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Public Policy Implications of Liability Regimes for Injuries Caused by Persons with Alzheimer's Disease

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Introduction

People in the United States and the developed world are living longer than ever before. While gains in the average life expectancy have been modest, these greatly underestimate the growth of the elderly population.[1] Most of this elderly population is healthier than comparable populations in the past and they actively participate in everyday life much more than people of comparable age in decades past. The amelioration of many of the diseases of age has accentuated the problems of the chronic diseases for which there are no effective treatments. Perhaps the most devastating of these is Alzheimer's disease, a progressive dementia leading to incapacity and death.[2] As discussed in the other articles in this symposia, Alzheimer's disease raises significant legal issues because it challenges our model of a world neatly divided into autonomous citizens and persons legally adjudged incompetent and under the control of duly appointed legal representatives in secure facilities.

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[1] Average life expectancy is strongly influenced by deaths of the young. Substantial increases in the survival rates of persons over the age of the average life expectancy raise the average life expectancy itself relatively little. More generally, mortality measures provide only a limited view of the health of a population. For a more detailed discussion of the problems related to mortality measures, see: Marilyn J. Field and Marthe R. Gold, Editors, Summarizing Population Health: Directions for the Development and Application of Population Metrics, National Academy Press, Washington, D.C. 1998.

[2] "Alzheimer's disease, which is characterized by progressive loss of memory and cognitive function, affects 15 million people worldwide. The incidence increases steadily from 0.5 percent per year at the age of 65 years to nearly 8 percent per year after the age of 85 years. Because survival for a decade is common, the prevalence increases from 3 percent at the age of 65 years to 47 percent after the age of 85 years." Mayeux, Richard; Sano, Mary. Drug Therapy: Treatment of Alzheimer's Disease, The New England Journal of Medicine Nov 25, 1999; 341 (22),pp 1670-1679, at 1670.
These numbers must be increased by the cases of non-Alzheimer's dementias, which pose the same legal issues. See: Crystal, Howard A. MD; Dickson, Dennis MD; Davies, Peter PhD; Masur, David PhD; Grober, Ellen PhD; Lipton, Richard B. MD, The Relative Frequency of "Dementia of Unknown Etiology" Increases With Age and Is Nearly 50% in Nonagenarians. Archives of Neurology Volume 57(5), May 2000 pp 713-719; and Ballard, Clive. McLaren, Andrew. Morris, Chris. Non-Alzheimer dementias. Current Opinion in Psychiatry. 13(4):409-414, July 2000.

This article discusses the public policy implications of tort liability rules for persons with Alzheimer's disease (PWD[3]) who injure their caregivers or member of the general public, and the potential liability of their caregivers for not preventing injuries to the general public. The analysis is rooted in preventive law and therapeutic jurisprudence concerns,[4] rather than advocacy for either PWDs or their victims. The objective is to identify the proper balance between tort liability, immunity, and non-tort approaches such as public health reporting and management strategies. This recognizes that expanding liability will increase the pressure on insurers[5] and families[6] to limit freedom of PWDs, while limits on liability may leave deserving persons uncompensated and create a public backlash that will drive unnecessarily broad or harsh restrictions of PWDs. Most troublingly, the tort doctrine that once a duty is assumed, it must be carried out non-negligently, can create perverse incentives: family caregivers may have no legal duty to prevent PWDs under their care to stop driving, but become liability for tying to stop them and not succeeding.[7]

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[3] As discussed infra, this includes Alzheimer's disease and dementias secondary to other common medical conditions such as HIV infection, strokes, and non-specific senile dementia.

[4] David B. Wexler, The Development of Therapeutic Jurisprudence: From Theory to Practice, 68 Rev. Jur. U.P.R. 691 (1999); Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering, 34 Cal. W. L. Rev. 15 (1997); David B. Wexler & Bruce J. Winick, Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (1996).

[5] As an example, assume a jury awards punitive damages against a PWD who injured someone in an automobile accident because the jury believes that it is gross negligence for a person with Alzheimer's disease to drive an automobile. This will put pressure on automobile insurers to deny coverage for PWDs or to price policies beyond the reach of most drivers.

[6] Cases that hold that institutional caregivers can sue the institutionalized PWD for injuries inflicted on the caregiver will the institution and the family to demand restrictions on the PWD. Holding families liable for the torts of PWDs they are caring for may encourage the families to unnecessarily limit the PWD's liberty and could force early PWDs into institutional care prematurely.

[7] "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or
(c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of Torts, § 324A (1965).

This article is meant as a guide to the study of tort issues in Alzheimer's disease, not a definitive recipe for solving the tort problem in Alzheimer's disease. It reviews the history of the applicable doctrines and the current trends, but recognizes that jurisdictions vary widely and that it is uncertain which approach, if any in current use, is the best. The author proposes modifying the tort law regime with public health and preventive law strategies. Most importantly, the author wants to encourage further study of these problems and the collection and analysis of empirical information on the impact of tort law on the lives of PWDs, their caregivers, and the people they interact with in society.

Pathophysiology of Alzheimer's Disease

While Alzheimer's disease has been known for nearly 100 years, until recently it was seen as a disease characterized by significant mental impairment in patients for whom no other specific cause could be found.[8] The diagnosis was not made until the PWD was so incapacitated that it was obvious to all, except perhaps the affected person,[9] that he/she was too impaired to engage activities that could endanger others. Outside of injuries to caregivers, the Alzheimer's disease patient did not pose significant risks to the public because they were too impaired to drive or engage in other risky behavior. In this period, a blanket rule that all persons diagnosed with Alzheimer's disease would lose their driver's license would not have been controversial because Alzheimer's disease was not diagnosed until the patient was clearly too incapacitated to drive.

The legal status of dementia is changing, however, as diagnostic tests are developed that allow Alzheimer's disease to be diagnosed long before it affects behavior, and as it is recognized that dementia is an important symptom of other diseases,[10] such as HIV infection.[11] Now Alzheimer's disease can be diagnosed

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[8] While there are specific pathologic signs of Alzheimer's disease in the brain, these could only be determined at autopsy.

[9] The affected person may never become aware of it because it is self-masking: it often impairs precisely the higher mental functions that are necessary to be self-aware that one is becoming impaired.

[10] Clive Ballard, Andrew McLaren, Chris Morris, Non-Alzheimer dementias. Current Opinion in Psychiatry. 13(4):409-414, July 2000.

[11] This article will use HIV (human immunodeficiency virus) infection rather the term AIDS (acquired immunodeficiency syndrome), which is only a symptom complex of some persons infected with the HIV virus. This distinction is important because dementia is often the first manifestation of HIV infection in persons who otherwise do not have the symptoms that trigger the diagnosis of AIDS. Until the definition of AIDS was revised to include dementia, it was common for individuals to have disabling HIV dementia without meeting the definition for AIDS.

well before it impairs the ability to drive or has other affects on gross behavior. New tests, including genetic testing,[12] may allow the diagnosis years or decades before the first symptomatic manifestations of the disease.[13] Once diagnosed, the current view is that the decline to total incapacity is inevitable and is usually only averted through death due to concomitant illness,[14] but the course is highly variable, with some patients declining very quickly and others only over a substantial period of years. Despite the significant risks posed by drivers with symptomatic Alzheimer's disease,[15] it is would be difficult to justify blanket rules that prohibit all persons diagnosed with Alzheimer's disease from driving might endanger the public because they would improperly limit the lives of a large number of persons who do not yet pose any threat to others.[16]

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[12] Kaj ab Blennow, Ingmar C. Skoog, Genetic testing for Alzheimer's disease: how close is reality? Current Opinion in Psychiatry. 12(4):487-493, July 1999; M. B. Liddell, S. Lovestone, M. J. Owen, Genetic risk of Alzheimer's disease: advising relatives. British Journal of Psychiatry. 178:7-11, January 2001; Jean Francois Dartigues, Luc Letenneur, Genetic epidemiology of Alzheimer's disease. Current Opinion in Neurology. 13(4):385-389, August 2000.

