of a brig who was required to be on deck constantly for two days because of severe storms. When the storms subsided he went to his cabin leaving the mate and crew in charge. Before long the mate called him back because of a broken rudder which left the brig drifting aimlessly. The defendant refused to believe the vessel was in trouble and refused the assistance of two tugs. As a result the brig drifted ashore and was totally destroyed. In response to a suit in negligence for damages by the other co-owners of the vessel, the defendant pleaded insanity, i.e. that from the time he went to his cabin until he found himself on shore he was unconscious. The history of the case is complex in that it went from the trial court to the court of appeals under Mr. Justice Earl in 1894, back to the trial court, and finally back to the court of appeals under Mr. Justice Haight in 1899. Many contrasting and conflicting statements were made about the liability of the insane throughout these judgments. As will be seen, the case could have been used to support the Canadian position in negligence cases, but has instead been cited in the United States to support the view that the insane are under the same duty of care in negligence actions as are the sane.

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112 Mullen v. Bruce, supra, note 103.
113 Albicocco v. Nicoletto, supra, note 103.
114 Williams v. Hays, supra, note 68. The citations for all the different levels are as follows:
—1st report of Williams in N.Y.S.C.: (1892), 64 Hun. 202 (N.Y.); 19 N.Y. Supp. 61 (Sup. Ct.)
—1st appeal: (1894), 143 N.Y. 442; 38 N.E. 449.
—2nd appeal: (1899), 157 N.Y. 541; 52 N.E. 589.
115 Donaghy v. Brennan, supra, note 65.
On appeal from the jury direction at trial where the trial judge stated that the insane are not under the same duty of care as the sane, Earl, J. held that they were:

The general rule is that an insane person is just as responsible for his torts as a sane person . . . the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage.118

After citing cases in support of this rule, Earl, J. proceeds:

There can be no distinction as to the liability of infants and of lunatics, . . . between acts of pure negligence and acts of trespass. The ground of liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; I have found no case which makes the distinction.119

Though Milson would agree with Earl, J. that there should be no distinction made between actions of trespass and negligence (trespass on the case), he would disagree with Earl, J.’s conclusion that fault, or the mental condition of the actor, was not a factor to be considered. Even those holding allegiance to Theory A would disagree with this conclusion because in recognizing a fundamental distinction between trespass and trespass on the case they would assert that fault was always a necessary element for liability in negligence especially since the landmark case of Brown v. Kendall (1857)120 decided some forty years earlier.121

Earl, J.’s decision is subject to the additional criticism that his reasoning is inconsistent.122 After making the above cited general statements of law that the law looks to the injury and not the mental state of the actor, he makes the following statement which allows the court to relieve this particular defendant in this particular situation:

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.123

Thus in one part of his judgment Earl, J. states that fault is not relevant while in the other he states that it is. When the case was returned to the trial

118 Williams v. Hays, supra, note 68.
119 Id. at 451.
120 Brown v. Kendall, supra, note 18.
121 For support of this theory A criticism see Bohlen, supra, note 12 at 24-25; Wm. Hornblower, Insanity and the Law of Negligence (1905), 5 Col. L. Rev. 278 at 294.
122 For support of this view see Bohlen, supra, note 12 at 25; Casto, The Tort Liability of Insane Persons: A Critique (1972), 39 Tenn. L. Rev. 705 at 718-19.
court wherein a finding was given for the plaintiff, the case was again appealed on the ground that the jury did not consider whether the effort of the defendant to save the vessel was the cause of the insanity. Mr. Justice Haight supported Earl, J.'s statement concerning fault saying.

... there is no obligation to perform impossible things.\textsuperscript{124}

Though the decision probably achieved justice in the particular circumstances of the case, it is unfortunate that the reasoning was inconsistent and that subsequent cases have relied on the general hardline statements which do not in fact support the actual outcome of the case. It would have been more consistent with the outcome if subsequent cases had centered their attention on Mr. Justice Haight's statement that "there is no obligation to perform impossible things" and concluded, as in the Canadian case of \textit{Buckley and the Toronto Commission v. Smith Transport Limited},\textsuperscript{125} that where it is impossible for an insane man to realize the duty of care on him or discharge it, he should not be held liable.

