

Of Unsound Mind: The Eternal Triangle of Negligence, Fault, and Mental Impairment

Zach Pullar*

Abstract—This article evaluates, and rejects, the *status quo* that mentally ill defendants to a negligence action are held to the standard of the ordinarily careful man. It critically considers the tenability of the Court of Appeal’s ‘elimination of responsibility’ reasoning in its *Dunnage v Randall* decision in light of its previous *Mansfield v Weetabix* judgment and the relaxed standard applicable to relevantly analogous child defendants. It is argued these examples betray the law’s underlying commitment to fault as its ‘organising idea’, despite contrary assessments. The article proposes a legislative solution by which judges may exclude certain mentally ill defendants from negligence liability.

1. Introduction

The standard of care in negligence is the benchmark against which the propriety of the conduct of a defendant who owes a duty of

* University of Exeter. I am grateful to the OUULJ editorial team for comments on earlier drafts. All errors remain my own.

care to another is measured. Where this benchmark is set is a question of law, which this article addresses. The objective approach to this standard is of such long standing ¹ that any modern case whose outcome apparently turns on the rule's applicability could be, in the realm of fiction, susceptible to a 'premature adjudication' in its favour. ² However, the critically diverse reaction to the Court of Appeal case of *Dunnage v Randall* ³ may prove an important testament to the contrary, betraying an antipathy for the status quo. ⁴

This article seeks to demonstrate a fundamental inconsistency between a number of critical judgments on incapacity and responsibility for the purposes of negligence law, and a *de facto* dichotomy between physical and mental impairment despite their formal identity *de jure*. ⁵ This article proffers a legislative solution: a decisive statement by Parliament affording the mentally impaired the legal protection their situation objectively demands, a clarion call which other common law jurisdictions have previously answered. ⁶

¹ *Blyth v Birmingham City Waterworks* (1856) ER 1047, 1049 (Alderson B).

² See, e.g., John Mortimer, 'Rumpole and the Old, Old Story' in *The Second Rumpole Omnibus* (Penguin 1988) 499.

³ *Dunnage v Randall* [2015] EWCA Civ 673, [2016] QB 639 (CA).

⁴ E.g. John Spencer, 'Dunnage v Randall: Liability - Personal Injury - Negligence' (2015) 4 JPI Law 200; J Goudkamp and M Ihuoma, 'A Tour of the Tort of Negligence' (2016) 32 PN 137; Maria Orchard, 'Liability in Negligence of the Mentally Ill: A Comment on *Dunnage v Randall*' (2016) 45(4) Common Law World Review 366; John Fanning, 'Mental Capacity as a Concept in Negligence: Against an Insanity Defence' (2017) 24(5) Psychiatry, Psychology and Law 694.

⁵ *Dunnage* (n 3) [104], [127], [159].

⁶ At common law: see below n 113 and n 114.

2. *The current law*

It is trite law that ‘the standard of care in the law of negligence is the standard of an ordinarily careful man’.⁷ However, whilst objective, this standard is not a unitary benchmark; the particular circumstances in which putatively tortious activity occurs are selectively considered.⁸ Where the defendant’s activity imports some specialism or professional skill, ‘the test is the standard of the ordinary skilled man exercising and professing to have that special skill’.⁹ Similarly to the professional’s reflexive standard—and, therefore, not uniquely¹⁰—children are held to a standard that is age-sensitive:¹¹ the variable standard thus does not *merely* shift upwards.¹² However, the law decisively refuses to countenance the defendant’s *inexperience* when measuring his conduct; the appropriate standard of skill is determined by that reasonably to be expected of an ordinary person undertaking the relevant non-professional¹³ or professional¹⁴ activity. Whilst the standard varies in these instances to reflect the defendant’s circumstances, it remains, it is said, strictly independent of the ordinary person’s ‘idiosyncrasies’.¹⁵ The relaxation of the standard for children, the court reasons, is merely commensurate with the

⁷ *Bolton v Stone* [1951] AC 850 (HL) 863.

⁸ Goudkamp and Ihuoma (n 4) 140-41. See, e.g., *Bolam v Friern Hospital Management Committee* [1957] WLR 582 (QB) 586.

⁹ *Bolam* (ibid).

¹⁰ Goudkamp and Ihuoma (n 4) 140-41.

¹¹ *Mullin v Richards* [1998] WLR 1304 (CA); *Orchard v Lee* [2009] EWCA Civ 295. The significance of this in particular is developed below.