[13] Ingmar Skoog, Detection of Preclinical Alzheimer's Disease. New England Journal of Medicine. 343(7):502-503, August 17, 2000. As diagnostic tests shift from measures of behavior to biochemical and genetic markers, it is expected that many people diagnosed with Alzheimer's disease will live for years without impairment, dying of other conditions without ever showing symptoms of Alzheimer's disease. This is already reflected in autopsy data that shows that significantly more people have the characteristic lesions of Alzheimer's disease in their brains than were diagnosed with Alzheimer's disease at the time of death.

[14] There are findings characteristic of Alzheimer's disease in brains of many people who die before developing overt symptom. The recent extension of the diagnosis to persons with few or no overt symptoms raises the possibility that some persons who diagnosed with Alzheimer's disease before any clinical signs develop may have an arrested clinical course and not develop the characteristics of Alzheimer's disease. Until there has been sufficient time to observe the course of the disease in these persons, it is impossible to say whether those persons with brain pathology consistent with Alzheimer's disease but who were asymptomatic would have developed symptoms had they just lived longer.

[15] Richard M. Dubinsky, Anthony C. Stein, et al., “Practice parameter: risk of driving and Alzheimer's disease (an evidence-based review): report of the quality standards subcommittee of the American Academy of Neurology.” Neurology 54(12): 2205-11 (2000); Gillian K. Fox, Stephen C. Bowden, et al. “Alzheimer's disease and driving: prediction and assessment of driving performance.” J Am Geriatr Soc 45(8): 949-53 (1997).

[16] In most cities, and almost all rural areas, being able to drive an automobile is essential for the basic tasks of life, including working and shopping for food and household goods. There is no good alternative transportation so that depriving individuals of their driver's licenses can effectively imprison them in their homes. The social cost of providing alternative transportation and support for such persons would make any such scheme politically impossible, without regard to it constitutional questionability.

There is an established jurisprudence and regulatory structure for insanity, which the courts use as their precedent for analyzing cases involving Alzheimer's disease. Much of the legal analysis of mental impairment is in the criminal context and deals with specific mental illnesses such as paranoid schizophrenia that have characteristic psychology profiles and behavior patterns, or conditions such as pedophilia which, by their nature, involve violations of the law. It is a thesis of this paper that Alzheimer's disease differs from traditional legal notions of insanity in several key ways that undermine the rigid application of this precedent to PWDs. These are rooted in the pathophysiology of the disease and while none are exclusive to Alzheimer's disease,[17] it poses a unique combination of these factors.

Demographics: The prevalence of Alzheimer's disease is already much greater than any other equally incapacitating mental disease, and it will increase dramatically with the aging of the population. This will inevitably lead to more accidents and intentional injuries related to dementia, and public pressure to compensate the injured and restrict the liberty of those with dementia.

Progression: Alzheimer's disease is progressive in all cases and results in complete incapacitation and death, given enough time.[18] Legal rules must reflect

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For a discussion of the limited impact of early Alzheimer's disease on driving, see: Jonathan D. Trobe, Patricia F. Waller, Carol A. Cook-Flannagan, Susan M. Teshima, Linas A. Bieliauskas, Crashes and Violations Among Drivers With Alzheimer Disease. Arch Neurol, Volume 53(5) May 1996.411-416.

[17] Another common cause of dementia is HIV infection, which has a direct detrimental effect on the brain of many infected persons:
"Approximately one third of adults and half of children with the acquired immunodeficiency syndrome (AIDS) eventually have neurologic complications, which are directly attributable to infection of the brain by the human immunodeficiency virus type 1 (HIV-1). Neurologic problems occur even in the absence of opportunistic infection or secondary cancer. Important clinical manifestations include impaired mental concentration, slowness of hand movements, and difficulty in walking. This malady has been called the AIDS dementia complex by Price and colleagues; a more recent term is HIV-1–associated cognitive– motor complex."
Stuart A. Lipton, Howard E. Gendelman, Dementia Associated With The Acquired Immunodeficiency Syndrome. 332 New England Journal of Medicine 934 (1995). See also: Clifford, David B., Human Immunodeficiency Virus & Associated Dementia. Archives of Neurology, Volume 57(3), March 2000, pp 321-324; Higgs, Roger; Pinching, Anthony J., Frontiers In Care: A Case Of Compulsory Treatment In Aids Dementia. Case Study And Commentaries, Journal of Medical Ethics 2000;26:61-65;

[18] Based on current knowledge. As the diagnosis is made ever earlier, it is possible that there will be a group of persons who have Alzheimer's disease who never manifest significant impairment and who were invisible in the past when diagnosis depended on substantial progression of the disease.

this dynamic process, whereas existing insanity precedent and competence jurisprudence is binary - the person is either fully legally competent or is incompetent. As a jurisprudencial matter, most of the law on insanity and mental incapacity comes from the criminal law, which does not prosecute either persons who are incapable of participating in their own defense or are dead. In contrast, tort law claims go forward without regard to the defendant's capacity or presence, merely substituting a legal representative when the defendant dies or becomes incompetent.[19] This means that defendants who might have been competent at the time of the accident will seldom be competent at trial or even during discovery, and will be unable to assist in their own defense without advance planning.

Unstructured Care: The vast majority of Alzheimer's disease patients are cared for by family members, entering nursing homes and other supervised care settings only when the disease is far advanced. Most do not have systematic evaluations of mental function to inform them and their care givers of any necessary restrictions on their activities. These caregivers are under signficiant stress from the 24 hour care necessary for PWDs, they receive little community support, and often are financially strapped and poorly educated. This makes it especially difficult for them to assure that the PWD receives proper care and medical evaluation, and limits their ability to prevent the PWD from posing a risk to others.

Tort Liability Doctrines and Alzheimer's Disease

Historical Foundations

The criminal law developed a jurisprudence of culpability based on degrees of mental capacity very early in its evolution.[20] Since tort law evolved from writs of

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[19] Stinson v. Holder, 996 P.2d 1238 (Alaska 2000).

[20] Legally, distinctions were made between those that were regarded as "natural" or "born fools" and those that were lunatics. It was believed, and for many years argued, that if one were a born fool or a child fool he or she could not be judged a criminal. The Selden Society's Volume 7, The Mirror of Justices (1895) stated the distinction as follows:

"...then as to fools let us distinguish, for all fools can be adjudged homicides except natural fools and children within the age of seven years; for there can be no crime or sin without a corrupt will, and there can be no corruption of will where there is no discretion and an innocent conscience, save in the case of the raging fools. And therefore Robert Walerand ordained that heirs who were born fools should be in wars to the king, to be married along with their inheritances, of whatsoever fees those inheritances might be held.* As to madmen we must distinguish, for those who are frantic or lunatic can sin feloniously, and thus may sometimes be accountable and adjudged as homicides; but not those who are continuously mad." [fn: The introduction of the rule that all

trespass, which did not require proof of motive to find liability, there was no reason for tort cases to delve into the nuances of mental impairment, so the cases speak of generic lunacy, idiocy, or insanity.[21] If defendant injured plaintiff intentionally or through negligence, defendant would be liable unless it could be proved that the injury was either privileged or was unpreventable. The classic statement of this theory is Weaver v. Ward,[22] a case in which a soldier was injured by a fellow soldier. The court found that there would be liability unless the defendant could show that the injury arose from a formal military action or exercise.[23] The plaintiff was not required to prove any intent to harm, nor was defendant's state of mind allowed as a defense.[24] As part of the dicta in the case, the court found: "if a lunatic hurt a man, he shall be answerable in trespass . . . ".[25]

This early distinction between the role of intent in civil and criminal law continued, with most common law courts accepting that the mentally impaired are responsible for their torts.[26] The courts also found that the mentally impaired

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idiots are in ward to the king is ascribed to Robert Walerand, a favorite and a justice of Henry III, 1216 - 1272.] (at 138 - 139)

[21] The Selden Society Year Books contain a decision from The Michelmas Term of King Edward II (1309) in which The Honorable C.J. Bereford distinguished between what was known as a "born fool" and a lunatic. The born fool was someone who had quite literally been born mentally incapacitated. The lunatic however was a person who had at one time been sane and later become mad, continuously furious or mentally incapacitated in some way.