In \textit{Sforza v. Green Bus Lines Inc.}, (1934)\textsuperscript{126} the defendant company was held liable in damages for the negligent driving of its employee even though all agreed that the employee was insane at the time of the negligence. Mr. Justice Pette relied heavily on \textit{Williams v. Hays} and without analysis accepted the proposition that no distinction should be made between trespass and negligence as well as the conclusion that an insane person is liable to maintain the same standard of care required of a sane person. Once again the court came to what most would probably agree was the fairest solution. Because the finding of liability meant that the victim could receive compensation from the defendant company (not the insane person himself in this situation) the loss was distributed according to who was best able to pay. The company could pass on the loss to the public while the individual victim could not. It is disconcerting, however, that en route to this justice the sanctity of sensitive analysis was sacrificed. Twenty-seven years later in \textit{Johnson v. Lambotte} (1961)\textsuperscript{127} the same uncompromising principle was applied to a paranoid schizophrenic who after escaping from the hospital and stealing a car collided with the plaintiff's car. As the insane defendant himself, rather than a company, was called on to pay the compensation, it is less likely that the strict principle achieved justice in this case.

The only United States case which has modified the strict rule of liability established in \textit{Williams v. Hays} is \textit{Breunig v. American Family Insurance Company},\textsuperscript{128} a Wisconsin case decided in 1970. Although the court found for the plaintiff on the ground that the defendant was aware of her insanity in advance, Chief Justice Hallows softens the old rule in \textit{dicta}:

\begin{quote}
We think 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
\end{quote}

\textsuperscript{124}\textit{Williams v. Hays} (1899), 157 N.Y. 541 at 548.

\textsuperscript{125}\textit{Buckley and the Toronto Commission v. Smith Transport Ltd.}, supra, note 101.

\textsuperscript{126}\textit{Sforza v. Green Bus Lines}, supra, note 117.

\textsuperscript{127}\textit{Johnson v. Lambotte} (1961), 363 P. 2d 165.

by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances. These are rare cases indeed, but their rarity is no reason for overlooking their existence and the justification which is the basis of the whole doctrine of liability for negligence, i.e. that it is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident.\textsuperscript{129}

While the \textit{Breunig} decision is similar to the Canadian decision of \textit{Buckley}, it does not go as far because it bases its reasoning on forseeability rather than on the extent of the insanity.\textsuperscript{128} Under the \textit{Breunig} decision, if a person had had a history of insanity or any reason to suspect his incapacity, he would be held liable under the strict rule of \textit{Williams v. Hays}. \textit{Breunig} serves only to carve out a piece of salvation for those who are suddenly overcome by insanity.

The Restatement (Second of Torts supports the \textit{Williams v. Hays} view. Section 283B reads,

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.

The faulty reasoning underlying this rule originating in \textit{Weaver}, solidified in \textit{Williams v. Hays} and perpetuated by the determined adherence of subsequent cases is probably less the product of incapable judges than the product of a conscious policy decision to ignore logic and general rules of tort liability in the situation of the insane. The public policy underlying the strict rule will be discussed and evaluated in Section V.

B. THE CIVIL LAW

Civil law jurisdictions stand at the other end of the spectrum from the United States; as a general rule they do not hold the insane liable for their torts. Perhaps the underlying reason for the difference is that the common law tends to look at the injury itself while the civil law looks to the cause of the injury.\textsuperscript{131} \textit{Yancey v. Maestri} (1934),\textsuperscript{132} the first Louisiana case to deal with this problem in the interpretation of their civil code, sets out the following reasons for the civil law rule:

The civil law rule is based upon the theory that recovery in tort cases is allowed upon the ground that the wrongdoer did something, or failed to do something, that ordinary care, prudence, and foresight dictated that he either should or should not have done under the circumstances, but that, since an insane person is not a rational being, he is incapable of appreciating right from wrong or distinguishing carefulness from carelessness, and therefore, his acts are looked upon as inevitable accidents.\textsuperscript{133}

This theory of liability reflects a principle of Roman law that has been carried forward into all modern civil law jurisdictions.

\textsuperscript{129} \textit{Id.} at 624.


\textsuperscript{131} \textit{Yancey v. Maestri} (1934), 155 So. 509 (La. App.) at 515.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 515.
The primary Roman statute dealing with torts was *Lex Aquilia*. Following the statement that injury is a prerequisite to an Aquilian (tort) action the Digest, a documentary written about three and one-half centuries later says:

_We interpret *injuria* as damage caused culpably even by one who did not intend the injury . . . Hence the question whether there will be an aquilian action for damage by a lunatic, Pegasus denies it: 'What fault (*culpa*) can there be in one who is not in his senses?' Which is quite true. So the Aquilian action fails as it would if an animal had done the damage — or a tile had fallen. And the same must be said if a child does the damages._

