Insanity as a Tort Defence

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Unlike the criminal law, tort law does not recognise insanity as an answer to liability. The fact that a defendant was insane at the time of his impugned conduct is essentially ignored by tort law’s liability rules. It will be argued that this situation is unsatisfactory. A person should not incur liability in tort in respect of acts committed while insane. This result should be realised by providing for a generally applicable affirmative defence of insanity.

1. Introduction

All of the major common law jurisdictions withhold insanity as an answer to liability in tort. The satisfactoriness of this situation has been extensively discussed by theorists. Some contend that tort law should fall into line with the criminal law and that insane defendants should be released from liability.1 Others argue that insanity on the part of the defendant should be disregarded in so far as liability is concerned.2

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2 See, e.g., George J Alexander and Thomas S Szasz, ‘Mental Illness as an Excuse for Civil Wrongs’ (1967) 43 Notre Dame L 24-38; Richard A Epstein, ‘Defenses and Subsequent Pleas in a System of
This article aims to advance this debate. The analysis begins with some preliminary points in Part 2. Part 3 delineates the effect of the defendant’s insanity on liability. Parts 4 and 5 present the case for withholding and admitting insanity as a defence respectively. It is concluded that insanity should preclude findings of liability. Part 6 considers how, precisely, this result should be realised. Part 7 addresses some potential implications of releasing insane persons from liability for other aspects of tort law. The conclusions are summarised in Part 8.

2. Preliminary Matters

A. Why is the Issue Worth Considering?

Why is it worth considering whether insanity on the part of the defendant should prevent liability from arising? Clearly, this issue is not of much practical relevance. This is because persons who cause injury while insane will not usually be worth suing unless they have secured an applicable insurance policy (they will typically be judgment proof). However, this does not mean that it would be unprofitable to ask whether tort law should recognise insanity as a defence. On the contrary, making enquiries in this respect is likely to be revealing for several reasons. In the first place, asking what stance tort law should take in relation to insanity forces us to confront any doubts that we may entertain as to whether anyone is ever responsible for their behaviour. Secondly, addressing the issue of insanity necessitates consideration of the

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3 Of course, whether a tortfeasor is entitled to a defence of insanity may affect whether another person can be held vicariously liable for him.
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scope of the defence of involuntariness. Are the bodily movements of an insane person truly voluntary? Thirdly, thinking about whether insanity should be a defence raises the question of whether other conditions that eliminate or seriously impair a person’s capacity for self-determination, such as infancy, should also be admitted as answers to liability. Fourthly, the position that tort law takes in relation to the defendant’s insanity has implications for the persuasiveness of certain accounts of tort law. For instance, if tort law does not exempt the insane from liability, it cannot be exhaustively explained by any theory of corrective justice. It is axiomatic that a corrective injustice can only occur through the actions of a rational agent. Just as theories of corrective justice do not suggest that a person who suffers loss due to an earthquake or a lightning bolt should have a right of repair against another, they are silent on the issue of whether one who sustains injury as a result of the conduct of a person who is not a responsible agent should be entitled to redress from the latter.

B. Absent Element Defences and Affirmative Defences

The word ‘defence’ bears several meanings in the tort setting and a considerable amount of easily avoidable confusion has been spawned by a consistent failure of the courts and commentators to make their intended meaning clear, both in discussions of the effect of the defendant’s insanity and generally. It is necessary for present

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5 Regarding infancy see below Part 7.


Agency … is implicated by the concept of corrective justice. In corrective justice excuses that aim to defeat agency are relevant for two different reasons. First, in order for an agent to have a duty in corrective justice to repair a loss, the loss must be wrongful in the appropriate sense. It must result from either wrongdoing or wrong. Both involve human agency. … Second, corrective justice imposes the loss upon the injurer, not simply because it [sic] wrongful, but because the loss is, in some appropriate sense, his responsibility.
purposes to distinguish between ‘absent element defences’ and ‘affirmative defences’. An absent element defence is a denial by the defendant of one or more of the elements of the tort in which the claimant sues. A defendant advances an absent element defence when, for example, he denies that he is the tortfeasor, denies that his impugned act was voluntary, denies that he was at fault when proof of fault is required and denies that the claimant suffered damage when damage is the gist of the tort in which the claimant sues. An affirmative defence is a rule that, when enlivened, results in a verdict for the defendant even if all of the ingredients of the tort on which the claimant relies are present. A defendant invokes a defence within this meaning of the word when he argues along the following lines: ‘Even if I committed a tort, judgment should nevertheless be entered in my favour because of rule so and so’. Affirmative defences include arrest, privilege, necessity and self-defence. A defendant who relies on any of these rules seeks to avoid liability not by denying the claimant’s allegations but by going around them.

As has just been mentioned, the case law and literature on the relevance of the defendant’s insanity in tort law often ignores the difference between absent element defences and affirmative defences. It is uncommon for insanity to be discussed without the reader being left in the dark as to whether the writer is talking about insanity qua absent element defence, insanity qua affirmative defence or insanity generally. However, there is a need for clarity on this point for at least two reasons. First, a failure to distinguish between the different types of defences is likely to

7 This label is borrowed from Paul H Robinson, Structure and Function in Criminal Law (Clarendon Press, Oxford 1997) 12.
8 More specifically, an absent element defence is (1) a denial of the truth of the claimant’s allegations or (2) a denial of the legal sufficiency of the claimant’s allegations (i.e. a denial that the claimant’s allegations, even if true, show that a tort was committed). While (1) and (2) are clearly distinct (in the old system of pleading (1) was made by traversing the allegations while (2) was made by a demurrer), the difference between them does not matter for present purposes. Accordingly, both (1) and (2) will be counted as absent element defences.
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contaminate the analysis as to whether insane persons should be exempted from liability. It may, for example, result in one mistaking an argument that only militates against insanity being admitted as an absent element defence for a consideration that counsels against exonerating the insane from liability generally. Secondly, unless one is alive to the distinction between absent element defences and affirmative defences, one cannot fully appreciate how a defence of insanity (if admitted) would operate. For instance, were insanity an answer to liability, the way in which it is cast would affect the allocation of the burden of pleading and proof in respect of it.

3. The Descriptive Issue

This Part describes the effect of insanity on the part of the defendant on liability in tort.

A. Insanity can Function Indirectly as an Absent Element Defence

No tort contains an element that is specifically concerned with whether the defendant was of sound mind at the time at which he engaged in his impugned conduct. In other words, sanity on the part of the defendant is not a component of any tort. It follows that insanity per se is not an absent element defence. Nevertheless, some torts incorporate elements that may be indirectly negated by insanity. For instance, if the claimant alleges that the defendant committed the tort of deceit, the fact that the defendant was insane at the relevant time may lead the court to conclude that he did not intend to defraud the claimant.9 Similarly, if the claimant was insane when he

9 Becker v Becker 138 NYS 2d 397 (Sup Ct 1954).
engaged in his impugned conduct, the court may be prompted to hold that he did not act voluntarily. This happened in *Breunig v American Family Insurance Co.*\(^{10}\) The defendant motorist in this case steered her vehicle on to the wrong side of the road and accelerated. She drove in this manner because she believed that God was controlling her car and that she could ‘fly like Batman’. She was surprised when she did not become airborne and, instead, collided with the claimant’s oncoming vehicle. The court found that the defendant’s insanity rendered her conduct involuntary.\(^{11}\) The claimant failed in his bid to recover damages as a result. Some elements of certain torts are insensitive to insanity on the part of the defendant. The most noteworthy of these elements is the breach element of the tort of negligence. The breach element cannot be undercut by the fact that a defendant was insane at the time of his conduct in question. This is because the standard of the reasonable person excludes mental illnesses suffered by the defendant from consideration.\(^{12}\)

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\(^{10}\) 173 NW 2d 619 (Wis 1970).