"...note that if an infant under age is a born fool, the King shall have a wardship all his life; but it is not so in the case of a lunatic." 53. ANON., Selden Society Year Books Volume 19 at 151.

[22] Weaver v. Ward, Hobart 135, 80 Eng. Rep. 284 (1616).

[23] Weaver v. Ward is also cited as an early statement of the doctrine that soldiers cannot sue the government or fellow soldiers. See Feres v. U.S., 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

[24] One of the earliest cases to adopt and modify Weaver v. Ward to law of the United States was Taylor v. Rainbow, 2 Hen. & M. 423, 12 Va. 423 (Va. 1808). The Taylor court discussed the case in terms of negligence, but followed the English court in not finding any acceptable defenses except for matters entirely beyond the control of the defendant.

[25] This was not at issue in the case and was only used to illustrate that while tort law did not depend on the on the defendant's state of mind, criminal law did and would excuse the actions of a lunatic who did have the ability to act with the necessary intent for a crime. See Grant H. Morris, Requiring sound judgments of unsound minds: Tort liability and the limits of therapeutic jurisprudence, 47 SMU LR 1837 (1994), 1839, et seq.

[26] During the same period, civil law jurisdictions did exempt insane persons from tort liability in many circumstances:

were responsible for their actions when they constituted contributory negligence, thus preventing the mentally impaired from suing for injuries to themselves when their incapacity put them in harm's way.[27] There are very few reported cases where the incapacity of the plaintiff or defendant is critical to the resolution of the case, so it is difficult to determine whether this was a significant legal doctrine or one that was oft cited but seldom applied. It would be expected that most persons so significantly impaired to trigger the issue would not have adequate assets to make litigation attractive. If the defendant had assets, they were probably under the control of a guardian or the court,[28] which complicated a recovery.[29]

"The curator ad hoc for the defendant based his legal position on the theory that, under the civil law as applied in Louisiana, an insane person is not liable for his tortious acts because, under the Roman, Spanish, and French jurisprudence, and in a number of countries where the principles of civil law are recognized, such injury falls within the category of damnum absque injuria, and that, while the language of article 2315, R.C.C., may appear to be all- embracing in its scope, it is nevertheless an adoption of the concept founded upon the old Spanish laws as applied in Louisiana prior to the adoption of the Code of 1825; that the language of the article had acquired a definite and established meaning which recognized an exception or exemption from liability in favor of insane persons, and, therefore, the provisions of the article should receive an interpretation and construction consistent with the theory of law which prevailed in Louisiana at the time of its adoption and which would cause it to be harmonized with the general theory of the civil law as recognized in the countries where its principles control."

Yancey v. Maestri, 155 So. 509 (La.App.Orleans 1934) at 509. Since it was unnecessary to resolve the liability of the insane in this case, the court did not decide whether this was an accurate statement of Louisiana law. This has not been addressed by subsequent courts, but related decisions indicate that Louisiana probably follows the common law rule. See Johnson v. Pendleton, 751 So.2d 332, 335 (La.App. 4 Cir. 1999).

[27] See for an early discussion of this: Hartfield v. Roper, 12 Am.Negl.Cas. 293, 21 Wend. 615, 34 Am.Dec. 273 (N.Y.Sup. 1839).

[28] "If a person has either a legal or equitable claim against the estate of an idiot, lunatic or habitual drunkard, in the hands of a committee appointed by the Court of Chancery, which such committee refuses to pay, he must apply to this court by petition, for payment of his demand; and he will not be permitted to obtain payment by means of a suit at law, unless such suit is brought with the sanction of this court." In re Heller, 3 Paige Ch. 199, 3 N.Y. Ch. Ann. 115 (N.Y.Ch. 1832). Interestingly, chronic drunkenness would also trigger the protection of the court. See In re Hoag, 7 Paige Ch. 312, 1838 WL 2897, 4 N.Y. Ch. Ann. 169 (N.Y.Ch. 1838).

[29] Some courts also limited the damages against mentally impaired defendants, espousing surprisingly realistic views of tort damages:

"Ordinarily, in an action for a personal injury, the amount of damages is, at least to a considerable extent, governed by the motive which influenced the party in committing the act. Thus it is usual, and as proper as it is usual, for the court, upon the trial of an action for an assault and battery, to instruct the jury that the action is maintainable even though the injury was accidental; that if intentional, yet when the act is done under the excitement of strong provocation, it is a proper

With the evolution of negligence theory came defenses such as standard of care and reasonable behavior.[30] While these do not depend on the actor's state of mind, they do depend on the state of the actor's mind: the mentally impaired will frequently be unable to know or carry out the appropriate standard of care, nor will they be able to behave reasonably in many situations. The law, however, makes few allowances for the mentally impaired. The classic statement of this doctrine is by Holmes, in this book, The Common Law:

> "The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account."[31]

Holmes recognized that there must be exceptions for children of tender years and for the physically handicapped.[32] These are blanket exceptions for liability but

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ground for the mitigation of damages. And, on the contrary, that when the act is committed deliberately or maliciously, it is good ground for increasing damages. In short, in such cases, the damages are graduated by the intent of the party committing the injury. But in respect to the lunatic, as he has properly no will, it follows that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured." Krom v. Schoonmaker, 3 Barb. 647 (N.Y.Sup. 1848).

[30] For the purpose of this discussion, the political issues underlying the evolution of tort liability, such as the rise of industrialization, are not relevant. For a discussion of this evolution, see Robert J. Kaczorowski, The Common-Law Background Of Nineteenth-Century Tort Law, 51 Ohio St. L.J. 1127 1990.

[31] O. W. Holmes, The Common Law 108 (1881).

[32] "A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the

are based on the standard for reasonable behavior by a person with the particular disability. Thus a blind man who chose to drive a wagon through town would be liable for any injuries caused to bystanders, but a blind man who was injured because he did not dodge a run away horse could not be charged with contributory negligence. At least in the case of children,[33] early courts imputed the negligence of their caregivers to the child, finding that even if a child was not old enough to know to stay out of the road, the child would be charged with the negligence of his caregivers.[34] The courts also rejected an assumption of risk defense when persons were injured through dealing with persons known to be insane.[35] This is consistent with Holmes' view that the tort law must not be tailored to the individual circumstances of each defendant and that plaintiff is entitled to assume reasonable behavior from all persons.

Holmes view of insanity, which grew out of the traditional distinctions between fools, raging fools, and lunatics, recognized few nuances of mental impairment. What is now recognized as many varieties of mental illness, dementia, and mental retardation were lumped together and differentiated functionally as to their duration and whether they rendered the person significantly incapacitated within the context of 19th century society. Holmes did recognize that while many insane persons might be able to carry out the tasks of life and should be charged with their torts, there are persons so incapacitated that they should be excused from liability.[36] This is reflected in modern cases which allow insanity as a defense in

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neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another." Common Law at 109.