Although all civil law jurisdictions have adopted this position concerning the insane they have not all done so in the same manner. Some jurisdictions like France and Louisiana have declined to carve out a special rule for the insane; instead the principle is deducted from the general code provision. Though wording may vary between jurisdictions the general tort provision in civil law jurisdictions reads,

_Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it._

Other civil law jurisdictions have made the rule explicit as exemplified by the German Civil Code:

_One, who in a state of unconsciousness or in a state of impairment of the mental faculties, excluding the free will, injures another, is not answerable for the injury._

Other jurisdictions with explicit provisions are Argentina, and Japan. The situation in Quebec falls midway between the above two possibilities. Though there is no special provision dealing with the insane, the general tort provision is more specific than most in the mental element required to establish liability and clearly excludes from responsibility those insane persons who are unable to distinguish right from wrong: Article 1053 of the Civil Code of Quebec reads:

_Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill._

In fairness to the victims, the civil law jurisdictions have generally provided that the guardians of the insane be liable if they were negligent in

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184 This translation is taken from Thayer, *Lex Aquilia* (Cambridge: Harvard University Press, 1929) Digest IX, 2.5 at 1-2, quoted in Harris, _supra_, note 9 at 364 and Yancey v. Maestri, _supra_, note 131 at 514. For further support of this principle being the Roman position see: Sanders, *Institutes of Justinian* (1st Am. ed., 1876) at 425; Cook, _supra_, note 50 at 349; Ague, _The Liability of Insane Persons in Tort Actions_ (1956), 60 Dick. L. Rev. 211 at 211.

185 See French Civil Code, art. 1382; Louisiana Revised Civil Code, art. 3521.

186 German Civil Code, art. 827, translated by Walter Loewy, 1909.

187 Argentine Civil Code, art. 1110; Japanese Civil Code, art. 713.

188 Civil Code of Quebec, art. 1053. For a case specifically supporting the principle that the insane will not be held responsible for their acts see: Busby v. Ford (1893), 3 C.S. 254; for general support of the principle of no liability without fault see Bertrand v. Anderson, [1963] B.R. 523; Robertson v. Penniston, [1968] B.R. 826.
their supervision. In fact some jurisdictions have gone so far as to pro-
vide that though the insane person is not liable, his estate should contribute
to the compensation of the victim if it is equitable to do so. Such a provision
is seen in the Swiss Federal Code of Obligations:

Where it is equitable the court may decide that even a person under incapacity
is liable to partial or full compensation for damage which he has caused.

The German Civil Code contains a similar provision:

One, who ... is not answerable ... for an injury caused by him, shall never-
theless, in so far as the indemnity for the injury cannot be obtained from a
third party, who has the duty of control, render indemnity for the injury to such
extent as fairness, according to the facts and circumstances of those concerned,
requires indemnity, provided that he be not deprived of the means of which
he is in need for his maintenance according to his status, as well as for the
fulfillment of the legal obligations for the maintenance of others.

Delivering justice on a case by case basis, on the basis of what seems fair
according to the circumstances is foreign to our common law way of think-
ing which places inordinate faith in the rule of law. The common law is
afraid to be run by discretion; it prefers to submit only to neutral principles.
Ironically, however, a sensitive look at cases demonstrates that judges and
juries usually do mold the “neutral principles” to what seems just in the
particular cases. Such adaption was clearly shown in Williams v. Hays, as
well as in the Ulman passage showing how present day juries ignore the
rule of contributory negligence. If it could be shown that justice was ob-
tained equally under both systems, the civil law system would still have the
greater virtue of being more forthright in its application of principles. Instead
of achieving compensation at the expense of denying the principles of tort
liability applicable to the analogous situations of infants, the handicapped,
and people suffering under sudden physical disturbances such as a heart
attack, epilepsy or blood clot, the civil law system, in deference to its
general tort principles, denies liability but at times modifies the situation by
looking to what the insane can afford to contribute to the victim if he is in
need of compensation. Though haphazard and inefficient the civil law scheme
appears to be the optimum within our present legal framework of tort
liability because it provides the best compromise between the competing
principles of fault and compensation.