¹² As is at least implicit perhaps in *Bolam*, which, in discussing ‘what in law we mean by “negligence”’, seems to contrapose the ‘ordinary case’ only against the case involving ‘some special skill or competence’: see *Bolam* (n 8).

¹³ *Nettleship v Weston* [1971] QB 691 (QB).

¹⁴ *Wilsber v Essex AHA* [1988] AC 1074 (HL).

¹⁵ *Glasgow Corp v Muir* [1943] AC 448 (HL) 457.

reduced ‘degree of sense and circumspection’¹⁶ which is an objective ‘characteristic’ of a child;¹⁷ likewise defendants must meet objective professional demands.

However, the unassailability of the objective standard—that the law governing children and professionals might already indicate is more apparent than real—is further undermined by the position as regards physical/mental impairment, and any resultant confusion is only exacerbated by the internal inconsistency of this area, developed below.¹⁸ Thus, whether the impairment merits a relaxed standard pivots on whether the defendant was (reasonably) *aware* of that impairment. Only where he is not aware of it will a relaxed standard apply.¹⁹ Suppression of the standard in consequence of some peculiar impairment betrays a basis that is ‘idiosyncratic’ to the possessor; otherwise the latter would simply be, for example, an ‘ordinary’ lorry driver,²⁰ against whose ‘ordinary’ standard of conduct the impaired person would be found negligent.²¹ Crucially, relaxation is restricted to where the impairment ‘entirely eliminates responsibility’,²² as in the event of severe hypoglycaemic attack where the defendant’s actions are ‘involuntary’.²³ There will be no suppression, it follows, where the defendant suffers schizophrenic attacks, since his mind ‘still directs his actions’.²⁴ The law accordingly rejects this idiosyncrasy:

¹⁶ *McHale v Watson* (1966) 115 CLR 199 [9].

¹⁷ *ibid* [6].

¹⁸ John Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Law Series 1985) 27.

¹⁹ *Mansfield v Weetabix* [1998] 1 WLR 1263 (CA); Cf *Roberts v Ramsbottom* [1980] 1 WLR 823 (QB). This is pithily known as the ‘doctrine of prior fault’.

²⁰ As in *Mansfield*.

²¹ *Nettleship* (n 13).

²² *Dunnage* (n 3) [114].

²³ *Mansfield* (n 19); *ibid* [48].

²⁴ *Dunnage* (n 3) [145].

it considers the schizophrenic's actions to be voluntary, and the schizophrenic defendant a legally responsible agent.²⁵

3. *The case for reform*

The 'elimination of responsibility' reasoning of the Court of Appeal in *Dunnage v Randall* cannot support a finding of liability in that case consistent with its binding predecessor *Mansfield v Weetabix*,²⁶ nor with the case law, canvassed above, more generally. In *Dunnage*, a Mr Randall, the claimant's schizophrenic uncle, doused himself in petrol during an altercation with the claimant in the latter's home. He set himself alight in protest and resultantly perished. The claimant, in an unsuccessful preventive attempt, was likewise 'engulfed in flames' and sustained serious burns.²⁷ Of significance is that the case was brought in the context of a household insurance scheme from which the claimant stood to benefit if he could establish that Randall's actions caused him 'accidental bodily injury'.²⁸ Accepting that Randall owed a duty of care to the claimant, the issue for the court was thus whether his actions were negligent; or, in other words, whether they fell below the requisite standard of care. The predecessor appeal case, *Mansfield*, disputed Weetabix's vicarious liability for the damage to a shop, owned by the Mansfields, caused by the company's lorry driver, a Mr Tarleton. The driver, who (unbeknownst to him) suffered from insulinoma—resulting in excessive insulin

²⁵ Similarly, schizophrenia does not *per se* prevent a patient from being legally capacitous to make decisions about his treatment: see, e.g., Clare Dyer, 'Woman with Schizophrenia is Judged to Have Mental Capacity to Decide on Amputation' (2014) 348 BMJ <<https://www.bmj.com/content/348/bmj.g1737>> accessed 7 April 2019.

²⁶ Goudkamp and Ihuoma (n 4) 138-40.

²⁷ *Dunnage* (n 3) [3].