[33] Since the early courts generally applied the same standards for children and the insane, it might be assumed that the courts would impute the negligence of his caregivers to an insane person as well: "There can be no distinction as to the liability of infants and lunatics, between torts of nonfeasance and of misfeasance,--between acts of pure negligence and acts of trespass." Williams v. Hays, 143 N.Y. 442, 452, 38 N.E. 449, 451 (N.Y. 1894) (This case has an excellent review of the law at the time.)

[34] "In an action for such injury, if there be negligence on the part of the plaintiff there cannot be a recovery; and although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult." Hartfield v. Roper, 12 Am.Negl.Cas. 293, 21 Wend. 615, 34 Am.Dec. 273 (N.Y.Sup. 1839).

[35] Morse v. Crawford, 17 Vt. 499, 44 Am.Dec. 349 (Vt. 1845)

[36] "Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with

cases which depend on specific intent and where the defendant's mental impairment prevents the manifestation of the requisite intent.[37] A variation of this defense is the sudden incapacitation defense, where the defendant is suddenly overcome by a mental or physical illness that prevents him from exercising due care. The sudden impairment defense is implicit in the even the oldest cases in that the courts have always recognized that defendants should not be liable if the injury was not of their making at all. In this sense the old cases do not stand for strict liability, but liability based on some voluntary action, even if the action was based on an insane delusion. The usual statement was that ". . . if the accident was attributable to a 'superhuman, or irresistible cause,'--to an 'act of God,'-- the defendant would not be liable; that as a general principle no man shall be responsible for that which no man can control. . . "[38] The special circumstance of acts of God excusing behavior was fundamental to Anglo-American jurisprudence and was frequently at issue in early cases.[39] The general warranty of common

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the rule which he has broken, good sense would require it to be admitted as an excuse." The Common Law at 109.

[37] Except for those torts that require a level of specific intent beyond the capacity of the defendant.

See: Wilson v. Walt, 138 Kan. 205, 25 P.2d 343, 89 A.L.R. 473 (Kan. 1933) - Court upheld a jury verdict for defendant in a slander case, finding that it was proper to allow the jury to determine if defendant's insanity impaired his ability to manifest the necessary intent to defame plaintiff; Becker v. Becker, 207 Misc. 17, 20, 138 N.Y.S.2d 397, 400 (N.Y.Sup. 1954) 400 (NY Supreme Court, Special Term 1954) - The court found that defendant could not form the necessary intent to defraud: "I cannot agree that it applies to actions to recover for fraud where the essential elements include intention to defraud and deception. ... An incompetent is incapable of deception" Preferred Risk Mut. Ins. Co. v. Saboda, 489 So.2d 768, 770-1 (Fla.App. 5 Dist. 1986):

"Obviously, a deranged person who cannot form a rational intent cannot be guilty of a wanton tort requiring a specific state of mind (actual or constructive malice)--the same "wanton negligence" required by the "firemen's rule." The liability for compensatory damages of insane persons for their acts or omissions is based on public policy rather than traditional tort concepts of fault--but that liability does not extend to punitive damages, nor can it be extended to any tort requiring wanton misconduct." At 770-1, citations omitted. (see also discussion of this case as an exception to the fireman's rule, infra notes xx; for a good review, see: Polmatier v. Russ, 206 Conn. 229, 537 A.2d 468 (Conn. 1988).

[38] "With regard to the act of God, it was a general principle, not peculiar to carriers nor to bailees, that a duty was [202] discharged if an act of God made it impossible of performance." The Common Law 201-202.

[39] Rodgers v. Central Pac. R. Co., 67 Cal. 607, 608 8 P. 377 (Cal. 1885). See also:

"An injury caused by the act of God or a superior agency without the fault of defendant will not impose any liability on him. An act of God is defined as inevitable accident without the intervention of man and the public enemy. To constitute an act of God in such sense as to relieve defendant from liability for injury it must have been so far outside the range of ordinary human

carriers was excused,[40] as was the obligation of contracts,[41] and the usual strict liability for the escape of prisoners.[42] The act of God exception was extended to persons who suffered sudden physical illnesses while operating trains[43] and then to persons driving automobiles.[44]

Modern Developments

A survey of early civil cases involving insanity finds that most cases involve the capacity to contract, to make wills, and to engage in various business ventures. There are relatively few tort cases. This began to change with changing technology. Modern personal injury law is very much a creature of technology, and no technology more than the automobile. Mental impairment becomes a much more serious threat as the automobile puts a premium on quick thoughts and action, and increases the potential lethality of an accident by orders of magnitude as compared to a horse and wagon. Automobile accidents are the most common worry for persons with early Alzheimer's disease. Traditional tort law does not allow mental or physical impairment as a defense to liability for a negligent accident.[45] If a driver's impairment prevents the driver from properly controlling the automobile, then the courts find that he/she should not be driving.

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experience that the duty of exercising ordinary care did not require it to be anticipated or provided against." Holden v. Toye Bros. Auto & Taxicab Co., 1 La.App. 521 (La.App.Orleans 1925).

[40] "Whatever doubts formerly prevailed as to the extent of a carrier's responsibility, the law seems now to be well settled that he is liable for all losses except such as happen by the act of God or the enemies of the state." Backhouse v. Sneed, 1 Mur. 173, 5 N.C. 173 (N.C. 1808); see also Williams v. Grant, 1 Conn. 487, 7 Am.Dec. 235 (Conn. Jun Term 1816); and Colt v. McMechen, 6 Johns. 160, 5 Am.Dec. 200 (N.Y.Sup. 1810).

[41] "Now it is a common principle, that, when a man is bound to perform a contract, which becomes impossible by the act of God, or unlawful by statute, after the making of the contract, he is excused from the performance; and may plead such matter in excuse, when sued upon his contract." Harrington v. Dennie, 13 Mass. 93, 1816 WL 995 (Mass. 1816).

[42] "That in every supposable case of an escape, the sheriff or county are liable, unless the escape was effected by inevitable accident, the public enemy, or the act of God." Clark v. Litchfield County, 1 Kirby 318 (Conn.Super. 1787); see also: Patten v. Halsted, 1 N.J.L. 277, (N.J. 1795).

[43] Beiner v. Nassau E. R. Co., 191 A.D. 371, 181 N.Y.S. 628 (N.Y. App. Div. 2d Dep't 1920).

[44] "By the great weight of authority a sudden and unforeseeable physical seizure rendering an operator unable to control his motor vehicle cannot be termed negligence." Carroll v. Bouley, 338 Mass. 625, 627 156 N.E.2d 687, 689 (Mass. 1959).

[45] This presumption of liability is so strong that a court found a ward liable for injuries caused by his property when it was negligently maintained by his conservator. See: Filip v. Gagne, 104 N.H. 14, 177 A.2d 509 (1962)

The only exception to this rule is the sudden incapacitation doctrine, updated to the special problems of the automobile.

The classic case of mental impairment as sudden incapacitation for an automobile driver is Breunig v. American Family Ins. Co.[46] Erma Veith, the insured, ran into the back of plaintiff Phillip Breunig's car. At the time of the accident she was suffering from an "insane delusion".[47] Defendant insurer argued that Veith should not be liable because her psychiatric condition came upon her without warning, thus falling into the sudden incapacitation exception. Plaintiff argued that precedent did not recognize mental illness as a defense to a negligence tort claim. The court first analyzed plaintiff's claim that mental illness should not be an excuse, beginning with the policy reasons that the mentally incapacitated are subject to tort laws while not prosecuted for crimes related to their mental illness:

> "(1) Where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it;
>
> (2) to induce those interested in the estate of the insane person (if he has one) to restrain and control him; and
>
> (3) the fear an insanity defense would lead to false claims of insanity to avoid liability."[48]

The court accepted these uncritically, but then distinguished the instant case from the precedent cases, which involved defendants with permanent insanity. The court found that while permanent insanity was not a defense to tort actions, the

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[46] 45 Wis.2d 536, 173 N.W.2d 619, 49 A.L.R.3d 179 (Wis. 1970). Wisconsin was a direct action state at the time and thus the insurance company was a named party. This case is also precedent for the trial's judge's latitude in showing the jury his displeasure with the defense. The judge believed that the insurance company should have paid up and not forced the nominal defendant to suffer through the trial. For an earlier discussion of this theory applied to physical illness, see: Waters v. Pacific Coast Dairy, Limited Mut. Compensation Ins. Co., Intervener, 55 Cal.App.2d 789, 131 P.2d 588 (Cal.App. 1 Dist. 1942).