\(^{11}\) See also *Morriss v Marsden* [1952] 1 All ER 925, 927 (QBD).

\(^{12}\) Johnson v Lambotte 363 P 2d 165 (Co 1961); Creasy v Rusk 730 NE 2d 659 (Ind 2000); *Carrier v Bonham* [2001] QCA 234; [2002] 1 Qd R 474; *Ramey v Knorr* 124 P 3d 314 (Wash Ct App 2005). *The Restatement (Third) of Torts*, § 11(c), provides: ‘[a]n actor’s mental or emotional disability is not considered in determining whether conduct is negligent’. Insanity of the claimant is treated differently for the purposes of contributory negligence: see below n 38. A case that might be thought to be inconsistent with the proposition that mental illnesses suffered by the defendant are not attributed to the reasonable person is *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263 (CA). In this matter, the defendant truck driver failed to control his vehicle. As a result, it ran off of the road and into the claimants’ shop. The accident occurred because the defendant suffered from a malignant tumor in his pancreas. This tumor meant that excessive insulin was secreted which in turn caused the amount of glucose in his blood to fall to such a point that his brain did not function properly. The defendant was unaware his severely reduced level of consciousness. The Court of Appeal held that he should be judged against the standard of care that would have been achieved by “a reasonably competent driver unaware that he is or may be suffering from a condition that impairs his ability to drive” (at 1268). It is submitted that this holding does not establish that mental illnesses under which the defendant labours may be attributed to the reasonable person. This is because the defendant in this case did not suffer from a mental illness. His disease was a physical one. Even if the defendant had suffered from a mental illness, it is doubtful that *Mansfield* should be accepted as good authority for the proposition that the reasonable person may be imputed with mental illnesses under which the defendant was labouring. English law has firmly rejected the suggestion that the standard of the reasonable person should be adjusted on account of the idiosyncracies of the defendant.
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B. Insanity is not an Affirmative Defence

It is well established in all of the major common law jurisdictions that insanity is not an affirmative defence to any tort. Consider the following cases:

1. In *Adamson v Motor Vehicle Insurance Trust*, the defendant insanely believed that his work colleagues had planned to murder him. He stole a vehicle with a view to fleeing from them (he did not use his car because he irrationally thought that his workmates had sabotaged it). While disobeying a stop sign, the defendant collided with the claimant pedestrian. The Supreme Court of Western Australia held the defendant liable in negligence.

2. In *Williams v Hays*, the best known American case on point, the owners of a ship that had been wrecked sued its captain in negligence. The captain had been continuously on duty for over 48 hours immediately preceding the ship’s loss and had become delirious. As a result, he had refused to accept that the vessel was in trouble despite being advised by his crew that the rudder was broken and useless. He had also rejected offers of assistance from the masters of nearby tugboats. By a majority, the Court of Appeals of New York found in favour of the owners. Earl J, who

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13 The *fons et origo* of this rule is generally considered to be *Weaver v Ward* (1616) Hob 134; 80 ER 284 (KB). The parties to this dispute were soldiers. While skirmishing in a military exercise, the defendant ‘by chance and misadventure’ discharged his gun and the projectile struck and injured the claimant. The King’s Bench found the defendant liable. However, in reaching this conclusion it took the opportunity to provide some illustrations of instances in which a person would not incur liability although he came into direct non-consensual contact with another. The report reads:

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

14 (1957) 58 WALR 56 (SC).

15 143 NY 442 (1894).
delivered the principal opinion, stated: ‘[t]he general rule is that an insane person is just as responsible for his torts as a sane person.’\textsuperscript{16}

(3) The claimant in \textit{Krom v Schoonmaker}\textsuperscript{17} had been arrested pursuant to a warrant issued by the defendant, a mentally disordered justice of the peace. He succeeded in an action in false imprisonment.

(4) The infant claimant in \textit{Tindale v Tindale}\textsuperscript{18} suffered grievous injures when she was attacked by the defendant (her mother) with an axe. The court found for the claimant in an action in battery. It held that the fact that the defendant was ‘acting under the influence of delusions and that her mind was in a severe state of perturbation’ at the time of the onslaught was no defence.

(5) On 30 March 1981, Mr John Hinckley attempted to assassinate President Reagan. Shots that he fired struck the President and several bystanders. Mr Hinckley was sensationaly acquitted on criminal charges by reason of insanity (he believed that killing the President would cause the actress Jodie Foster to fall in love with him). Civil proceedings for damages were then brought against him. An application by Mr Hinckley for summary judgment on the grounds that he was insane at the time of the shooting was denied, the court holding that insane persons are liable for their torts.\textsuperscript{19}

\textsuperscript{16} Ibid 446. See also \textit{Sforza v Green Bus Lines Inc} 268 NYS 446 (Mun Ct 1934).
\textsuperscript{17} 3 Barb 647 (NY 1848).
\textsuperscript{18} [1950] 4 DLR 363 (BCSC).
\textsuperscript{19} \textit{Delahanty v Hinckley} 799 F Supp 184 (DDC 1992).
In *Morse v Crawford*, the claimant bailed oxen to the defendant, one of which the defendant strangled with a rope while mentally disordered. The claimant recovered damages in conversion.

The *Restatement (Second) of Torts* confirms that insanity is not a tort defence. Section § 895J provides: ‘One who has deficient mental capacity is not immune from tort liability solely for that reason’. The Reporters supplied the following light-hearted example to illustrate this rule:

A, who is insane, believes that he is Napoleon Bonaparte, and that B, his nurse, who confines him in his room, is an agent of the Duke of Wellington, who is endeavouring to prevent his arrival on the field of Waterloo in time to win the battle. Seeking to escape, he breaks off the leg of a chair, attacks B with it and fractures her skull. A is subject to liability to B for battery.

As is always the case, there are several decisions that go the other way. One of the more noteworthy is *Buckley and Toronto Transportation Commission v Smith Transport Ltd*. This action concerned a motorist who insanely believed that his vehicle ‘was under some sort of remote electrical control’ that rendered him unable to steer it. The claimant was injured in the ensuing accident. The Court of Appeal of the Supreme Court of Ontario held that the claimant could not recover damages since the motorist’s mind was ravaged by disease. This holding, however, represents a minority view. The prevailing position throughout the common law world is that

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20 17 Vt 499 (1845). See also *In re Guardianship of Meyer* 261 NW 211 (Wis 1935).
21 [1946] OR 798 (CA).
22 See also *White v Pile* (1950) 68 WN (NSW) 176 (DC); *Hutchings v Nevin* (1992) 9 OR (3d) 776 (OCJ).
23 A certain amount of *dicta* supports the minority position. In *Hanbury v Hanbury* (1892) 8 TLR 559, 560 (CA), a divorce case, Lord Esher MR said that he was prepared: to lay down as the law of England that whenever a person did an act which is 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 consequence of the act which he was doing, that was an act for which he could be civilly or criminally responsible to the law.

Consider also Lord Esher MR’s remarks in *Emmens v Pottle* (1885) 16 QBD 354, 356 (CA).
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one who commits a tort cannot escape from liability on the basis that he was insane at the time.

C. Summary

In this Part, the following important features of the relevant law were noted:

1. Insanity is not, strictly speaking, an absent element defence to liability in tort. This is because no tort includes sanity as one of its elements.

2. Nevertheless, insanity can occasionally function as an absent element defence indirectly. The fact that the defendant was insane at the relevant time can undercut some elements of certain torts (e.g. the fraud element of the action in deceit).

3. The breach element of the tort of negligence is not one of these elements. This is because the fact that the defendant was insane at the material time is not taken into account in determining the standard of care. The standard is impersonal in this respect.

4. Insanity is not an affirmative defence to any tort.

Due to these rules, a defendant generally cannot avoid incurring liability in tort on the ground that he was insane when he engaged in his impugned behaviour.