IV. PUBLIC POLICY CONSIDERATIONS UNDERLYING THE
IMPOSITION OF TORTIOUS LIABILITY ON
INSANE PERSONS

Contrast between the civil law and common law, divergence within the

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130 Civil Code of Quebec, art. 1054; Louisiana Revised Civil Code, art. 2319;
German Civil Code, art. 832; Argentine Civil Code, art. 1150; Japanese Civil Code,
art. 1903; French Civil Code, art. 1384; Civil Code of Panama, art. 2346.
140 Swiss Federal Code of Obligations, art. 54.
141 German Civil Code, art 829. The Soviet Civil Code has a similar provision in
art. 411. The Civil Code of Quebec has no similar provision.
142 Ulman, supra, note 56.
143 For specific cases on heart attacks, epilepsy and blood clots see infra, note 158.
common law world, and the apparent lack of consistent and thorough analysis arouses a desire to know what public policies underlie both the imposition of liability and lack of such imposition. Since the finding of liability has persisted almost without modification in the United States, and since the refusal to impose liability has persisted without modification in the civil law jurisdiction with Canada falling in between, it would appear that valid public policies underlie both schemes. To decline to impose liability, however, without attending to the underlying policies in favor of such liability would be as destructive as imposing liability without attending to the basic policies behind declining to impose liability. An optimum system would consist of satisfying the valid policies underlying both schemes.

A. POLICY REASONS AGAINST THE IMPOSITION OF LIABILITY

The first policy reason against the imposition of liability is that the law exists to control the conduct of individuals in society and that since the insane cannot be controlled by an understanding of the law, the law should not be imposed upon them. Austin expressed this view in his twenty-sixth Lecture on Jurisprudence:

It is inferred, from his infancy or insanity, that at the time of the alleged wrong, he was ignorant of the law, or . . . was unable to remember the law. Or . . . it is inferred that he was unable to apply the law, and to govern his conduct accordingly; that he did not and could not foresee the consequence of his conduct; and, therefore, did not and could not foresee that his conduct tended to the consequences which it was the end of the law to avert . . . . Every application of the law to a fact of case is a syllogism of which the minor premises and the conclusion are singular propositions. Unless I am competent in this intellectual process, the sanction cannot operate as a motive to the fulfilment of the obligation or (changing the expression) the obligation is necessarily ineffectual.\textsuperscript{144}

The second and most popular reason advanced, which is included in the broader scope of the first, is that the law of torts is concerned with controlling those who cause damage by their fault; to the extent that the insane are not capable of controlling their actions, they are not at fault and should, therefore, not fall under the sanction of the law. This is the justification for declining to impose liability in all civil law jurisdictions.\textsuperscript{146}

A third reason for declining to impose liability comes from analogies to the immunity given infants in the United States and the handicapped who are responsible only for the standard of care which can reasonably be ex-


\textsuperscript{146} For example the \textit{Corpus Juris Civilis} which was the compilation of all Roman Law ordered by Emperor Justinian in 528 has been translated to read:

An insane person . . . is legally incapable of malicious intent, and the power to insult, and therefore the action for injuries cannot be brought against him.

Tort Liability of the Insane

pected given the circumstances of the infant and the handicapped. Further analogies are drawn to the favorable treatment given those who are suddenly overcome by physical causes such as a heart attack, epilepsy, hemorrhage or the like.

To summarize, there are three policy reasons behind declining to impose tort liability on the insane: 1) liability will fail to operate as a deterrent or control, 2) liability should only fall on those who are at fault, and 3) liability for the insane should be consistent with the law regarding infants, the handicapped, and those overcome by physical causes.

B. POLICY REASONS IN FAVOR OF THE IMPOSITION OF LIABILITY

The policy reasons supporting the imposition of liability could be stated as follows:

1) When one of two innocent parties is injured the one who caused the damage must bear the loss.
2) Imposing liability will make the guardians of the insane exercise more care in controlling the actions of the insane.
3) In the absence of liability tortfeasors will feign insanity.
4) The purpose of tort law is compensation.
5) It is unfair to the victim not to be compensated when the insane person can pay.

For specific cases concerning infants and the handicapped see infra, notes 156, 157.

For specific cases concerning persons suddenly overcome by physical causes see infra, note 158. See Curran, supra, note 4 at 62.


Williams v. Hays, supra, note 68 at 447; Seals v. Snow, supra, note 149 at 831; Sforza v. Green Bus Lines, Inc., supra, note 117 at 448; see also McIntyre v. Sholty, supra, note 107; Restatement (Second) Torts, s. 238B, comment b(2).

Williams v. Hays, supra, note 68 at 447; Seals v. Snow, supra, at 831; Sforza v. Green Bus Lines, Inc., supra, note 117 at 448; see also McIntyre v. Sholty, supra, note 107; Restatement (Second) Torts, s. 283B, comment b(4).