²⁸ *ibid* [4] (emphasis added).

production—crashed into the shop during the onset of a hypoglycaemic attack.²⁹

According to the court in *Dunnage*, since the mind of a conscious, schizophrenic defendant yet ‘directs his actions’,³⁰ those actions are ‘voluntary’ and the defendant accordingly susceptible to liability in negligence.³¹ However, this article will seek to demonstrate that whether the defendant’s volition was wholly or ‘grossly’³² impaired, the significance of the impairment for his legal responsibility *should*, in the appropriate case,³³ be no different. The apparent justification for the ‘involuntariness exception’ to liability is that fault is ‘entirely eliminated’ if a defendant ‘did nothing himself to cause the injury’³⁴ because of physical/mental incapacity. Importantly, the success of the exception in *Mansfield* followed from the court’s recognition that the law cannot hold a defendant who is *incapacitated* from acting to the same standard as a capacitous person. To rule otherwise would be tantamount to a finding of strict liability, since a capacitous defendant reasonably would not have crashed, and ‘that is not the law’³⁵—confirmed, on the face of it, in *Dunnage*.³⁶

By this same inductive process, the court in *Dunnage* should have considered that, given his *non*-rationality—‘[w]hat he *could not do was to decide* to take any alternative action that would obviate the risk’ created by his actions³⁷—the defendant was

²⁹ *Mansfield* (n 19) 1265.

³⁰ *Dunnage* (n 3) [145].

³¹ *ibid* [131].

³² *ibid* [26]. That is, owing to mental illness.

³³ See below, ‘Proposal for Reform’.

³⁴ *Dunnage* (n 3) [115], [132]. Much, therefore, rests on the appropriate construction of the reflexive pronoun.

³⁵ *Mansfield* (n 19) 1268. Given exceptions are, arguably, the doctrines of vicarious liability and non-delegable duties of care.

³⁶ *Dunnage* (n 3) [129].

³⁷ *ibid* [143] (Arden LJ) (emphasis added).

incapable of rational control, and so, like his *Mansfield* counterpart, of conformity with reasonable standards of conduct otherwise attainable by the ordinary man. On the *Dunnage* court's own admission, the named reason for that incapability is not material; the *effect* of it, however, is so.³⁸ Indeed, whilst *Dunnage* has revitalised this debate, the view that incapacity (associated with mental illness) should be capable of excusing liability is not novel.³⁹ A 16th century articulation of first principles by Montaigne remains particularly compelling: 'We cannot be held responsible beyond our strengths and means, since the resulting events are quite outside our control, and, in fact, we have power over nothing except our will; which is the basis upon which all rules concerning man's duty must of necessity be founded.'⁴⁰

Contrary to Vos LJ's view, the situation of the *Dunnage* defendant is incomparable to the qualitatively different 'matter of regret that even the most intelligent in our society sometimes do act irrationally', in which case the relevant benchmark is correctly unvaried.⁴¹ Such defendants *would* 'act unreasonably because such persons *do not lack* rational control':⁴² it is the incapacity for control intrinsic to defendants with certain mental illnesses that drives the requirement for legal protection. The *Dunnage* defendant, conversely, was 'not at fault' in relevantly the same sense as his *Mansfield* counterpart; it cannot accordingly be said that the two decisions are 'far removed'⁴³ from each other, since both decisions are concerned with the legal relevance of an

³⁸ *Dunnage* (n 3) [104] (Rafferty LJ).

³⁹ See, e.g., James Barr Ames, 'Law and Morals' (1908) 22 Harv L Rev 97, 99-100; WGH Cook, 'Mental Deficiency in Relation to Tort', (1921) 21 Columb L Rev 333, 344; Francis Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924) 23 Mich L Rev 9, 28, 31-32.

⁴⁰ JM Cohen, *Montaigne: Essays* (5th ed, Penguin 1967) 25.

⁴¹ *Dunnage* (n 3) [135].

⁴² Goudkamp and Ihuoma (n 4) 144 (emphasis added).

⁴³ *Dunnage* (n 3) [147].

incapacitating ‘idiosyncrasy’.⁴⁴ Once this is accepted, the remaining material distinction between these two cases would appear to consist in the division that all three of the judges in *Dunnage* purported to reject as a matter of law:⁴⁵ that Mr Randall’s impairment was mentally incapacitating, whereas Mr Tarleton’s—the *Mansfield* lorry driver’s—was physically so.