4. The Prescriptive Issue: The Case Against a Defence of Insanity

This Part and the next consider whether insanity should prevent liability in tort from arising. It is convenient to begin by examining the arguments for maintaining the status quo. Two points need to be made in clarification of the way in which the
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analysis will proceed. First, we are not focusing on any tort in particular. The argument is addressed to tort law generally. Secondly, the issue that is under consideration here is whether insanity on the part of the defendant should prevent liability from arising simpliciter. We are not at present concerned with whether, in the event that insanity should exculpate, tort law should recognise an absent element defence of sanity or an affirmative defence of insanity. Accordingly, in this Part and in Part 5, the word ‘defence’ is used to encompass both absent element defences and affirmative defences except where the difference between the two types of defences is important.

A. The Causation Argument

Suppose that D, who is insane, causes C loss. (For insulation from possible distractions, assume that D had no responsibility for C, that neither D nor C did anything to precipitate D’s insanity and that neither party had any warning that D might become insane.) Both parties in this scenario are blameless. How should tort law allocate the loss between them? It has often been contended that, since D caused the loss, it should be imposed on him. As one court put it, ‘as between an insane person who injures another and an innocent person, it is more just for the insane person to bear the loss he caused than to visit the loss on the injured person.’ This line of reasoning, which I will call the ‘causation argument’, is, in essence, a plea for insane persons to be held strictly liable for harm that would not have occurred but for

24 This issue is the subject of Part 6.
25 Williams v Kearbey 775 P 2d 670, 672 (Kan Ct App 1989). See also Beals v See 10 Pa 56, 61 (1848); Williams v Hays 143 NY 442, 447 (1894); Seals v Snow 254 P 348, 349 (Kan 1927); Kuhn v Zabotsky 224 NE 2d 137, 141 (Ohio 1967); Vosnos v Perry 357 NE 2d 614, 615 (Ill Ct App 1976); Epstein (n 2) 169-170; Francis Trindade, Peter Cane and Mark Lunney, The Law of Torts in Australia (4th edn OUP, Oxford 2006) 98.
the fact that they were insane. Before it can be accepted, it is necessary to identify a convincing reason for holding insane persons strictly liable.

Landes and Posner claim to have identified such a reason. They maintain that the insane are highly dangerous and that the same arguments that weigh in favour of imposing strict liability on those who participate in ultrahazardous activities therefore also support holding the insane strictly liable. They write:

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\text{[P]eople whose insanity is severe enough to affect their ability to avoid physical injury to themselves and others are generally kept under restraint. They are highly dangerous— one might say ultrahazardous—and the same considerations that argue for strict liability for ultrahazardous activities argue for strict liability for the torts of the insane.}
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This argument is unpersuasive. The key problem with it is that it ignores the fact that part of the reason why strict liability is imposed for harm resulting from abnormally dangerous activities is that, typically, those who cause harm while engaged in such activities will be at fault. The levying of strict liability saves the effort and expense of inquiring as to fault when fault will normally be present. Clearly, though, a person who causes damage while insane will rarely be to blame.

Can the imposition of strict liability on insane persons be supported by analogy to any other situation in which defendants are held strictly liable? Those who belong to a class of persons who tend to be in a good position to bear or distribute losses are sometimes held strictly liable. The classic illustration of such a class is employers, who are vicariously (strictly) liable for the torts of their employees acting in the

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26 This plea has been rejected on the ground that tort law has largely rejected strict liability: see, e.g., Robert M Ague, ‘The Liability of Insane Persons in Tort Actions’ (1956) 60 Dick L Rev 211-228, 221-2; Okianer Christian Dark, ‘Tort Liability and the “Unquiet Mind”: A Proposal to Incorporate Mental Disabilities into the Standard of Care’ (2004) 30 T Marshall L Rev 169-214, 183. Rejecting it on this basis is inappropriate. There are still large swathes of strict liability in tort law. Moreover, the fact that tort law generally requires proof of fault before imposing liability does not mean that holding insane persons strictly liable is unwarranted.

27 Landes and Posner (n 2) 128.

28 For criticism of Landes’s and Posner’s argument on other grounds see Mayo Moran, Rethinking the Reasonable Person (OUP, Oxford 2003) 43.
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course of their employment. For the sake of argument, assume that it is justifiable to impose strict liability on those who are good loss bearers/distributors. Is levying strict liability on insane persons thereby warranted? Obviously it is not. The insane are unlikely to have deep pockets (particularly if they are institutionalised). On the contrary, they will typically be hard up.

Is there any other theory by which holding the insane strictly liable can be justified? An important general defence of strict liability was offered by Tony Honoré in his well known essay ‘Responsibility and Luck’.29 Honoré argues that since we take the benefit of good luck when we do not deserve it, it is fair for us to be burdened with responsibility for the bad consequences of our acts even if we were not at fault in bringing them about. It is just, he says, because, over the long run, people tend to come out in front in the sense that they will have more credits from good outcomes than debits from bad ones. Does this logic support holding the insane strictly liable? It does not. This is because it is unlikely that the insane will be winners overall. This was noted by Honoré. He said that it is only fair to impose liability on persons who are not at fault if they ‘possess a minimum capacity for reasoned choice and action’.30

It would be possible to continue exploring grounds on which the imposition of strict liability generally has been defended. But it should be apparent from what has already been said that doing so is unlikely to uncover an argument that will support holding the insane strictly liable. Accordingly, we will leave matters here and conclude that, unless a compelling reason is identified for imposing strict liability on insane persons, the causation argument is unconvincing. As it stands, it is merely a question-begging statement.

B. The Fraud Argument

It has been argued that insanity should not be a defence since, were it an answer to liability, sane defendants might invoke it. Built into this argument is an assumption that it would be hard to identify defendants who succumb to this temptation. This logic (I will refer to it as the ‘fraud argument’) has been criticised on the ground that defendants would be unlikely to concoct a defence of insanity since being found insane carries a serious and indelible stigma, the possibility of civil commitment and the risk of suffering various civil disabilities, such as the loss of the right to practise one’s profession. Critics of this argument have also observed that since most defendants are insured, there would be little incentive for them to plead insanity were insanity as answer to liability. One theorist sums up this line of reasoning as follows:32

A label of mental illness … carries with it a substantial stigma in our society. While some criminal defendants may be willing to assume the stigmatizing effect of such a label in order to escape … lengthy imprisonment, it does not necessarily follow that tort defendants would be willing when money damages are the only penalty at issue. The fact that many tort defendants are substantially insured to cover the cost of an adverse judgment further mitigates the concern about false claims and mental disability.

Proponents of the fraud argument and the critics of it have both overlooked a breathtakingly obvious point. Due to the ubiquity of insurance, it is not defendants but
their insurers who normally invoke defences. Insured defendants typically have no say as to the defences that will or will not be raised on their behalf. Insurers do not even usually notify or consult with defendants as to how they will proceed in this respect. Consequently, were insanity a defence, defendants would not often have the opportunity to plead it fraudulently. The fraud argument is therefore meritless. It also follows that the critics’ observation that there would be many disincentives for defendants to contest their sanity were insanity a defence (although surely accurate\(^\text{33}\)) is neither here nor there.

Advocates of the fraud argument could reformulate it to accommodate the fact that it is insurers who get to decide whether to raise a defence. So restructured, this rationale for holding the insane liable is that insanity should not be a defence since, were it an escape route from liability, insurers may dishonestly rely on it. Insurers, unlike defendants, have nothing to lose and everything to gain from succeeding on a defence of insanity and so have an incentive to rely on it fraudulently. But the fraud argument surely cannot be rescued in this way. It is simply improbable that many insurers would fraudulently enter a plea of insanity were insanity a defence. This is partly because they could not entertain any realistic hope of succeeding in any such subterfuge without colluding with the defendant and, for the reasons that have just been mentioned, few defendants will want to contest their sanity.