[47] "The psychiatrist testified Mrs. Veith told him she was driving on a road when she believed that God was taking ahold of the steering wheel and was directing her car. She saw the truck coming and stepped on the gas in order to become air-borne because she knew she could fly because Batman does it. To her surprise she was not air-borne before striking the truck but after the impact she was flying." Id at 539, 622.

[48] Id at 624.

sudden onset of incapacitating insanity could be.[49] While not discussed explicitly by the court, it could be argued that sudden incapacitating insanity does not violate the general principles for holding the insane liable for their torts. First, since it comes suddenly and without warning, the defendant is innocent, in the sense that he/she continued the dangerous activity in good faith, rather than being seen as putting others at risk. Second, there is no legal authority to control a person before the onset of the mental illness, nor would this be accepted as a valid restriction. Third, at least in this case, the insanity was permanent and thus did not raise the issue of faking to avoid liability.[50] The court allowed defendant to go forward with its expert testimony on the sudden onset of insanity as a defense and required plaintiff to rebut the defense.[51] While the court did allow the mental illness as a defense, it used the sudden physical illness model, which the plaintiff successfully rebutted by showing that plaintiff had some premonition of the illness.[52]

The California courts reviewed the applicability of the sudden incapacitation doctrine to mental impairment in Bashi v. Wodarz.[53] Defendant Wodarz was involved in two automobile accidents in a period of minutes. This case involves the second, brought by plaintiff Bashi. Defendant moved for summary judgment, arguing that she suffered a sudden mental impairment and thus was not responsible as a matter of law. The trial court granted her motion and plaintiff appealed. Recognizing that California has a long history of accepting sudden physical illness as a defense to an automobile accident claim, the judge determined that no court in California had yet ruled on the Bruenig situation of

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[49] The court relied on Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (Wis. 1962), which involved an accident caused when the driver fell asleep at the wheel. The Theisen court rejected arguments that falling asleep at the wheel should be strict liability. Relying on previous cases involving epilepsy and other sudden illnesses, the court allowed defendant to put on evidence that his falling asleep was a sudden and uncontrollable event.

[50] The incentive to fake is much higher in criminal cases, but the courts seem able to secure adequate expert testimony to continue using insanity as a defense. It is hard to say whether the court would have ruled the same way had the claim been for temporary insanity.

[51] The court did not require plaintiff to present expert testimony. Plaintiff was allowed to question defendant about her previous behavior, her overall medical condition, and other factors which might indicate that she had some warning of her mentally unstable condition.

[52] The jury awarded plaintiff $10,000, reduced by the court to $7,000. The award was complicated by the accusations of judicial misconduct on behalf of the plaintiff. While the court found these within the bounds of judicial discretion, it would be expected that they had a significant influence on the jury.

[53] 45 Cal.App.4th 1314, 53 Cal.Rptr.2d 635 (Cal.App. 5 Dist. 1996)

sudden mental impairment.[54] Unlike most states, California had codified the common law rule that the insane are responsible for their torts.[55] When this law was revised, effective January 1, 1994, the legislature removed minors from the law but left the rest substantially intact.[56] The court found this to be a significant statement of public policy, one that was bolstered by comments in the Restatement 2d of Torts that indicate that the drafters did not believe that the sudden medical emergency doctrine extended to mental illness.[57] Driven by these findings, the court rejected sudden mental impairment as a defense to a negligent tort and reversed the summary judgment for the defendant.

The most difficult question in sudden incapacitation cases, and, more generally, in Alzheimer's disease, is determining when the patient is on notice that he/she is sufficiently impaired that he/she should voluntarily restrict his/her activities. This illustrated by Word v. Jones ex rel. Moore,[58] in which defendant driver requested

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[54] "Under a line of appellate authorities beginning with Waters in 1942, these cases generally hold that a driver, suddenly stricken by an illness rendering the driver unconscious, is not chargeable with negligence. (Waters v. Pacific Coast Dairy, Inc., supra, 55 Cal.App.2d at pp. 791-793, 131 P.2d 588 [driver rendered unconscious from sharp pain in left arm]; Ford v. Carew & English, supra, 89 Cal.App.2d at pp. 203-204, 200 P.2d 828 [fainting spell from strained heart muscle]; Zabunoff v. Walker (1961) 192 Cal.App.2d 8, 11, 13 Cal.Rptr. 463 [jurors could have concluded that a sudden sneeze was an intervening cause similar to a fainting spell]; Tannyhill v. Pacific Motor Trans. Co. (1964) 227 Cal.App.2d 512, 520, 38 Cal.Rptr. 774 [heart attack]; Hammontree v. Jenner (1971) 20 Cal.App.3d 528, 530-531, 97 Cal.Rptr. 739 [loss of consciousness due to unexpected epileptic seizure].)" Id at 1391.

[55] Civil Code section 41, as originally enacted in 1872, provided:

"A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful." Id at 1320.

[56] Id at 1320.

[57] "under comment (b), page 18, explaining section 283 C, the Restatement discusses the effect of a sudden onset of a "transitory delirium" as follows:

"The same allowance [the reasonable man is identical with the actor] is made for physical, as distinguished from mental, illness. Thus a heart attack, or a temporary dizziness due to fever or nausea, as well as a transitory delirium, are regarded merely as circumstances to be taken into account in determining what the reasonable man would do. . . . Although the respondent's sudden onset of mental illness might arguably be classified as a "transitory delirium" under the Restatement, such a classification is unlikely given that the "transitory delirium" is discussed in the comment relating to physical, as opposed to mental, disabilities. (Since the Restatement makes a distinction between physical and mental disabilities, it is more likely that the phrase "transitory delirium" used in the Restatement relates back to the previous phrase regarding the effects of fever.)" Id at 1322-3.

[58] 350 N.C. 557, 516 S.E.2d 144 (N.C. 1999)

sudden incapacitation instructions as a defense[59] to plaintiff's claim that she negligently operated her automobile. The trial court granted these instructions, which the plaintiff argued were defective because they did not require the jury to find that defendant was rendered unconscious. The appeals court agreed with defendant and remanded for a new trial because it found that the court's use of the terms "confusion" and "disorientation" was too vague.[60] The Supreme Court disagreed, finding that unconsciousness was too narrow a limit on the sudden incapacitation defense. The court directly addressed plaintiff's assertion that Alzheimer's disease could not form the basis of a sudden incapacitation defense[61] and established the standard for using this defense in Alzheimer's disease cases:

"During the trial defendant presented three different medical explanations supporting the defense of sudden incapacitation: Alzheimer's disease, TIA,[62] and arrhythmia. This evidence went directly to the elements of sudden incapacitation. The testimony of defendant's two witnesses, both qualified as medical experts, in substantiation of her affirmative defense was neither objected to nor controverted by plaintiff. For example, defendant presented evidence that she had not previously been diagnosed with and had never before experienced any of the three possible medical conditions which tended to show the second element of the affirmative defense, namely whether the incapacitation was foreseeable. Therefore, the trial court properly submitted to the jury the issue of whether defendant suffered a sudden, unforeseen incapacitation which caused her to lose control of her vehicle and caused the accident."[63]

While this case shows that Alzheimer's disease is not a complete bar to the use of the sudden incapacitation defense, at least in jurisdictions that do not require a showing of unconsciousness, it also indicates that had she had a prior diagnosis of

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[59] Also referred to in this jurisdiction as the sudden medical emergency defense. Id at 559, 145.