Williams v. Hays, supra, note 68 at 448; Restatement (Second) Torts, s. 283B, comment b(3).
6) Granting immunity to the insane would introduce into the civil law the chaos surrounding the insanity plea in criminal law.\footnote{Restatement (Second) Torts, s. 283B, comment b(2); Prosser, Torts (2d ed. St. Paul, Minn.: West Publishing Co., 1955) at 792; G. Alexander and T. Szasz, Mental Illness as an Excuse for Civil Wrongs (1967), 43 Notre Dame Law, 24 at 26-27. For a good discussion of the whole problem see D. Pugh, supra, note 2; J. Hardisty, supra, note 2.}

7) It is too difficult to draw a line between mental deficiency and mere variations of temperament and ability (low intelligence, clumsiness) which tort liability cannot practically consider in imposing liability.\footnote{Restatement (Second) Torts, s. 283B, comment b(1); for a good discussion of the problem of drawing lines between psychoses, neuroses, and personality disorders, see Curran, supra, note 4, at 66ff; see also Holmes, supra, note 144 at 108; Casto, supra, note 122 at 713-14. For further arguments in favor of imposing liability which are interesting but not of widespread currency see Alexander and Szasz, supra, note 154 at 35-38 wherein they argue it would be contrary to the interests of the insane to deny them liability.}

C. EVALUATION

The above itemization of the policy reasons pro and con brings into focus the dilemma of choosing one system over the other. The choice of either one automatically involves a sacrifice of equally compelling policies underlying the other. If for example, recognition is given to the principle that liability should only fall on those who are at fault, the principle of compensating victims cannot be simultaneously fulfilled. To prepare the way towards discussing a resolution of this problem, it is constructive to determine which policies should be salvaged and which discarded. To this end the following discussion is necessarily heavily subjective. But so it must be since value judgments underlie each of the three schemes discussed, are responsible for the choice of an alternative and are necessary to give meaning to any legal system.

Involved in every common tort are at least two interests — that of the actor and that of the victim. If an actor causes damage under the influence of his insanity, the injury is similar to an accident for which the actor should be treated with mercy. Whether mercy is shown to the tortfeasor or not, however, the victim has suffered damage and must be compensated. Mercy and compensation are the two basic, underlying policies and both must be honored. The society as a whole also has an interest in the commission of torts to the extent that the wellbeing of the society depends on the wellbeing of its members. A discussion of this third interest, however, will await the discussion of an alternative method of dealing with torts in Section V since under the present tort schemes the interests of society have not been overtly recognized.

The desire of those opposing liability to have the law with respect to
the insane consistent with the law for infants,\textsuperscript{156} the handicapped,\textsuperscript{157} and the suddenly overcome\textsuperscript{158} is praiseworthy; the source of the distinction is prejudice. We all were infants and most have relationships with the young. We can be sympathetic to their plight and more forgiving of their shortcomings knowing they will grow up. We are able to identify with the handicapped as well. Any of us could be afflicted with a handicap, it has happened to people we know and they often live constructive lives even under their handicap. Those overcome by physical causes are in a similar situation; we all fear being overcome physically and usually know someone who has been an unfortunate victim. On the other hand, few people relate to the plight of the insane and assume insanity won't befall them; it is therefore easy to put the insane in a separate category and apply different principles. Indeed any argument from the insane on the matter is simply a product of their insanity, a delusion to be ignored. Certainly the common denominator of uncontrollable incapacity should dictate the same treatment for all.

The practical desire not to bring into civil courts the definitional and evidentiary confusion surrounding the criminal insanity defense deserves recognition. As the subject of the criminal confusion has been discussed elsewhere\textsuperscript{159} such will pass here with the recognition of its merits.

The other worthy policy reason in favor of imposing liability is the difficulty of drawing lines between insanity and those variations of temperament and ability which the law of torts has refused to consider by its adoption of the reasonable man standard. Perhaps an accident prone person is just as non-responsible as an insane person and one cannot justify treating them separately. The resolution to this possibility, however, does not necessitate imposing liability on the insane; it can decline to impose liability on the accident prone.

\textsuperscript{156}Infants are only held to the standard of conduct of a reasonable person of like age, intelligence and experience under like circumstances. \textit{Restatement (Second) Torts}, s. 283A; see Casto, supra, note 122 at 708; Prosser, supra, note 5 at 154-55; Bohlen, supra, note 12; \textit{Charbonneau v. MacRury} (1931), 84 N.H. 501; 153 A. 457 at 463; \textit{Grealish v. Brooklyn Q.C. & S.R. Co.} (1909), 130 App. Div. 238; 114 N.Y. Supp. 582; \textit{Hoyt v. Rosenberg} (1947), 80 Cal. App. 2d 500; 182 P. 2d 234; 173 A.L.R. 883.