In addition to the foregoing, there are several other shortcomings in the fraud argument. These problems include the following:

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(1) It is incompatible with the assumption that the courts are generally thought to be capable of identifying mendacity. The courts are trusted to sort out the veracity of denials by the defendant (or, rather, his insurer) that he acted (for example) voluntarily or with an intention to bring about a particular result. Why should the courts not also be trusted to ascertain the truthfulness of pleas by the defendant that he was insane at the time of his conduct in question?34

(2) It is unsustainable in light of empirical studies that establish that insanity is not easily faked.35

(3) It cannot account for the fact that insanity is a defence to criminal liability.36 Why should defendants on the civil side of things be denied a defence of insanity on the ground that it may be invoked fraudulently but not those in the criminal context?

(4) It cannot explain why evidence that the defendant was insane may be taken into account in the assessment of damages. Such evidence may be admitted to show that grounds for awarding punitive damages do not exist.37 Nor can it account for the fact that evidence of a mental illness suffered by the claimant may be considered for the purposes of

34 ‘Courts must depend upon the efficacy of the judicial process to ferret out the meritorious from the fraudulent in particular cases’ (Emery v Emery 289 P 2d 218, 224 (Cal 1955)). See also Hambrock v Stokes Brothers [1925] 1 KB 141, 158 (CA) (Atkin LJ) (quoting with approval from Dulieu v White & Sons [1901] 2 KB 669, 681 (DC) (Kennedy J)).


36 Fears of false insanity defences being advanced in the criminal setting have often been ventilated. For argument that these fears are unfounded see Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 E&P 241-79, 263-5.

37 McIntyre v Sholty 13 NE 239, 241 (Ill 1887); Moore v Horne 69 SE 409, 410 (NC 1910); Parke v Dennard 118 So 396, 399 (Ala 1928).
determining whether he is guilty of contributory negligence\textsuperscript{38} or if his acts constitute a \textit{novus actus interveniens}.\textsuperscript{39}

(5) The risk that a defence of insanity would be fraudulently invoked were it recognised as an answer to liability does not establish that the insane should be held liable but that mechanisms are needed to weed out false insanity defences.\textsuperscript{40}

(6) It does not give any weight to the number of occasions on which defendants who were insane at the relevant time and who would be able to substantiate a plea of insanity would be denied a defence. It is hardly fair to deprive 100 insane defendants of a defence of insanity because a single defendant might fraudulently plead insanity were insanity a way out of liability.

(7) It cannot easily explain why actions in respect of psychiatric injuries are permitted. Until relatively late in the day, psychiatric injuries were not compensable unless intentionally inflicted\textsuperscript{41} or consequential upon physical harm. There were a variety of reasons for this blanket rule, one of which was a concern that granting redress would invite counterfeit claims.\textsuperscript{42} This concern was eventually cast aside.\textsuperscript{43} Its dismissal would

\textsuperscript{38} Noel \textit{v} McCaig 258 P 2d 234, 241 (Kan 1953); \textit{Lynch v Rosenthal} 396 SW 2d 272, 278 (Mo Ct App 1965); \textit{Mochen v State} 43 AD 2d 484, 488-9 (NY Sup Ct App Div 1974); \textit{Baltimore & PR Co v Cumberland} 176 US 232, 238 (1990); cf \textit{Galindo v TMT Transport, Inc} 733 P 2d 631, 632-4 (Ariz Ct App 1986); Glanville L Williams, \textit{Joint Torts and Contributory Negligence} (Stevens & Sons Ltd, London 1951) 357. For further discussion see \textit{Restatement (Third) of Torts}, § 11, cmt e.


\textsuperscript{40} Special measures have been put in place in the criminal context to ensure that only those defendants who were insane at the time of the offence succeed on an insanity defence. For instance, s 1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (UK) requires evidence of two medical practitioners, at least one of whom is an experienced psychiatrist, before a defendant may be acquitted on the grounds of insanity. The fear of false insanity defences also probably underpins to some extent the fact that, in derogation of the presumption of innocence, the defendant bears the onus of proving insanity.

\textsuperscript{41} Wilkinson \textit{v} Downton [1897] 2 QB 57 (QBD).

\textsuperscript{42} For statements to this effect see \textit{Victorian Railway Commissioners v Coultas} (1887) 13 App Cas 222, 225 (PC); \textit{Waube v Warrington} 258 NW 497, 501 (Wis 1935); W Page Keeton, Dan B Dobbs,
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seem to be difficult to reconcile with the acceptance of the fraud
argument.

For these reasons, the argument that a defence of insanity should not be recognised on
the ground that it would foment fraudulent reliance on it is unconvincing.

C. The Imported Difficulties Argument

William Prosser argued against the recognition of an insanity defence on the basis that
it spares ‘the law of torts the confusion and unsatisfactory tests attending proof of
insanity in criminal cases.’44 This argument (the ‘imported difficulties argument’) still
resonates in some quarters. For instance, the Reporters of the Restatement (Third) of
Torts cited it with approval and opined that ‘[i]he awkwardness experienced by the
criminal-justice system in attempting to litigate the insanity defense is at least
instructive.’45 Criminal lawyers are the first to admit that the M’Naghten test,46 which
controls the defence of insanity in their field, is plagued by formidable problems. One
theorist writes that ‘[i]t is widely accepted that the law in this area is inadequate’.47
Others describe the M’Naghten test as ‘intractabl[y]… controvers[ial]’,48 ‘impossible
to administer … rationally and equitably’49 and ‘narrow, outmoded and deeply
stigmatic’.50 Senior judges have remarked that the test is ‘at best obsolete and

Robert E Keeton and David G Owen (eds), Prosser and Keeton on Torts (5th edn West Publishing
Co, St Paul 1984) 361.

Dillon v Legg 441 P 2d 912 (Cal 1968); McLoughlin v O’Brien [1983] 1 AC 410, 421 (HL); White

Keeton et al (n 42) 1073 (footnote omitted).

Restatement (Third) of Torts, § 11, cmt e. See also McGuire v Almy 8 NE 2d 760, 762 (Mass 1937);
Jolley v Powell 299 So 2d 647, 649 (Fla Dist Ct App 1974).

M’Naghten’s Case (1843) 10 Cl & Fin 200; 8 ER 718 (HL).


Husak (n 4) 196.


RD Mackay, ‘Diminished Responsibility and Mentally Disordered Killers’ in Andrew Ashworth
and Barry Mitchell (eds), Rethinking English Homicide Law (OUP, Oxford 2004) 55, 83.
probably never scientifically sustainable’,51 ‘the subject of persistent and powerful
credibility’52 and a ‘quagmire’.53 However, the fact that the M’Naghten test is
problematic does not sustain the imported difficulties argument. If insane defendants
should be exempted from liability, it is hardly fair to deny defendants who were
insane at the relevant time a defence due to feared difficulties in administering it. It is
unacceptable to say that such defendants must be held liable because a rule releasing
them from responsibility cannot be tailored to the satisfaction of lawyers.54 If a
particular result is just, it behooves lawmaking bodies to develop rules that realise it.55

It is also worth noting that the imported difficulties argument assumes that, were
insanity a tort defence, it would be governed by the M’Naghten test.56 This
assumption is unwarranted.57 The criminal law is not the only field that is concerned
with whether a person is a rational agent. Many other bodies of law are too. For
example, a lack of capacity in some aspect of a person’s life may be relevant to
whether the person concerned possessed testamentary capacity,58 can be civilly
committed59 or the subject of a guardianship order,60 can execute or revoke a power