Fleming is therefore correct to underscore that the opposite outcomes of these cases—one in respect of the consequences of unexpected seizure; the other, of those flowing from schizophrenic attack—are ‘difficult to reconcile’.⁴⁶ This article accordingly rejects the ‘binary capacity/incapacity interpretation’ adopted in *Dunnage*, in which any defensible distinction between the two cases under discussion is located.⁴⁷ The *Dunnage* defendant’s conduct may have been technically ‘voluntary’ insofar as his mind ‘directed the attack’;⁴⁸ and, admittedly, *criminal* liability would be obviated only where the defendant can ‘show that he was in a state of automatism [importing unconsciousness requisite for criminal liability]. [But] *in civil cases that is not the test.*’⁴⁹ *Mansfield* suggests that test—when reduced to a question of principle—is whether his conduct can be ascribed fault: it demonstrates that a loss of capacity for control is excusatory of negligence liability, since the resultant lack of blame *prima facie* excludes negligence;⁵⁰ and, importantly, that such a ‘loss of control *may or may not be accompanied* by loss of consciousness’.⁵¹

⁴⁴ Goudkamp and Ihuoma (n 4) 139–40.

⁴⁵ *Dunnage* (n 5).

⁴⁶ Fleming (n 18).

⁴⁷ Fanning (n 4) 699.

⁴⁸ *Dunnage* (n 3) [146].

⁴⁹ *Mansfield* (n 19) 1266 (emphasis added).

⁵⁰ *ibid* 1268.

⁵¹ *ibid* 1267 (emphasis added).

Outside of a *Mansfield*-type scenario, therefore, this might manifest as a loss of *rational* control.⁵²

Indeed, it is suggested even a case such as *Nettleship v Weston*⁵³—a *prima facie* obstacle to a fault-oriented ‘test in civil cases’—can be interpreted such that it does not impugn fault-based reasoning in principle. *Per* Lord Denning MR, ‘[m]orally the learner driver is not at fault; but legally she is liable to be *because she is insured* and the risk should fall on her.’⁵⁴ Given the contingent fact of the ‘policy of the Road Traffic Acts’⁵⁵ that all road users should carry third-party insurance, ‘[...] the judges [saw] to it that [the defendant] [was] liable’ *so that* the claimant may recover.⁵⁶ This is plainly ‘artificial’⁵⁷ and inverted reasoning that puts the cart (the claimant’s entitlement to recover) before the horse (the defendant’s liability on the facts). But for the contingent facts involved in *Nettleship*, the defendant’s liability could and *should* have fallen to a principled, subjective determination according to her fault.

Developing the expanded notions of capacity and voluntariness indicated by the *Mansfield* judgment, this article suggests it would have been quite open to the *Dunnage* court to accept the argument advanced by counsel for the defendant—framed here pithily by David Owen—that ‘an actor fairly may be held accountable ... only if he was *at fault* in causing it, [and] *only if his choices that resulted in the [claimant’s] harm fairly may be blamed*’.⁵⁸ Neither the deluded *Dunnage*, nor the insulinomic *Mansfield*

⁵² *Dunnage* (n 3) [145].

⁵³ n 13.

⁵⁴ *ibid* 700 (emphasis added).

⁵⁵ *ibid* 699.

⁵⁶ *ibid* 700.

⁵⁷ *Cook v Cook* (1987) 162 CLR 376 [5] (Brennan J).

⁵⁸ David Owen, ‘Philosophical Foundations of Fault in Tort Law’ in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 228 (emphasis added).

defendant, were ‘blameworthy’ in their choices;⁵⁹ and neither, it follows, could ‘fairly’ be held to account for any resultant damage. It has been judicially suggested ‘the law of negligence is concerned less with what is fair than with what is culpable’;⁶⁰ but, on a fault-oriented conception of ‘fairness’ such as that articulated by Owen and embodied at common law in *Mansfield*, these two norms should drive at the same conclusion.

Mansfield and *Dunnage* demonstrate the materiality of ‘idiosyncrasies’ to blameworthiness, to which, *Mansfield* reveals, negligence law responds; and ‘if no blame can be imputed to the defendant, the action, based on negligence, must inevitably fail’.⁶¹ In this light, the positive statements of commentators like Goudkamp supporting ‘the fact’ that negligence is exclusively a type of conduct (excluding considerations of mentality), on the premise that the law of negligence ‘shuns the most reliable indicators of when the attribution of blame is warranted, such as deliberation and choice’,⁶² seem problematic. A list of such ‘reliable indicators’ must also include these legally relevant incapacitating ‘idiosyncrasies’. This article supports Goudkamp’s view, however, that *Dunnage*, in dismissing these factors material to blame, is ‘seriously deficient’.⁶³ To the contrary, Spencer has argued that since the *duty* of care in negligence is determined by reference to an ‘objective and reasonable standard’,⁶⁴ whether that duty has been *breached* should be adjudged according to that same standard;⁶⁵ and so adjudged ‘notwithstanding any mental or

⁵⁹ *Dunnage* (n 3) [156]; *Mansfield* (n 49) respectively.