[60] "Practical considerations also support a requirement of loss of consciousness as an element of the sudden medical incapacitation defense. 'Confusion' and 'disorientation' are somewhat vague, imprecise, and subjective terms. They present the potential to foster fraud and abuse of the sudden medical incapacitation defense. 'Unconsciousness' is a workable, objective test that is more easily understood and applied to measure sudden medical incapacitation." Id at 562.

[61] "Plaintiff argues that submitting that defense improperly extends the sudden-incapacitation defense to mental illnesses and deficiencies which do not excuse negligence; plaintiff further argues that Alzheimer's disease does not cause unconsciousness and that its effects are not unforeseen or sudden." Id at 565, 149.

[62] Transient ischemic attack - a temporary clouding of consciousness caused by an interruption in blood flow to the brain.

[63] Id at 565-6, 149.

Alzheimer's disease, however mild, it is unlikely that she would be able to prove that her sudden incapacitation was unforeseeable. If it was foreseeable, then plaintiff will be able to argue that defendant was negligent in driving at all, beyond the specific negligence that lead to the accident, and may be able to get a punitive damages instruction based on defendant's behavior in knowingly subjecting plaintiff and others to the risk that she would not be able to control her car. Strategically, this will be a very powerful argument because of the combination of the progression of Alzheimer's disease and time it takes to get to trial. Whatever defendant's condition at the time of the accident, the jury is likely to see a severely demented defendant on the stand. Unless defendant's condition at the time of the accident was fully documented in a way that will be admissible to the court, defendant will find it very hard to convince the jury that he/she was justified in driving after a diagnosis of Alzheimer's disease.

Claims by Injured Caregivers

Some PWDs are combative and dangerous to those around them when they get confused or disoriented, and some become consistently violent. This takes a great toll on caregivers and raises issues of spousal abuse as well as potential tort and criminal liability. Developing a model for legal responsibility to caregivers must address the problems of both professional and informal caregivers. The reported cases deal only with professional caregivers.

Professional Caregivers

The older cases, typified by McGuire v. Almy,[64] analyze the case from the traditional frame of reference that the insane are liable for intentional torts as long as they can form the requisite intent to act. Critically, the courts did not accept as a defense that the action was based on an insane delusion.[65] In Almy, the plaintiff was a nurse assigned to 24 hour duty caring for defendant. Defendant was locked in her room unless accompanied by plaintiff or other caregivers, and had threatened plaintiff in the past. At the time of the injury, defendant was in a rage in her room, having broken up her furniture. When plaintiff entered the room, she

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64 8 N.E.2d 760 (Mass. 1937).

65 "This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it."

Almy at 763.

saw defendant brandishing the leg of a low-boy.[66] Plaintiff called for help and when it arrived they attempted to subdue defendant. In the process, defendant clubbed plaintiff, causing serious head injuries. Since the jury found that defendant had the requisite intent, the court reviewed defendant's argument that plaintiff had assumed the risk of caring for defendant and was on notice of the danger defendant posed.

The court rejected this assumption of risk defense, finding that prior to the incident in question, defendant had not manifested dangerous propensities.[67] Finding the defendant brandishing the furniture leg as a club did put the plaintiff on notice of the danger, but the court found that by that time there was an emergency and it was within plaintiff's duty to try to help defendant. Understandably, the court was unwilling to create a rule that would discourage caregivers from helping the insane when are might be at risk themselves.[68] This analysis is consistent with the policy that employees do not assume the risk of the workplace.[69] It contradicts one of the key policy justifications for holding the insane liable for their torts: that such liability will encourage those with responsible for the insane person to assure that person is confined as necessary to protect the public. If the caregivers who have been hired to protect the patient and prevent the patient from being a threat to others can sue the patient, then the relatives will have less incentive to protect the family assets by confining the patient. It may also result in demands that the patients be restrained or otherwise restricted to prevent hard to nursing home personnel. This would make it more difficult to assure humane care of the patients.

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[66] Id at 761.

[67] "Although the plaintiff knew when she was employed that the defendant was a mental case, and despite some show of hostility and some violent and unruly conduct, there was no evidence of any previous attack of even of any serious threat against anyone."

Almy at 763.

[68] "The plaintiff had assumed the duty of caring for the defendant. We think that a reasonable attempt on her part to perform that duty under the peculiar circumstances brought about by the defendant's own act did not necessarily indicate a voluntary consent to be injured. Consent does not always follow from the intentional incurring of risk. 'The degree of danger, the stress of circumstances, the expectation or hope that others will fully perform the duties resting on them, may all have to be considered.'"
Almy at 763-4.

[69] But see Van Vooren v. Cook, 273 A.D. 88, 75 N.Y.S.2d 362 (N.Y.A.D. 4 Dept. 1947), where the court indicated that notice of the defendant's dangerousness might preclude suit by long term employees who knew him well.

Firefighter's Rule Cases

The court in Anicet v. Gant,[70] considering the case of an involuntarily committed patient who could not control his actions, recognized that finding an insane person was liable for intentional torts because he acted voluntarily, even if deluded, was a pretext for liability driven by public policy and not by traditional notions of responsibility for one's own actions.[71] The court distinguished the plaintiff caregiver from the innocent member of the general public contemplated in the policy of compensating the innocent. Instead, the court analogized to the firefighter's rule which contemplates that confronting risk is inherent in some professions. The risk of injury is internalized in the pay and benefits of the profession and in return the professional gives up the right to sue third parties when the risk occurs. Without such restrictions, the general public might be reticent to call firefighters and other emergency workers for fear of liability. The court held that the same rationale should govern institutional caregiver cases. To rule otherwise could encourage institutions to limit personal contact with patients in favor of restraints and drastically curtailed liberty. The court also rejected the rationale that such liability would encourage families to better protect the public from the insane because the family and the defendant had already done everything they could to protect the public.

It is tempting to analogize institutional caregivers to public safety personnel, thus resolving the liability problem with the firefighter's rule.[72] Herrle v. Estate of Marshall[73] generalized the concept behind the firefighter's rule through the doctrines of primary versus secondary assumption of risk, applying it to the nursing home caregiver situation.[74] The archetypical case of primary assumption

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[70] 580 So.2d 273 (Fla.App. 3 Dist. 1991).

[71] "Instead, the conclusion that liability exists is founded squarely and acknowledgedly upon principles of good public policy which, it is held, are furthered by that conclusion. Almost invariably these considerations are stated to be:
(1) the notion that as between an innocent injured person and an incompetent injuring one, the latter should bear the loss ; and
(2) the view that the imposition of liability would encourage the utmost restriction of the insane person so that he may cause no unnecessary damage to the innocent."
Anicet at 275.

[72] See: Gould v. American Family Mut. Ins. Co., 198 Wis.2d 450, 543 N.W.2d 282 (Wis. 1996).

[73] Cal. App. 4th 1761, 53 Cal. Rptr. 2d 713 (Cal. App. 4th Dist. 1996).