The law has been more strict with infants in assault actions tending to hold them liable except where the event can be classed as an unavoidable accident. See Prosser, supra, note 5 at 997; Bohlen, id.; \textit{Johnson v. Pye} (1665), 1 Sid. 258; 82 E.R. 1091; \textit{Munden v. Harris} (1910), 153 Mo. App. 652; 134 S.W. 1076.

\textsuperscript{157}If the defendant is physically disabled he will be held to the standard of a "reasonable man under like disability". \textit{Restatement (Second) Torts}, s. 283C; Casto, supra, note 122 at 708; Blindness: \textit{Apperson v. Larzo} (1909), 44 Ind. App. 186; 87 N.E. 97; 88 N.E. 99; \textit{Smith v. Sneller} (1942), 345 Pa. 68; 26 A. 2d 452; Deafness: \textit{Jakubiec v. Hasty} (1953), 337 Mich. 205; 59 N.W. 2d 385.

\textsuperscript{158}Those overcome by sudden mental illnesses have been able to use the defense of unavoidable accident; Curran, supra, note 4 at 62; Heart Attack: \textit{Welton Tool Co. v. Kelley} (1947), 81 Ohio App. 427; 76 N.E. 2d 629; Hemorrhage: \textit{Keller v. Wonn} (1955), 140 W. Va. 860; 87 S.E. 2d 453; Epilepsy: \textit{Moore v. Capital Transit Co.} (1955), 226 F. 2d 57 (D.C. Cir.); \textit{Wishone v. Yellow Cab Co.} (1936), 20 Tenn. App. 229; 97 S.W. 2d 452.

\textsuperscript{159}See Pugh, supra, note 2; Hardisty, supra, note 2 at 26-27.
The other arguments in favor of imposing liability can be dispensed with; whatever threads of truth lie within them are considerations which are sufficiently minor that they should follow the outcome of the major competition.

The policy of protecting the innocent victim is simply a modernized method of stating the obsolete rule of absolute liability. If compensation is properly the only aim of tort law then negligence should be stricken from the law and all tortfeasors, not just the insane, should be subject to the same hardship. Where the modern law has recognized strict liability as in the escape of dangerous objects (Ryland v. Fletcher (1868)) or as in workmen's compensation acts or manufacturers' products liability, it is either out of the theory that those who willingly deal with dangerous objects must be utterly responsible for their effect, or the modern theory of letting the loss fall on the one who can best bear it. Certainly it is not out of the generalized, ancient theory that a man acts at his peril. Far from being able to bear losses, the insane usually need to preserve their funds in order to pay expensive bills for psychiatric care and treatment. Such a policy of strict liability also overlooks the possibility of the victim having sufficient funds of his own so as not to require compensation.

Policy reasons like inducing custodians to be more attentive and preventing tortfeasors from feigning insanity are probably less the product of accurate predictions than an intuitive and unstudied rationalization for compensation. It is unlikely that the conduct of the guardians would vary with the choice of system, either to impose liability or not impose it. The projected effect on the guardians is based on the assumption that they will be heirs to the estate of the insane and that the insane have sizeable estates to distribute. The cases discussed above indicate that the torts often occur within the hospital setting in which case the guardian nurse would probably not be an heir to the estate, or upon a sudden attack of insanity in which case the guardian could not have prevented the tort even if he were an heir to the estate. The way to make guardians more responsible than they might otherwise be is to make them responsible for the torts of the insane. Such is ordinarily the case where guardians have been negligent.

Feigning insanity is an unlikely though possible outcome of allowing insanity as a defense. To impose liability in all cases to prevent abuse by a

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160 See Casto, supra, note 122 at 715-16.
161 Rylands v. Fletcher (1868), L.R. 3 H.L. 330.
162 For support of these arguments as well as others see Ague, supra, note 134 at 222; Casto, supra, note 122 at 717.
163 However, see the recent Ontario case, Lawson v. Wellesley Hospital (1974), 2 O.R. (2d) 674, wherein it was held that under The Mental Health Act, R.S.O. 1970, c. 269, s. 59 the hospital is exempt from liability for a tort committed by any of its patients.
few is another unfortunate example of legislating to the lowest common
denominator. This exaggerated protection overlooks the stigma that still
attaches to insanity and the threat of forced committal; it also underestimates
the ability of psychiatrists to discern fakers from nonfakers.