⁶⁰ *Bolton* (n 7) 868 (Lord Radcliffe).

⁶¹ *Snelling v Whitehead* [1998] RTR 386 (HL) (Lord Wilberforce).

⁶² James Goudkamp, ‘The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence’ (2004) Melbourne University Law Review 343, 351. See also Fanning (n 4) 700.

⁶³ Goudkamp and Ihuoma (n 4) 138.

⁶⁴ *Caparo v Dickman* [1990] 2 AC 605 (HL) 617-18 (Lord Bridge).

⁶⁵ Spencer (n 4) 201.

physical illness issue pertinent to the alleged tortfeasor'.⁶⁶ However, the finding of a duty is a preliminary issue concerned with whether the defendant's negligence is *capable* of being actionable;⁶⁷ but whether the defendant was legally negligent is a substantive question of fault—of 'blame', which these 'illness issues' materially inform.

The advantage, therefore—at least in principle—of the prerequisites for liability proffered by Owen is their systematic inclusion of these issues in the negligence inquiry. The prerequisites anticipate a conceptually logical symmetry between provision of compensation for the claimant and of due 'ethical retribution'⁶⁸ for the defendant; the latter is liable to compensate only where *at fault*, having made 'blameworthy choices'.⁶⁹ Echoing Montaigne, Cane similarly contends that tort liability should be understood as premised on 'ethical principles of personal responsibility' for conduct.⁷⁰ If indeed, in Weinrib's terms, correlativity is negligence's 'organising idea', underlying and structuring the claimant-defendant relationship,⁷¹ *Dunnage* (like *Nettleship*, discussed above) suggests an irregularity. The claimant cannot suffer an actionable injustice unless the defendant *commits* an injustice—'the same injustice that the [claimant] has suffered'.⁷² If, on account of the arguments presented in this article, a schizophrenic defendant is properly regarded as legally beyond reproach, the entitlement to recover, correlative to a breach of

⁶⁶ *ibid.*

⁶⁷ *Caparo* (n 64) 629.

⁶⁸ Glanville Williams, 'The Aims of the Law of Tort' (1951) 4 CLP 137, 140.

⁶⁹ G Williams and BA Hepple, *Foundations of the Law of Tort* (2nd edn, Butterworths 1984) 136.

⁷⁰ Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 24-5.

⁷¹ Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) UTLJ 349.

⁷² *ibid* 351. See also Fleming (n 18) 179.

obligation, should not arise. That entitlement might instead be justified against alternative, outcome-based considerations, purposively favourable to the claimant. But, as *Nettleship* demonstrated—and probed further below—these considerations are normatively irrelevant to a correlatively-structured law of negligence.⁷³

The conception of justice reflected in Owen's correlative liability conditions, embodied in *Mansfield*, is moreover borne out in the context of child defendants. As cited above, the case law in this vein develops the reasoning that a child's suppressed standard of care is commensurate with, and justified by, his undeveloped 'sense and circumspection'.⁷⁴ Materially, this state precludes an 'adult's realisation' of risk and likewise an adult's capacity for *ethical* reasoning, otherwise 'effective as a control' on his conduct.⁷⁵ It follows that children are correctly held 'both legally and morally less responsible for what they do'.⁷⁶ In every respect pertinent to responsibility, therefore, the cases of the schizophrenic and the child are analogous: both act on impulse, whether 'irresistibly'⁷⁷ or otherwise juvenily,⁷⁸ precluding rational self-control; and, as Mackie reflects—achieving a more convincing and precise analogy than that dismissed by the *Dunnage* court that the mentally ill have a 'mental age of five'⁷⁹—the adult psychopath is confined to a *childlike* incapacity for moral reasoning.⁸⁰

Cane, in opposition, suggests the 'bad moral luck' of being endowed with 'deficiencies' in one's capacities is an

⁷³ Weinrib (n 71) 352.

⁷⁴ *McHale* (n 16) [9].

⁷⁵ J.L. Mackie, *Ethics: Inventing Right and Wrong* (Penguin Books 1990) 213.

⁷⁶ *ibid.*

⁷⁷ *Dunnage* (n 3) [32].