52 Williams v Williams [1964] AC 698, 720 (HL) (Lord Reid).
54 Bohlen wrote ((n 1) 37 n 38):
   It seems unworthy of the law, whose purpose should be to do justice and to perfect its
   machinery so that justice may be done, to deny immunity to persons so insane as to be incapable
   of culpability because of the difficulty of evolving a test satisfactory alike to lawyer and alienist
   by which the precise degree of mental deficiency which precludes culpability may be
   determined.
55 The prospect of administrative difficulties was often cited in the past in support of the historical
   refusal of the law to entertain actions in respect of negligently inflicted psychiatric injury. This
   argument was exposed as fallacious in this context too. The following remark in Emden v Vitz 198
   P 2d 696, 700 (Cal Ct App 1948) is instructive: ‘[The] contention that the rule permitting the
   maintenance of [negligence actions for psychiatric injury] would be impractical to administer … is
   but an argument that the courts are incapable of performing their appointed tasks, a premise which
   has frequently been rejected.’
56 This assumption has often been stated expressly: see, e.g., White v Pile (1951) 68 WN (NSW) 176,
   178-80 (DC).
57 Some judges have rightly held that, were insanity a tort defence, it would not necessarily be
   controlled by the M’Naghten test: see, e.g., Morriess v Marsden [1952] 1 All ER 925, 927 (QBD).
58 The test for testamentary capacity was stated in Banks v Goodfellow (1870) LR 5 QB 549.
59 Mental Health Act 1983 (UK) ss 2-5, 135-136.
60 Mental Health Act 1983 (UK) s 7.
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of attorney,\(^{61}\) can commence and defend civil proceedings,\(^{62}\) can benefit from an extension of a limitation bar,\(^{63}\) can escape from a contract\(^{64}\) and can be called as a witness\(^{65}\) or serve as a juror.\(^{66}\) But only the criminal law uses the *M’Naghten* test to resolve the issue of capacity. Thus, were it decided that tort law should recognise a defence of insanity, tort law would not have to blindly embrace the *M’Naghten* test. Tort law is a *tabula rasa* in this respect. The test for insanity that is thought to best fit its agenda could be embraced.\(^{67}\)

D. The Unsatisfactory Evidence Argument

The rule that insanity is not an answer to liability has been defended on the basis of ‘[t]he unsatisfactory character of the evidence of mental deficiency in many cases.’\(^{68}\) This logic, although deployed in many different contexts,\(^{69}\) is utterly without merit.\(^{70}\) It cannot explain why evidence of insanity is relevant to various other issues inside tort law\(^{71}\) and in numerous other legal contexts.\(^{72}\) In particular, it does not establish why an affirmative defence of insanity should be withheld. This is because, even if evidence of insanity is typically ‘unsatisfactory’, no problem would arise were

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\(^{61}\) Mental Capacity Act 2005 (UK) ss 2, 9, 13.

\(^{62}\) CPR 21.

\(^{63}\) Limitation Act 1980 (UK) s 28(1).

\(^{64}\) *Hart v O’Connor* [1985] AC 1000 (PC).

\(^{65}\) Youth Justice and Criminal Evidence Act 1999 (UK) s 53(3).

\(^{66}\) Juries Act 1974 (UK) s 1, sch 1.

\(^{67}\) I will refrain from speculating on the issue of the test for insanity that tort law should embrace in the event that it is decided that insanity should be admitted as a defence. The concern here is with the general issue of whether insanity ought to be a defence. The precise form that any insanity defence that is recognised should take is another matter.

\(^{68}\) *Restatement (Second) of Torts*, § 283B, cmt b(2).

\(^{69}\) It played a major role in the past refusal of the courts to countenance actions for negligently inflicted psychiatric injuries (see, e.g., *Victorian Railway Commissioners v Coultas* (1887) 13 App Cas 222, 225 (PC)).

\(^{70}\) For a rare occasion on which this has been realised see *Magill v Magill* [2006] HCA 51; (2006) 226 CLR 551, 617 [211] (Heydon J). Consider also *McLoughlin v O’Brien* [1983] 1 AC 410, 421 (HL) (Lord Goff).

\(^{71}\) See above Part 4(b).

\(^{72}\) See above Part 4(b) and Part 4(c).
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insanity an affirmative defence since it would fail when the evidence is deficient (because the defendant would not discharge his burden of proof).

E. The Deterrence Argument

It has been argued that withholding a defence of insanity encourages insane actors to implement measures to ensure that, as a consequence of their insanity, they do not injure others. In the words of one commentator, ‘[j]ust as holding average persons liable for their torts may make them behave more conscientiously, holding the mentally ill liable may have a similar effect.’ A fatal difficulty with this suggestion is that it is unlikely that the insane can be deterred by the threat of tort liability. Insane persons will often lack the cognitive or affective skills necessary for effective deterrence. Moreover, the insane will typically either be insured or judgment proof and will, consequently, have relatively little to lose by being held liable.

The fact that the insane are unlikely to be deterred by the threat of liability has led many philosophers and jurists interested in criminal justice to conclude that no argument from deterrence existed for holding them liable, including Bentham, Austin and Holmes. This conclusion is wrong. This was famously pointed out by Hart, who described it as a ‘spectacular non sequitur.’ Visiting the insane with

73 Splane (n 2) 166 (footnote omitted). To like effect see Landes and Posner (n 2) 183.
75 John Austin, Lectures on Jurisprudence (John Murray, London 1869) 506.
Bentham] sets out to prove that to punish the mad … must be inefficacious; but all that he proves (at the most) is the quite different proposition that the threat of punishment will be ineffective so far as the class of persons who suffer from [madness] is concerned. Plainly it is possible that though (as Bentham says) the threat of punishment could not have operated on them, the actual infliction of punishment on those persons, may secure a higher measure of
liability might incentivise others to behave in a way that reduces the rate at which wrongs are committed. Put differently, while imposing liability on the insane cannot be supported on the ground of specific deterrence, it may be defensible on the basis of general deterrence. Interestingly, tort lawyers were much faster than their criminal law colleagues to realise that this might be the case. It has often been contended that holding the insane accountable for their torts induces their guardians, carers and family members (I will refer to such individuals collectively as ‘guardians’ for convenience) to take proper care of them since they may have an interest in their estate and would not wish to see it depleted through damages awards. One court expressed this idea as follows:78

If an insane person is not held liable for his torts, those interested in his estate, as relatives, or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the relatives or friends of the lunatic to pay the expense of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons.

It is possible that holding the insane liable might prompt their guardians to act in such a way as will reduce the rate at which they injure others. But this seems unlikely in the extreme. In the first place, guardians already have powerful incentives to use reasonable care in discharging their responsibilities. Guardians may incur liability conformity to law on the part of normal persons than is secured by the admission of [a defence of insanity].

78 McIntyre v Sholty 13 NE 239, 241 (Ill 1887). See also Williams v Hays 143 NY 442, 447 (1894); Seals v Snow 254 P 348, 349 (Kan 1927); McGuire v Almy 8 NE 2d 760, 762 (Mass 1937); Van Vooren v Cook 273 AD 88, 92 (NY Sup Ct App Div 1947); Schumann v Crofoot 602 P 2d 298, 301 (Or Ct App 1979); Restatement (Second) of Torts, § 895J, cmt a; Thomas M Cooley, A Treatise on the Law of Torts (Fred B Rothman & Co, Littleton 1993) 100-1.
personally for injuries that their ward causes to a third party. Concern for their own
and for their ward's physical well-being provides additional reasons to take proper
care since an insane person is just as likely to injure his guardian or himself as a third
party. These inducements to take care are much more powerful than that supplied by
the risk that a potential legacy may be lost or diminished through liability. If they do
not influence the behaviour of guardians, holding insane persons liable for their torts
will hardly would do so. Secondly, this argument assumes that guardians have a very
considerable amount of control over their wards, a greater degree of control that they
may in fact enjoy. Thirdly, it is surely the case that many guardians do not stand to
receive any substantial inheritance from their wards. Insane persons, as was noted
earlier, are unlikely to have deep pockets. Fourthly, guardians may mistakenly assume
that, since insanity is a defence to criminal liability (a matter of common knowledge),
it is also a tort defence.