Turning to the fifth reason in support of liability, while it may be unfair
to the victim not to be compensated when the insane person can pay, it is
equally unfair to the insane to compensate the victim if the victim can pay.
The two possibilities cancel each other out so that a consideration of their
competing merits will lead nowhere.

The best system, then, would appear to be one which would give com-
pensation to the victim, be merciful to the insane, treat the insane con-
sistently with infants, physically handicapped and those suddenly overcome
by physical causes, reject the obsolete rule that a man acts at his peril, side-
step the chaos surrounding the criminal defense, avoid the problem of draw-
ing impossible lines between mental deficiency and variations of temperament,
as well as escape any potential problem of tortfeasors feigning insanity. All
of this would be accomplished by abolishing the entire law of tort liability
and replacing it with a system of social insurance which would provide
compensation for injury regardless of cause.

V. AN ALTERNATIVE

The existing system of tort liability produces undesirable results for
the victim, the insane and the society. Insurance companies and lawyers
are the sole beneficiaries.

To tend to the needs of the victim by charging the insane with liability
is an inefficient method of compensation. Even if the victim recovers judg-
ment against the insane defendant, there is no guarantee that the defendant
has the funds to pay. Accordingly, whether the victim will actually be
compensated depends more on fortune than right. In addition, the delay
involved in getting to court can be hazardous to a victim who is in immediate
need of compensation. The time and money spent on the trial to untangle
evidentiary problems, jar foggy memories, and pay lawyers, juries, clerks,
bailliffs, judges and witnesses would be more profitably spent if it went
directly to the compensation of the victim. Even if the victim can wait for the
trial for compensation, the assessment of damages seldom accurately reflect
his needs. Studies have shown that minor injuries are usually overcom-

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164 For support of these arguments and others see Casto, supra, note 122 at 715;
Ague, supra, note 134 at 222.
165 For general criticisms of the system of tort liability see T.G. Ison, The Forensic
Lottery (1968); British Columbia, The Report of the Royal Commission on Automobile
Insurance (Victoria, 1968), cited in T.G. Ison, Tort Liability and Social Insurance
166 Id.
pensated which is unfair to the tortfeasor and major injuries are under-
compensated which is unfair to the victim.167

If the victim is fortunate enough to squeeze his rightful damages out of the estate of the insane, the insane may be stripped of the funds necessary to pay his medical bills and meet his other financial obligations. The insane does not become well when his funds are exhausted; he becomes a charge on society and may well end up suffering inhuman treatment in the hands of some under-financed, under-motivated public institution.

Although it would be possible to improve administrative efficiency and thus perhaps give more rapid compensation to the victim, it is impossible within the framework of tort liability to eliminate the present injustices of inadequately compensating the victim, of depleting the vital funds of the insane and of causing some insane to become charges on an unprepared, unwilling society; the only solution which will account for the needs of each of the three interest groups — the victim, the insane, the society — is the complete restructuring of injury compensation through the abolition of tort liability and the institution of social insurance; one total social insurance scheme which would cover fully all types of injuries and disease however caused.168

An insurance system which would only supplement tort liability through some form of automatic compensation up to a particular level, leaving the victim to his traditional court remedy if his injury warrants additional compensation, is inadequate.169 Such a scheme would not eliminate the unnecessary, inordinate administrative costs; in addition, compensation over the automatic amount would still depend on the fortuitous circumstances of whether the defendant could actually pay the judgment; the funds of the insane would remain vulnerable, with society still the ultimate victim. An insurance system which would cover completely one form of accident such as automobile insurance or workmen’s compensation is inadequate for those who are not lucky enough to be injured on the road or at work, and the


168 Examples of systems of this nature are the Saskatchewan Automobile Plan (Automobile Accident Insurance Act, R.S.S. 1965, c. 409); Keeton-O’Connell Plan, Keeton and O’Connell, Basic Protection for the Traffic Victim (Cambridge: Harv. U. Press, 963).