⁷⁸ *McHale* (n 16) [9].

⁷⁹ *Dunnage* (n 3) [130].

⁸⁰ Mackie (n 75) 213.

‘ineradicable feature of the human condition’,⁸¹ such that it is morally legitimate to expect a defendant to ‘correct’ them. However, a likewise ineradicable feature of the human experience is the ‘mistakes and failings of childhood ... to which everyone is heir’,⁸² yet there is no corresponding ethical imperative for children to ‘correct their deficiencies’. It does not follow that, simply because a deficiency arises by nature, it is morally legitimate to expect a defendant to correct it. At the very least, any such ethical imperative ought to depend on a claimant being aware of his illness—the *Dunnage* defendant was not.⁸³ On each of these bases, therefore, the acts of neither the schizophrenic nor the child can properly be criticised from an ethical or *legal* perspective: if it would ‘offend against principles of justice’ to expect of children the capacities of the reasonable man,⁸⁴ the same intuitional⁸⁵ principles of justice should require that these two classes of defendant receive similar legal treatment.

Supporting objectivity of legal fault, contrarily, is the entirely correct (ethical) argument advocating the comparative treatment of relevantly similar individuals:⁸⁶ unequal treatment by the law which otherwise ‘appears arbitrary, and for which no sufficient reason can be given, is held to be unjust’⁸⁷ and is antithetical to the rule of law⁸⁸—hence the application of a like ‘standard of conduct that [the reasonable man] would set for

⁸¹ Cane (n 70) 51.

⁸² Fleming (n 18) 26.

⁸³ *Dunnage* (n 3) [12], [92], [147].

⁸⁴ Irish Law Reform Commission, *Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors* (Rep 17, 1985) 58.

⁸⁵ See, e.g., Steven Pinker, *The Language Instinct* (Penguin Books 1995) 420, who hypothesises on the existence of an innate cognitive ‘module’ for perceiving and responding to justice and injustice.

⁸⁶ William Frankena, *Ethics* (Prentice Hall 1963) 39.

⁸⁷ Henry Sidgwick, *The Methods of Ethics*, Book 3, Chapter 5 (first published 1874, Cambridge University Press 2011).

⁸⁸ Thomas Bingham, *The Rule of Law* (Penguin Books 2011) 55-59.

himself *and require of his neighbour*'.⁸⁹ However, it must follow that the existence of a 'morally relevant' difference, such as the 'dissimilarities in ability'⁹⁰ of both children and the schizophrenic compared to the reasonable person, would by the same token render their identical treatment unjust: it has been demonstrated above that physical/mental impairment is legally relevant;⁹¹ and if relevant *similarity* justifies equal treatment, relevant *dissimilarity*, 'idiosyncratic' to the defendant, should justify differential treatment. Viewed from a (legal) equality perspective, the threat presented by the status quo to the integrity and legitimacy of the objective standard is recognised even by proponents of objective liability criteria, like Avihay Dorfman.⁹² However, Dorfman's suggestion⁹³ that the 'egalitarian structure' of the objective standard is restored if compliance with its demands is understood as requiring moderation of the *choice* of conduct, rather than how conduct is undertaken—a futility given a mentally ill defendant's insufficient caring skills—is contestable.⁹⁴ It may be a consequence of mental impairment, as Arden LJ's *dictum* cited above attests, that even the facility for such decision-making becomes effectively foreclosed.

A subjective standard, then, appears preferable on both ethical and egalitarian grounds. Nonetheless, a purely objective standard *is* defensible—indeed, desirable—if viewed in light of a conception of justice, qualitatively different to that contemplated by Owen, that is rooted in 'the practical necessity of subordinating

⁸⁹ *Bolton* (n 7) 869 (Lord Radcliffe) (emphasis added).

⁹⁰ *Frankena* (n 86) 41.

⁹¹ *Mansfield* (n 19); *Dunnage* (n 3) [104], [127], [159].

⁹² Avihay Dorfman, 'Reasonable Care: Equality as Objectivity' (2012) 31(4) *Law and Philosophy* 369.

⁹³ *ibid* 381-85.