It is possible to point to various individuals other than guardians who might take
notice of the fact that insanity is not a defence and alter their behaviour in a way that
is desirable as a result. These include those who are on the verge of insanity and
those who might be tempted to feign insanity. However, this suggestion is just as
implausible as the contention that holding the insane liable for their torts will
incentivise their guardians to take reasonable care in the performance of their
obligations. The fact of the matter is that the further removed the target of deterrence

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79 Holgate v Lancashire Mental Hospitals Board [1937] 4 All ER 19 (Liverpool Assizes); Tarasoff v Regents of the University of California 551 P 2d 334 (Cal 1976); Alan A Stone, 'The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society' (1976) 90 Harv L Rev 358-378.
80 Section 1(6) of the Mental Capacity Act 2005 (UK), which determines when and how decisions may be made on behalf of persons lacking mental capacity, provides that '[b]efore [any act done or decision is made under this Act for or on behalf of a person who lacks capacity], regard must be had to whether the purposes for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action' (emphasis added).
81 Ague (n 26) 222.
82 I am borrowing here from the argument in George P Fletcher, Rethinking Criminal Law (Little, Brown & Co, Boston 1978) 813-7.
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is from the individual held liable, the less likely it is that imposing liability will have the desired deterrent effect.

F. The Avoidance and Deinstitutionalisation Arguments

There are two closely related but subtly different arguments to the effect that insanity should not be a tort defence since, were it an answer to liability, it would have deleterious consequences for insane persons. We will call these arguments the ‘avoidance argument’ and the ‘deinstitutionalisation argument’. The gist of the avoidance argument is that tort law should not recognise a plea of insanity since admitting insanity as a defence would discourage interaction with insane persons. George Alexander and Thomas Szasz put this contention as follows:83

[A] person dealing with another who might raise the defense of insanity is bound to be affected by the decision made concerning liability for injury. Adults justifiably avoid dealing legally with children because of a recognition of their immunity to suit. Likewise, mentally healthy persons may be expected to avoid dealing with mentally sick ones … if the mentally sick are held harmless when they injure. … [A] policy [not to hold the insane liable] would thus create a class of irresponsible persons … However persons in this hypothetical class might well be shut off from society and desocialized to an extent surpassing anything with which we are familiar today.

This argument is unpersuasive. The central defect in it is that the analogy between contract and tort is a false one. People can, generally speaking, select carefully those with whom they contract. Consequently, they may, as Alexander and Szasz point out, avoid contracting with individuals who might have a defence to liability for breach of contract. However, it is not very possible to limit the people with whom one interacts

83 Alexander and Szasz (n 2) 36.
to those from whom one might be able to recover damages in tort law in the event that one is injured by them. This is because, very often, the victims of torts and tortfeasors are strangers.

The thrust of the deinstitutionalisation argument is that insanity should not be a defence since exempting the insane from liability might increase opposition to the policy of deinstitutionalisation.84 This logic is embraced in the Restatement (Third) of Torts. The Reporters claim that deinstitutionalisation ‘becomes more socially acceptable if innocent victims are at least assured of opportunity for compensation when they suffer injury’ at the hands of those who would escape from liability.85 Similarly, Stephanie Splane argues:86

Allowing a defense of mental illness to tort liability may increase public resistance to having the mentally ill in the community. The public’s attitude towards the mentally ill vacillates capriciously and it takes only a few well-publicized cases absolving the mentally ill from tort liability to start a public outcry. If the law gives the mentally ill special immunities from liability for causing havoc, then society might well restrict their opportunities to create injury. Opportunities for the mentally ill to obtain licenses, employment, or housing might be substantially circumscribed. Finally, such immunity would probably exacerbate the problems of social segregation and stigmatization of the mentally ill, since such immunity effectively labels them as a special class of irresponsible, incompetent persons that the general community would wish to avoid.

It is readily accepted that the public would be easily inflamed by reports of insane individuals escaping from tort liability by reason of their mentally disordered state. Some well-reported instances of defendants being absolved of responsibility in tort for injuries that they cause on the basis of insanity may well strengthen public opposition

84 For discussion of this policy see Peter Bartlett and Ralph Sandland, Mental Health Law (3rd edn, OUP, Oxford 2007) ch 3.
85 Restatement (Second) of Torts, § 11, cmt e.
86 Splane (n 2) 165 (footnote omitted). See also Creasy v Rusk 730 NE 2d 659, 664-7 (Ind 2000); Carrier v Bonham [2001] QCA 234; [2002] 1 Qd R 474, 487-8 [36].
to the policy of deinstitutionalisation. But this is not a convincing reason for holding
the insane liable for their torts. This is because the inflammatory effect of exonerating
insane defendants from tort liability would surely generally pale in comparison to the
public hostility to the policy of deinstitutionalisation that is aroused by letting such
defendants out of criminal liability. Furthermore, tort law is unlikely to be an
efficacious tool for bolstering the policy of deinstitutionalisation. It would be much
more sensible to advance this policy through educational and other modalities.

In conclusion, the avoidance and deinstitutionalisation arguments are unpersuasive.
There are two further criticisms that can be made against them jointly. First, neither of
them demonstrates that the suggested deleterious consequences of recognising a
defence of insanity for the mentally disordered are worth tolerating. They myopically
centre on the downsides for the insane of providing them with a defence without
considering the potential benefits. Secondly, several civil law jurisdictions admit
insanity as a defence to delictual liability but the feared consequences predicted by
these arguments do not seem to have materialised.

It is abundantly clear that the public is ardently opposed to the insanity defence in the criminal
sphere. It is widely perceived to be a loophole that is frequently exploited. For empirical research
concerning these views see Valerie P Hans, ‘An Analysis of Public Attitudes towards the Insanity
Defense’ (1986) 24 Criminology 393-414; Eric Silver, Cermen Cirincione and Henry J Steadman,
Behavior 63-70. Public opposition to the defence reached fever pitch following the acquittal of John
Hinckley in respect of the attempted assassination of President Reagan on the basis of insanity
(discussed above in Part 3.2). The legislative response in the United States to his acquittal was
swift: see Lisa Callahan, Connie Mayer and Henry J Steadman, ‘Insanity Defense Reform in the

France adopts the common law rule. Article 414–3 of the French Civil Code states: ‘A person
who has caused damage to another when he was under the influence of a mental disorder is
nonetheless liable to compensation’. The position is the same in Switzerland. Article 19(3) of the
G. The Purpose of Tort Law Argument

Thomas Cooley, in an early and influential analysis, developed an argument in favour of disregarding insanity in determining liability based on what he perceived to be the purpose of tort law. Cooley began by remarking that, since the principal object of the criminal law is punishment, it rightly exempts the insane from liability. In his words, ‘to punish, as for a wrong, a party incapable of indulging an evil intent is a mere barbarity; not useful as a discipline to the individual punished, and of evil example instead of warning to others.’\footnote{Cooley (n 78) 98.} Cooley then contended that tort law properly parts company with the criminal law in refusing to recognise insanity as a defence as the purpose of tort law is not punishment but compensation. He wrote:\footnote{Ibid 98-9. Essentially the same argument is made in RFV Heuston and RA Buckley, Salmond & Heuston on the Law of Torts (21\textsuperscript{st} edn, Sweet & Maxwell, London 1996) 415-6.}

A wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose, or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore the law, in giving redress, has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. … There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make...
compensation for an injury committed by him; for, as is said in an early case, “the reason is, because he that is damaged ought to be recompensed.”

This argument does not hold water for three reasons. In the first place, compensation per se is not a goal of tort law. Tort law has never made it its business to compensate all losses. Indeed, it leaves most losses to lie where they fall. Secondly, this line of reasoning does not explain why we should not dispense with all restrictions on liability. Thirdly, Cooley’s contrast between crime and tort is far too simple. It is of course true that the criminal law places more emphasis on punishment than tort law. But punishment is not alien to tort law. This is not just because tort law awards punitive damages. It is primarily because tort liability, like criminal liability, is a sanction. The imposition of tort liability is, among other things, an expression by the State of disapproval of the defendant’s behaviour. Therefore, Cooley’s observation that it is a ‘mere barbarity’ to hold a mentally disordered person criminally liable applies also to visiting such persons with tort liability.