[74] When California went to comparative fault, assumption of risk became a critical issue because it became the only action by plaintiff that could continue to defeat plaintiff's claim. See Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226. (1975). This forced the

of risk is participation in sports events. It was an informal touch football game that resulted in California explicating these doctrines in Knight v. Jewett.[75] Primary assumption of risk occurs when plaintiff engages in an activity that generically involves known risks, while secondary assumption of risk deals with situation where the plaintiff knowingly encounters risks specific to the facts of the case at issue. Primary assumption of risk means that defendant has no duty to prevent or mitigate those risks, and that defendant does not need to show that the risks were known to the plaintiff personally. These are important distinctions because it is much more difficult for plaintiff to raise facts which allow plaintiff to get to the jury in a primary assumption of risk case.[76]

Herrle is a key case because it involves a patient with Alzheimer's disease who was confined in a nursing home. She had a history of being combative and belligerent: "The admitting diagnosis indicated 'She can be very combative at times.' Likewise, the nursing assessment indicated, '... becomes very belligerent at times. High risk for injury.' Plaintiff was injured when she attempted to prevent defendant from falling when being moved from a chair to the bed and defendant struck her in the head, causing serious injuries.[77] In a traditional assumption of risk - now denominated secondary assumption of risk - case defendant would have to prove that plaintiff knew of the risks and unreasonably encountered them,

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California courts to sort out the conflicting usage of assumption of risk in past cases:
"As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . .. Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.'" Li at 824-5, 872-3, 1240-1, citing Grey v. Fibreboard Paper Products Co., 65 Cal.2d 240, 245--246, 53 Cal.Rptr. 545, 548, 418 P.2d 153, 156 (1966).

[75] 3 Cal.4th 296, 834 P.2d 696, 11 Cal.Rptr.2d 2 (Cal. Aug 24, 1992)

[76] "Although the difference between the 'primary assumption of risk'/'secondary assumption of risk' nomenclature and the 'reasonable implied assumption of risk'/'unreasonable implied assumption of risk' terminology embraced in many of the recent Court of Appeal decisions may appear at first blush to be only semantic, the significance extends beyond mere rhetoric. First, in 'primary assumption of risk' cases--where the defendant owes no duty to protect the plaintiff from a particular risk of harm--a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable or unreasonable." Id at 309, 703-4, 9-10.

[77] Id at 715, 1764.

i.e., that the emergency defense from McGuire v. Almy does not apply. However, defendant can claim primary assumption of risk through a general showing that nurses are trained to recognize and manage such violence, that patients with defendant's condition are prone to violence, and that a nurse working in the institution were defendant was housed would have been aware of the nature of the patient population, even if she were unaware of the specific proclivities of defendant. Having found that defendant made this showing, the court found that defendant did not owe plaintiff any duty of care and thus could not be liable for her actions toward plaintiff.[78]

The dissent in Herrle raises difficult issues in the factual application of primary assumption of risk to plaintiff's circumstances. The firefighter's rule is predicated on the job role of a professional public safety worker who is trained to encounter the specific risks of the profession, and, most importantly, is explicitly compensated for encountering negligent and even intentional risks:

> "Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences. Hence, for that risk, the fireman should receive appropriate compensation from the public he serves, both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling."[79]

In most jurisdictions, firefighters and police have separate disability, pension, and worker's compensation benefits than other municipal workers. These are very generous, both in benefits paid and in the criteria for qualifying for those benefits.[80] In contrast, many nursing home personnel, such as plaintiff Herrle,[81]

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[78] "We conclude the primary assumption of the risk doctrine bars recovery under these circumstances and therefore affirm the trial court's judgment." Id at 714-5, 1763-4.

[79] Krauth v. Geller, 31 N.J. 270, 274, 157 A.2d 129, 131 (N.J. 1960)

[80] "First, they receive special presumptions of industrial causation as to certain disabilities. Second, special death benefits apply to public safety officers if they are under the Public Employees Retirement System. Third, if under that system or the County Employees Retirement Law of 1937, they are entitled to an optional leave of absence for up to one year with full pay. Fourth, their permanent disability benefits are fully payable despite retirement, and are not reduced by disability pensions even when both are paid for the same injury."

Walters v. Sloan, 20 Cal.3d 199, 205, 571 P.2d 609, 613, 142 Cal.Rptr. 152, 156 (Cal. 1977), citations omitted.

are minimally trained paramedical positions such as nurses aides. They are poorly paid, often have limited benefits,[82] and little expectation of continued employment. Rather than being trained and hired to deal with violent patients, they are hired to do low level nursing care and come into contact with such patients through inadvertence or, as in Herrle's case, while trying to help prevent injury to a patient in a emergency. In Herrle's case, her injuries cost more than $200,000 and it is not clear how much of those were covered by worker's compensation.[83] It is hard to justify a claim that such caregivers with their marginal benefits and limited job security are paid to encounter the risks of their employment in the same as professional public safety workers. Since even the firefighter's rule has exceptions for risks beyond those contemplated in going to a fire,[84] the dissent argues that it is unjust to hold that every employee of a nursing home has assumed the risks of being battered by a patient.

More critically, the courts justify the firefighter's exception on the special nature of the public safety employment.[85] The courts have held that these factors are not present in private employment, even of safety personnel,[86] which makes it

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[81] Herrle at 1775.

[82] In some circumstances they are contract or agency workers who have no benefits at all.

[83] Though clearly some were because the worker's compensation care was paid because the compensation carrier intervened in the case to recoup its payments.

[84] "The firefighter's rule, however, is hedged about with exceptions. The firefighter does not assume every risk of his or her occupation. The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene."

Neighbarger v. Irwin Industries, Inc., 8 Cal.4th 532, 538882 P.2d 347, 352, 34 Cal.Rptr.2d 630, 634 (Cal. 1994)

[85] "When the firefighter is publicly employed, the public, having secured the services of the firefighter by taxing itself, stands in the shoes of the person who hires a contractor to cure a dangerous condition. In effect, the public *543 has purchased exoneration from the duty of care and should not have to pay twice, through taxation and through individual liability, for that service."

Nuebarger at 355.

[86] "The most substantial justifications for the firefighter's rule are those based on the public nature of the service provided by firefighters and the relationship between the public and the public firefighter. Fire fighting is essentially a government function, and the public has undertaken the financial burden of providing it without liability to individuals who need it. Because of the relationship between the public, the firefighter, and those who require the services of the firefighter, the individual's usual duty of care towards the firefighter is replaced by the individual's

questionable whether they should be found in the employment of nursing home personnel. The majority opinion meets these objections by returning to Neighbarger and arguing that the key point was not the public/private dichotomy, but that whether the defendant had contracted for the plaintiff's services. Thus the taxpayers contract for fire services and the nursing home resident contracts for care, each with its attendant risks to the provider, while the defendant in Neighbarger was a third party with no agreements with the plaintiff.[87] While the court focuses on assumption of risk, it is more useful to look at the problem from the perspective of the caregiver. The caregiver does not assume the risk of injury, in the sense that the old cases found that employees assumed the risk of injuries and thus were estopped from suing for compensation. Instead, caregivers accept that their compensation will be limited to that available through worker's compensation. Thus the nursing home residents, or others on their behalf, shift the burden of compensating workers injured by their actions to the employer through contracting for care. This is a more meaningful analysis because primary and secondary assumption of risk are about losing the right to compensation, rather than the contractual reallocation of the method and form of compensation. More importantly, it obviates the need to access the competence of the patient[88] and it removes the patient as a party to the litigation.

Informal Caregivers

Most PWDs are cared for by family members or other significant others, outside formal institutions. They are subject to the same abusive behavior as the institutional caregivers, but seldom have the training or resources to manage it as effectively as do the institutions. Their only resort in severe cases is to call the

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contribution to tax- supported compensation for the firefighter. This relationship is missing between a privately employed safety employee and a third party."

Neubarger at 640.