⁹⁴ Dorfman himself recognises the weakness of this solution, albeit from a different angle, at 386-88.

ethical values to the more exigent demands of public safety'.⁹⁵ Negligence law, understood in view of these overriding public policy demands, would thus be justified in 'exact[ing] a degree of care commensurate with the risk' created by the defendant's activity,⁹⁶ rather than with his own capacities. The considerable weight attached to public policy is driven by the impropriety of denying an innocent claimant recovery, solely on account of his transgressor's peculiar idiosyncrasy, despite its incapacitating effect.⁹⁷ Where a claimant cannot reasonably appreciate with sufficient foresight the defendant's qualified capacity for taking care, and reasonably modify his conduct accordingly, it cannot be *fair* to shift the loss resulting from the putative negligence onto him. As the law currently recognises, only where the claimant is himself 'responsible', in view of his *own* negligence, is it in principle correct that he should bear a measure of the loss.⁹⁸

Thus, whilst nonstandard capacities may reasonably be expected of children and professionals, this is generally untrue of the mentally ill or the inexperienced: the ability to recover should not depend on the vagaries of chance, defeated by the misfortune of receiving an injury attributable to inexperience;⁹⁹ nor, similarly, on what the claimant happens subjectively to know of the defendant's capacities.¹⁰⁰ The enjoyment of coequal individual privilege by members of society to 'move freely' in that society necessarily entails the generic acceptance of coequal mutual obligations of care, legitimating a singular objective standard

⁹⁵ Fleming (n 18) 22.

⁹⁶ *Read v Lyons* [1947] AC 156 (HL) 173 (Lord Macmillan).

⁹⁷ Claimant-centric policy considerations have a considerable length of standing: see *Bessey v Olliot & Lambert* (1681) 83 ER 244.

⁹⁸ Law Reform (Contributory Negligence) Act 1945 c.28, s 1.

⁹⁹ *Wilsber v Essex AHA* [1987] QB 730 (CA) 750.

¹⁰⁰ *Nettleship* (n 13) 700-01, 709.

governing all conduct.¹⁰¹ As Cane notes, an objective standard achieves ‘fairness in loss allocation’, thereby justifying the inevitable ‘gap’ between legal and ethical responsibility:¹⁰² the loss resulting from the defendant’s acts, where neither defendant nor claimant are ‘at fault’ in the respects considered above, is fairly borne by the defendant who created the risk of loss. As suggested above in connection with *Nettleship*, this is especially so, perhaps, where the tortfeasor—or his estate, as in *Dunnage*—is insured.¹⁰³ It is a conventional absurdity to assume every defendant enjoys third party insurance coverage; but by enabling the claimant to recover without personally impoverishing the defendant, it can significantly relieve both the ‘admonitory’ force of liability and the requirement for ‘fault’ a punishment presupposes.¹⁰⁴

Regrettably, in consequence of *Dunnage*, this article does not share the enthusiasm of commentators like Richard Mullender who extol the ‘reflexivity’ of negligence law, whose ‘informing ideals’, such as justice, reliably influence how its doctrine is configured.¹⁰⁵ Any true commitment to what Mullender terms ‘ethical community’,¹⁰⁶ qualifying ‘ordinary notions of what is fit and proper’ conduct,¹⁰⁷ is doubtful in light of *Dunnage* and its normalisation of a circumscribed involuntariness rule.

¹⁰¹ Some weight was given to this point in *Dunnage*: see *Dunnage* (n 3) [153].

¹⁰² Peter Cane, ‘Justice and Justification for Tort Liability’ (1982) 2 OJLS 30, 48.

¹⁰³ *Nettleship* (n 13) 699–700; *ibid.* Speculatively, this may, at least implicitly, have inclined the *Dunnage* court towards a finding of liability in spite of the defendant’s lack of fault (as this article contends).

¹⁰⁴ Fleming (n 18) 6.

¹⁰⁵ Richard Mullender, ‘The Reasonable Person, The Pursuit of Justice, and Negligence Law’ (2005) 68(4) MLR 681, 687–88.

¹⁰⁶ *ibid* 688.

¹⁰⁷ *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL) 108 (Lord Millett).

This circumscription would make sense if it can be accepted that ‘the criterion of liability in tort is not so much culpability, but on whom should the risk fall’¹⁰⁸ for the claimant-centric reasons considered above; but, it is suggested, there is *no* such singular criterion. This criterion cannot explain the law’s mitigation for children;¹⁰⁹ nor, even, why there was no liability in *Mansfield*, since, on the facts, a large corporation is far better equipped to shoulder loss than a small family enterprise. Indeed, as the no-fault compensation practice in New Zealand since 1974 bears out, the logical development of this criterion would appear to favour the abolition of tortious liability altogether—the ‘death of tort’.¹¹⁰ As Orchard comments,¹¹¹ given that the reasoning in *Dunnage* ‘only becomes plausible’ if this criterion of liability prevails, the circumscribed voluntariness rule—a product of that reasoning—is in some doubt. The final section of this article proposes to resolve that doubt, by means of a legislative solution.