169 For support of this criticism see Ison, Tort Liability and Social Insurance, supra, note 162 at 616, 621.
above stated problems would still remain for many victims, e.g. the house-
wife who is assaulted in her home or on the street.\textsuperscript{170}

Since the wellbeing of society through the compensation of its members
is the aim of a social insurance plan, there is no reason to distinguish
between death or disability arising out of accident or intentional injury and
death or disability arising out of sickness or disease. One would not want
the care of his family to depend on the haphazard circumstance of the means
by which he is struck down.\textsuperscript{171}

For a wide range of reasons, it is more efficient for the government to
run this scheme than for private insurance companies to do so. There would
be one set of administration costs instead of as many as there are insurance
companies. Additionally, although private insurance companies have been
able to provide adequate protection for death (e.g. life insurance), studies
have shown that insurance companies have not been able to provide policies
which would guarantee a satisfactory level of income for the duration of the
disability. Normal accident or sickness policies give lump sum or limited,
fixed periodic payments.\textsuperscript{172} If such payments are not adequate, the purpose
of the scheme would be defeated. To equitably affect the required compen-
sation the insurance scheme must be compulsory. It is easier for the
government than for private insurance companies to enforce a uniform
scheme and impose a method of collection. Collection could take the form
of taxation with proportionate charges being made on the activities from
which injuries, accidents and disease are known to result (e.g. a charge on
cars, employment, hazardous activities and cigarettes) with supplemental
base payments made by all through income tax.\textsuperscript{173}

A further problem with private insurance companies is that there is a
direct relationship between the premiums and the amount of one's protection.
On its face this may appear equitable, but in reality the young people with
families need the highest coverage and they are the least able to pay. With a
government run plan the total situation could be coordinated so that the
age groups who need more coverage than normal but who are less able to
pay, pay less than the required cost for the amount of protection they would
receive, while the older age groups who need less coverage but who are more
able to pay, pay more than the required cost for the amount of protection
they would receive.\textsuperscript{174} Under such an adjustment according to needs, people
would be treated humanely and a sense of community would result from the
dual feelings of being taken care of and taking care of others.

Although it might be more efficient for the federal government to run
such a complete program of social insurance and although administration by
the federal government would insure uniformity, and therefore equality,
massive government programs are alien to a sense of community, a feeling

\textsuperscript{170} Id. at 615.
\textsuperscript{171} Id. at 616.
\textsuperscript{172} Id. at 617-18.
\textsuperscript{173} Id. at 617.
\textsuperscript{174} The Ontario Guaranteed Annual Income Act, S.O. 1974, c. 58.
we must regain if we are to survive the dehumanization which we have
brought upon ourselves through our unquestioning acceptance of advanced
technology's super powers of manipulation. Thus, the provincial governments
in Canada should run this program of social insurance. To the extent that
this decentralized administration causes sacrifices in equality and efficiency,
it will produce gains in individual sensations of well being and of an ability
to care for oneself, as well as allow questions and problems to be dealt
with directly by those in ultimate control rather than passed on to some
faceless central authority.

A program recently instituted in Ontario, Guaranteed Annual Income
Systems — GAINS,176 demonstrates the lack of consideration given the
insane and the resulting inequities for society under our existing process of
piecemeal social legislation. Under the new program people who are classified
as "disabled" qualify for the GAINS benefits of tax free monthly payments
coupled with an entitlement to free drugs and other special assistance while
those classified as "permanently unemployable" do not. This distinction,
vague as it is, has the vivid effect of excluding from the scheme those insane
persons who do not possess the mental capacity to maintain a job.178 Half
measures such as the new GAINS program heighten the visibility of the
need for one social insurance scheme covering all injury, disease or death
however caused.

VI. CONCLUSION

Although the above scheme of social insurance would replace all tort
liability, its need is especially vivid with respect to the insane. From 1616,
with Weaver v. Ward, the inequitable treatment of the insane in tort liability
began to develop. It becomes clear from a look at the history, either through
Theory A or Theory B, that if society had wanted to, it could have relieved
the insane from their awful burden of compensation and been faithful to
the existing principles of tort liability. After a bad start, Canada went a
long way down this road; the United States never started. The road, how-
ever, is a dead end; hopefully Canada will veer off it and the United States
will never start down it. Although the civil law schemes which provide
compensation where equitable are the best possible compromise between
the competing interests within the system of tort liability, they too are on
an inadequate road. The essential dilemma is this: under the existing tort
scheme if one treats the insane equitably, one treats the victim inequitably and
vice versa; no principle of tort liability can lead away from this ultimate circle.
As long as we work with tort liability, the pendulum of the law will respond
to society's compassions of the moment and will forever swing between the
victim and the insane; it will find no rest in the middle. With the addition
of society's interest through the proposed scheme of social insurance abolishing
tort liability, the peace of equity will bring the pendulum to a halt. After the
tortured trek of centuries there will be, at last, both mercy for the insane and
compensation for the victims, and our society will be that much closer to justice.

\footnote{176 See The Globe and Mail, July 30, 1974 at 1, "'Disabled' or 'unemployable?'
The difference is expensive!"}

\footnote{178 Id.}