92 For discussion see Coleman (n 6) 209; Robert Stevens, *Torts and Rights* (OUP, Oxford 2007) 320-1.

The proposition that tort liability is a sanction cannot be refuted on the ground that one can insure against liability to pay damages in tort. There are at least two reasons why this is the case. First, rejecting the proposition concerned on this basis would be to overlook the fact that contracts of insurance in respect of liability to pay punitive damages, the sole or dominant purpose of which is to punish the defendant, are not contrary to public policy: see *Lamb v Cotogno* (1987) 164 CLR 1 (HCA); *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897 (CA); *Gray v Motor Accidents Commission* [1998] HCA 70; (1998) 196 CLR 1, 12–13 [32]–[35]; cf at 25–27 [80]–[83]. The second reason is that one who rejects the proposition in question on this ground would be committed to the untenable claim that, were it possible to insure against criminal sanctions, criminal liability would cease to be a sanction.
H. The Self-Support Argument

Another argument in favour of liability is the ‘self-support argument’. One court expressed it as follows:94 ‘that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does’. This argument does not work. It is not a corollary of an ability to pay for one’s necessaries that one should also pay for any damage that one causes. There is no rule that persons who are of sound mind and who have sufficient financial resources to pay for their sustenance are held liable for all of the losses that they occasion in the course of their lives. Why should the position be different for the insane? Additionally, this argument provides no support for imposing liability on insane persons who cannot pay for their upkeep and are dependent on the charity of others or the welfare system.

I. The Distributive Justice Argument

Suppose that D owns an apartment in Park Lane. While strolling through Hyde Park, he suffers a fit of insanity during which he tackles a homeless person. The homeless person is badly injured. If D can escape from liability because he was insane at the time he executed the tackle, the homeless person will remain destitute. D, meanwhile, can continue to luxuriate in his apartment. The prospect of such unjust distributions of financial wealth has prompted some courts to withhold a defence of insanity. In the words of one court, were insanity a defence ‘there would be no redress for injuries

94 McGuire v Almy 8 NE 2d 760, 762 (Mass 1937).
[caused by insane persons], and we might have the anomaly of an insane person having abundant wealth depriving another of his rights without compensation’.\textsuperscript{95}

This argument is afflicted by serious confusion. The main problem with it is that it assumes that tort law is concerned to ameliorate unjust distributions of financial wealth. This is not the case. On the contrary, it can aggravate such distributive injustices. Grindingly poor defendants who commit torts against the obscenely wealthy are liable to compensate the latter for their losses. In any event, the spectre that this argument raises is all but non-existent. There is virtually no prospect of extreme distributive injustices of monetary assets resulting by virtue of the creation of an insanity defence since, as has been stressed several times, the insane will usually not be possessed of substantial means.

J. The Justified Expectations Argument

According to Patrick Keeley, a defendant’s insanity should not provide him with a defence in so far as letting him out of liability would frustrate the claimant’s reasonable expectations that the defendant would comply with safety conventions.\textsuperscript{96} Keeley writes:\textsuperscript{97}

When the plaintiff coordinates her conduct with that of the defendant reasonably expecting him to follow the applicable safety conventions, a mentally ill or mentally deficient defendant should be held liable if he failed to follow that convention and caused injury to her. In that case, the defendant objectively wronged the plaintiff. When plaintiff [sic] knew of defendant’s [sic] mental condition and appreciated the danger to

\textsuperscript{95} Seals v Snow 254 P 348, 349 (Kan 1927).
\textsuperscript{97} Keeley (n 2) 236.
herself threatened by that condition, and after acquiring that knowledge failed to act
with ordinary care or voluntarily remained subject to that danger, she should not be able
to recover even though defendant [sic] breached a safety convention.

There are several oddities lurking in this argument. Kelley states that a claimant
who is injured by a mentally ill defendant should be denied compensation if he knew
that the defendant was mentally ill but failed to take reasonable care for his own
safety. But why should this be the case? Ordinarily, a failure by the claimant to take
reasonable care for his interests results in apportionment rather than a verdict for the
defendant. Furthermore, does Kelley believe that liability should be imposed
whenever the claimant’s justified expectations that the defendant would comply with
a safety convention would be dashed were redress unavailable? Does he believe, for
instance, that an occupier from whose property a dangerous object escapes due to an
act of God should be held liable for the ensuing damage if others reasonably expected
that the object would be kept under control? Does he think that damage caused by a
person’s unexpected involuntary bodily movements should be compensable? If he
does, his vision of tort law is radically different from the way it exists at present.
Finally, this argument focuses on the claimant but leaves this focus unexplained. Why
should the attention be on the claimant’s reasonable expectations rather than on the
fairness of holding insane defendants liable?

K. The Price Paid for Membership of Society Argument

One of the more specious arguments in support of liability is that the insane should
pay for the damage that they cause in return for being permitted to live among the
general population. The Reporters of the Restatement (Second) of Torts put this
argument as follows: ‘if mental defectives are to live in the world they should pay for
the damage they do…. [I]t is better that their wealth, if any, should be used to
compensate innocent victims than that it should remain in their hands.\footnote{98} This
contention, which is couched in rather backward language, is not so much an
argument as an ideological assertion. It does not explain why it is preferable for
insane actors to pay for the damage that they cause than for them to apply it for their
purposes. Nor does this argument tell us why insane persons who are institutionalised
should have to pay for damage that they inflict upon their carers and others with
whom they have contact.

L. The Consistency Argument

Richard Epstein argues that withholding a defence of insanity is consistent with tort
law’s refusal to recognise certain other defences,\footnote{99} most notably private necessity and
duress.\footnote{100} He contends that this is because the plea of insanity, like the pleas of private
necessity and duress, is an assertion by the defendant that he should be allowed to
solve his own problems at the claimant’s expense. This is true. But while insanity is
similar to private necessity and duress in this respect, it is different in a deeper way. A
defendant who acts out of private necessity or under duress is able to cite reasons in
support of his acts. An insane defendant cannot. Insane persons are, by definition,
incapable of being guided by reasons. Due to this fundamental difference between the
plea of insanity and those of private necessity and duress this argument founders.

\footnote{98}Restatement (Second) of Torts, § 895J, cmt a. To like effect see Schumann v Crofoot 602 P 2d 298,
300-1 (Or Ct App 1970); Jolley v Powell 299 So 2d 647, 648 (Fla Dist Ct App 1974).
\footnote{99}Epstein (n 2) 169-70.
\footnote{100}Tort law, unlike the criminal law, does not recognise duress as a defence: Gilbert v Stone (1647)
Aleyn 35; 82 ER 902 (KB); cf Waller v Parker 45 Tenn 476 (1868).}
M. The Resistance and Asset Recovery Argument

Imagine the following scenarios:

1. C1, a businessman, is walking to work. D1, who is insane, lunges for C1’s briefcase.

2. D2, who is insane, breaks into C2’s house and absconds with C2’s computer.

Were insanity a defence, would it be permissible for C1 to resist D1? Similarly, would it prevent C2 from recovering his computer from D2? If recognising a defence of insanity would have these implications, this would be a reason not to let insane persons out of liability since, clearly, C1 should be able to resist D1 and C2 should be able to reacquire his computer from D2. The question, then, is would providing for a defence of insanity have these ramifications. Plainly, it would not. Insane persons who engage in criminal conduct may be resisted.101 Why should tort law take a different position were insanity a tort defence? Similarly, it is difficult to identify any reason why, if tort law recognised insanity as a defence, insane persons who convert another’s property should be entitled to keep it.102

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102 See the remarks in Morris v Marsden [1952] 1 All ER 925, 927 (QBD). The following passage in Lon L. Fuller, The Morality of Law (rev ed, Yale University Press, New Haven 1969) 73 is also pertinent:

A lunatic, let us suppose, steals my purse. His mental condition may be such that it is impossible for him to understand or to obey the laws of private property. This circumstance furnishes a good reason for not sending him to jail, but it offers no reason at all for letting him keep my purse. I am entitled under the law to get my purse back, and he is, in this sense, under a legal liability to return it, even though in taking it he acted without fault and without any intention of doing wrong.
5. The Prescriptive Issue: The Case in Favour of a Defence of Insanity

In the previous Part, arguments upholding the rule that insanity is not a defence were considered. They were all found wanting. Indeed, most are so breathtakingly weak that it is surprising that they continue to enjoy support. In this Part, the case in favour of recognising a defence of insanity will be sketched. Since the opposing arguments have been moved out of the way, this can, fortunately, be done within a short compass.