4. *Proposal for reform*

This article submits that the involuntariness rule, having been unduly curtailed by the courts and whose current place in the scheme of negligence is ambiguous,¹¹² should be reconceptualised and given a statutory basis, furnishing ‘incapacity’ with a practicable definition. A statutory solution particularly commends itself to those who, in light of *Dunnage*, are reasonably sceptical about the capacity of the common law of negligence to be ‘reflexive’. Following closely the thread laid by Canadian jurisprudence—in particular, *Buckley v Smith Transport Ltd*¹¹³ and,

¹⁰⁸ *White v White* [1950] P 39 (CA) 59 (Denning LJ).

¹⁰⁹ Goudkamp and Ihuoma (n 4) 142.

¹¹⁰ Fleming (n 18) 172.

¹¹¹ Orchard (n 4) 370-71.

¹¹² Goudkamp and Ihuoma (n 4) 145-49.

¹¹³ [1946] OR 798 (CA).

later, *Fiala v MacDonald*¹¹⁴—the proposal mooted here could take the following form:

A court may relieve a defendant to an action in negligence of liability when, on the balance of probabilities, he is capable of demonstrating, as a result of recognised mental illness:

(1) He had no capacity to understand or appreciate the duty of care owed at the relevant time; or

(2) He was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care.

The statutory discretion does not apply where, at the relevant time, the defendant was, or should reasonably have been aware of his mental illness.

Crucially, this reform does not impugn the objective standard, which, in general, remains a desirable referent for the reasons canvassed above. However, it does empower the court to extend legal protection, hitherto withheld,¹¹⁵ to the mentally ill whose impairment genuinely (or, at least, on the balance of probabilities) vitiates the capacity to recognise or discharge a duty of care. Thus, on the facts of *Dunnage*, given the schizophrenic defendant's apparent lack of 'meaningful' ability to take 'any

¹¹⁴ [2001] 201 DLR (4th) 680. See in particular [49].

¹¹⁵ Though, it is submitted, there are strands of English judgments that might support the principle of the reform advocated: see, e.g., *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884 (HL) [16], [22], [63].

alternative action' other than the course he took,¹¹⁶ the second limb (at least) is engaged and the statutory discretion applies. It may, after all, be countered that this proposal presupposes *too* great a weight attached to ethical considerations of fault—the main focus of this article—but which are, in fact, of little moment to negligence law.¹¹⁷ Significantly, however, even the early proponent of compensation-based objectives in tort law, Oliver Wendell Holmes,¹¹⁸ recognised the differentiable situation of the mentally impaired. Thus, where mental impairment 'manifestly incapacitat[es] the sufferer from complying with the rule which he has broken, good'—and, it may be added, *moral*—'sense would require it to be admitted as an excuse.'¹¹⁹

5. Concluding remarks

Dunnage v Randall exemplifies the tension between two competing objectives—one claimant-oriented, one defendant-oriented—that the common law on the standard of care has variously, and with some inconsistency, pursued. The reform this article has advanced is an essential one, for it resolves the apparent inconsistency in the treatment by the law of defendants with relevantly similar incapacities. It is practical and affords real consequence to the observation in *Dunnage* that 'it is the effects of a condition or illness which ought to be in play, not its label,'¹²⁰ eliminating the *de facto* line between physical and mental illness as regards negligence liability which was ironically consolidated by *Dunnage*.¹²¹ Beyond its immediate application to mentally incapacitous

¹¹⁶ *Dunnage* (n 3) [143].

¹¹⁷ e.g. Mullender (n 105) 691-92.

¹¹⁸ Oliver Wendell Holmes Jr, *The Common Law* (first published 1881, Dover Publications 1991) 108.

¹¹⁹ *ibid* 109.

¹²⁰ *Dunnage* (n 3) [104] (Rafferty LJ).

¹²¹ Orchard (n 4) 371. See also *Clerk & Lindsell On Torts* (22nd edn, Sweet & Maxwell 2017) para 8-161.

defendants, such a reform could have broader social ramifications: it strips of currency any lasting anachronistic conceptions of mental illness as 'beset with an atavistic attribution of sin from which modern man has not yet succeeded in emancipating himself.'¹²²

¹²² Fleming (n 18) 26.