A. The Free Will Paradigm Argument

Like the criminal law, tort law is premised on the concept of free will; the idea that human beings are self-determining agents. This notion finds expression in many of tort law’s most basic principles. It will suffice to mention two (these examples could easily be multiplied). Take, first, the rule that involuntary acts do not attract liability. A person who strikes another individual due to an uncontrolled muscular reflex, or because he was attacked by a swarm of bees, or because he suffered from a coughing fit, or while unconscious and so on is not responsible in tort. Secondly, generally speaking, the law treats the acts of human beings as intervening causes. A deterministic view of the world is to this extent thereby rejected. Since insanity destroys or at least severely diminishes a person’s capacity for self-determination, tort

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106 Slattery v Haley (1922) 52 OLR 95 (Sup Ct App Div).
law, in failing to grant a defence of insanity, does not adhere faithfully to the paradigm of free will. In order to be consistent, it must, like the criminal law, release insane persons from liability.

B. The Sanction Argument

Another reason for exempting insane persons from liability was gestured towards earlier when we considered the ‘purpose of tort law argument’. This argument, recall, draws a sharp contrast between tort law and the criminal law, identifying the former with compensation and the latter with punishment, and holds that, by reason of their different purposes, these bodies of law properly diverge in their treatment of insane defendants. It was contended that this view of the tort/crime divide is much too simple. This is mainly because it fails to acknowledge that tort liability, like criminal liability, is a sanction. That tort liability should be identified as a sanction is beyond serious dispute. Tort liability is not akin, for instance, to a tax. It is designed to express, among other things, disapproval of substandard conduct. It is true that, generally speaking, tort liability is not as censorious as criminal liability. But it is a sanction nonetheless. Once this is accepted, the conclusion that it is unfair to hold insane defendants liable in tort becomes irresistible. Just as it would be a travesty to impose criminal liability on insane persons, it is unjust to visit them with tort liability.

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108 See above Part 4(g).
109 On this point see the contributions cited in n 93 and the accompanying discussion.
110 This is why insane defendants are not liable for punitive damages: see n 37 and the accompanying text.
The insane should not be held liable in tort law. How should this result be realised? There are two options. First, insanity could operate as an absent element defence. Secondly, an affirmative defence of insanity could be recognised. It is submitted that the case for casting insanity as an affirmative defence is overwhelming. In the first place, the criminal law treats insanity as an affirmative defence. Why should tort law proceed differently? A second reason has to do with the fact that the burden of proof is allocated by reference to the distinction between absent element defences and affirmative defences. Were tort law to introduce sanity as an element of each tort, it would be for the claimant to prove that the defendant was of sound mind in every case. This would be unfair since the defendant will invariably have better access to evidence on this point. It would also involve a very considerable waste of scarce court resources since, in the vast majority of cases, there will be no doubt as to the defendant’s sanity. Thirdly, and perhaps most importantly, construing insanity as an absent element defence would mean that tort law would only speak to those who are of sound mind; only those of sound mind would be required to refrain from engaging in certain acts. This would be undesirable. It would be more respectful of the mentally ill to characterise insanity as an affirmative defence. Doing so would address them as subjects of tort law.

7. Implications of Recognising Insanity as an Answer to Liability

The birth of an affirmative defence of insanity may have ramifications for other parts of tort law. For example, it would seem to have implications for the way in which tort
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law should treat infant defendants. At present, infancy, like insanity, only functions as an absent element defence indirectly.\footnote{Regarding the liability of infants generally see Roderick Bagshaw, ‘Children Through Tort’ Julia Fionda (ed), Legal Concepts of Childhood (Hart Publishing, Oxford 2001) 127.} For example, if the defendant is an infant, the court may, for that reason, conclude that he lacked an intention to injure or defraud the claimant.\footnote{(1799) 8 TR 335, 337; 101 ER 1419, 1421 (KB).} The fact that the defendant is an infant can also make it easier for him to establish that he took reasonable care for the purposes of the tort of negligence.\footnote{‘There can be no distinction as to the liability of infants and lunatics’ (Williams v Hays 143 NY 442, 451 (1894)).} But infancy per se is not an absent element defence (no tort includes among its elements a requirement that the defendant attained a specific age). Nor is infancy an affirmative defence.\footnote{It is not convenient to explore here the issue of precisely when a defence of insanity should be available. This is a secondary question.} As Lord Keynon CJ said in Jennings v Rundall, ‘if an infant commits an assault, or utter slander, God forbid that he should not be answerable for it in a Court of Justice.’\footnote{(1799) 8 TR 335, 337; 101 ER 1419, 1421 (KB).} If, however, insanity is recognised as an answer to liability, it would appear that infancy should be too.\footnote{‘There can be no distinction as to the liability of infants and lunatics’ (Williams v Hays 143 NY 442, 451 (1894)).} This is because sufficiently young infants, like insane persons, are not self-determining agents.\footnote{It is not convenient to explore here the issue of precisely when a defence of insanity should be available. This is a secondary question.}

It might be thought that the creation of an affirmative defence of insanity would also mean that account should be taken of the fact that the defendant was insane in asking whether he met the standard of the reasonable person for the purposes of the tort of negligence. This would not be the case. There are several reasons not to attribute a defendant’s insanity to the reasonable person that do not militate against the recognition of an affirmative defence of insanity. To give one example, if a
defendant’s insanity is imputed to the reasonable person, the court would be required to ask how the reasonable insane person would have acted in the circumstances. This is an absurd question since the notion of a reasonable insane person is oxymoronic.\(^{118}\)

This is, therefore, a factor that weighs against imputing the reasonable person with mental illnesses suffered by the defendant. Importantly, however, it has no bearing whatsoever on the issue of whether insanity should be an affirmative defence.

8. Conclusion

The general position throughout the common law world is that liability in tort cannot be avoided on the grounds of insanity. This article has examined the reasons that have been offered in support of this rule. None of them is capable of sustaining it. Two arguments were, however, identified in favour of letting insane defendants out of liability. The gist of the first argument is that tort law should admit insanity as a defence because doing so is called for by its acceptance of the paradigm of free will. The thrust of the second is that tort liability is a sanction and that it is therefore unjust to impose it on insane defendants. Insanity should constitute an affirmative defence rather than an absent element defence. This is principally because taking insanity into account via an absent element defence would demean insane persons: it would mean that tort law would not address them. The admission of insanity as an affirmative defence would have various implications for the rest of tort law. Most notably, it would call for the recognition of a defence of infancy.

\(^{118}\) In *A v Hoare* [2008] UKHL 6; [2008] 1 AC 844, 860 [35] Lord Hoffmann said that it would destroy the word ‘reasonable’ to speak of the ‘reasonable unintelligent person’ and that, consequently, ‘judges should not have to grapple with [such a] notion’. These remarks apply *a fortiori* to the concept of the reasonable insane person.