[87] "Having no relationship with the employee, and not having contracted for his or her services, it would not be unfair to charge the third party with the usual duty of care towards the private safety employee." (Neighbarger, supra, 8 Cal.4th at p. 543, 34 Cal.Rptr.2d 630, 882 P.2d 347.) This rationale clearly does not apply here. Defendant, through her relatives, did contract, seek, and need the services of plaintiff. Defendant, through these same relatives, paid to be relieved of a duty of care. Defendant had a relationship of care receiver to care giver with plaintiff. Therefore it would be unfair to now impose on defendant the very duty of care which she had contracted for plaintiff to supply."
Neighbarger at 1772, 720-1.

[88] Assuming that the patient is impaired to some degree. This doctrine should not shelter attacks made with criminal intent, unrelated to impairment. Thus mere housing at a nursing home should not convey blanket immunity for torts.

police or emergency medical personnel. They are not covered by worker's compensation and may not even have health insurance. If the person they are caring for has some type of personal liability insurance, they could sue under the same theories as other tort claimants. While the insurance company might argue assumption of risk, it is not supported by any of the policy rationales developed in the professional caregiver cases. In the absence of insurance, they are exposed to the risk of injury with little hope of compensation. To the extent that this makes it difficult to care for their family member, the state might, as a matter of public policy, extend some type of disability and health insurance coverage to informal caregivers, recognizing the benefit of their services to the PWD and as a cost-saving measure for the state.

When informal caregivers call the police, or when emergency medical personnel find an injured caregiver and call the police as required by various spousal abuse laws, the caregiver is confronted with the problem of the police arresting the PWD, which is usually what they want. If the police do arrest the abuser, which they are obligated to do under some spousal abuse laws, they do not have proper facilities to hold and care for a PWD. These situations demand a system that can protect both the caregiver and the PWD. One system would use 24 hour care centers where a PWD can be taken by the police or emergency medical personnel, and the right of the caregiver to use such personnel for emergency transport. Any such system requires rethinking domestic violence laws so they recognize that the caregiver is not served by a system that criminalizes the dangerous behavior, thus discouraging the caregiver from calling for help in all but the most extreme situations.

Caregiver Liability

The legal issues and public policy concerns are very different for professional and informal caregivers. Informal caregivers are usually family members who volunteer their services with limited community support. Professional caregivers are usually state regulated and often paid through state and federal funds, as well as private insurance. From a public safety perspective, it is arguable that both should have a duty to protect their charges from injury and to protect the general public from injury caused by PWDs under their control. However, such liability comes with a significant price in insurance costs, risks to assets, and resources that might better be used for caring for the PWDs. The courts have responded to these differing policy concerns with very different liability regimes for informal and professional caregivers.

Professional Caregivers

Professional caregivers, especially total care facilities, assume the duty to protect the patient and their liability is governed by the same precedent as that of health care providers in general. They are liable for injuries to the PWD caused by substandard care, which will be measured by expert testimony and the use of professional standards documents. They will be liable for injuries to third parties to the extent that they either owe a specific duty to the third party[89] or when they undertake a general duty of care that includes preventing harm to others. There is little precedent directly on point for nursing homes and controlled living centers caring for PWDs. Most cases deal with question of whether a mental institution properly released an insane person who then committed a murder or other intentional tort. These divide into the Tarasoff[90] line of failure to warn cases and the pure negligent discharge or supervision cases.[91] Even in these cases, the

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[89] The most common example is the duty to prevent one patient from injuring another. These cases usually turn on whether the caregiver had notice of the patient's dangerous tendencies, although it can be argued that PWDs always pose some risk to others through inadvertence. See: Delk v. Columbia/Healthcare Corp., 259 Va. 125, 523 S.E.2d 826 (Va. 2000) - patient sexually assaulted by another patient; Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982) - patient kills wife while on leave; Sylvester v. Northwestern Hosp. of Minneapolis, 236 Minn. 384, 53 N.W.2d 17 (Minn. 1952) - patient injured by another patient who was visibly drunk; Freeman v. St. Clare's Hosp. & Health Ctr., 548 N.Y.S.2d 686 (N.Y.App.Div.1989) - patient raped while in restraints; Roettger v. United Hosp., 380 N.W.2d 856 (Minn.Ct.App. 1986) - patient assaulted by intruder; Roettger v. United Hospitals of St. Paul, Inc., 380 N.W.2d 856 (Minn.App. 1986) - patient injured by an intruder. For a general review, see: N. Jean Schendel, Patients As Victims--Hospital Liability For Third-Party Crime, 28 Val. U. L. Rev. 419 (1993); Adam A. Milani, Patient Assaults: Health Care Providers Owe A Non-Delegable Duty To Their Patients And Should Be Held Strictly Liable For Employee Assaults Whether Or Not Within The Scope Of Employment, 21 Ohio N.U. L. Rev. 1147 (1995); and Gregory G. Sarno, Physician's Failure To Protect Third Party From Harm By Nonpsychiatric Patient, 43 AMJUR POF 2d 657 (1985 - current through July, 2000).

[90] Tarasoff v. Regents of University of Cal., 13 Cal. 3d 177, 529 P.2d 553 118 Cal. Rptr. 129 (Cal 1974) and on rehearing, Tarasoff v. Regents of University of Cal., 17 Cal. 3d 425, 551 P.2d 334 131 Cal. Rptr. 14 (Cal 1976).

[91] See: Lacock v. U.S. (Dept. of Veterans Affairs), 106 F.3d 408 (Table, Text in WESTLAW), Unpublished Disposition, 1997 WL 22263 9th Cir.(Mont.) Jan 15, 1997; Baldwin v. Hospital Authority of Fulton County, 191 Ga.App. 787, 383 S.E.2d 154 (Ga.App. 1989); Estate of Johnson by Johnson v. Condell Memorial Hosp., 119 Ill.2d 496, 520 N.E.2d 37, 117 Ill.Dec. 47 (Ill. 1988); White v. United States, 780 F.2d 97 (D.C.Cir.1986); Allentown State Hospital v. Gill, 88 Pa.Commw. 331, 488 A.2d 1211 (1985); Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976); Hicks v. United States, 167 U.S.App.D.C. 169, 511 F.2d 407 (D.C.Cir.1975); Underwood v. U. S., 356 F.2d 92 (5th Cir. 1966); Fair v. U. S., 234 F.2d 288 (5th Cir. 1956); Williams v. U. S., 450 F.Supp. 1040 (Dist.S.D.1978); Panella v. United States, 216 F.2d 622 (2d Cir. N.Y. 1954); Smart v. United States, 111 F. Supp. 907 (D. Okla. 1953); Kendrick v. United States, 82 F. Supp. 430 (D. Ala. 1949);

courts are reluctant to find liability without very specific evidence of dangerousness, sometimes including the identification of the specific victim.[92]

The best analysis is in Garrison Retirement Home Corp. v. Hancock,[93] which deals with the whether a controlled living center had the duty to prevent a PWD (probably Alzheimer's disease)[94] from driving his car.[95] Plaintiff was a contractor's employee investigating a roof leak at a retirement home who was injured when the patient drove his car into plaintiff while plaintiff was standing by his truck. Plaintiff sued the home, arguing that it was negligent in its duty to prevent plaintiff from driving. The court analyzed the case in terms of Section 315, Restatement (Second) of Torts:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:
>
> (a) A special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) A special relation exists between the actor and the other which gives to the other a right to protection.[96]

The court recognized that the key element, which also runs through the informal caregiver cases, is whether the defendant had the right and the ability to control the actions of the person under their control. Defendant had taken significant measures to prevent the patient from driving, which the patient evaded with remarkable ingenuity.[97] The court found that these evidenced defendant's ability

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[92] Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (Ga. 1982); Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (Cal. 1980).

[93] 484 So. 2d 1257 (Fla. Dist. Ct. App. 4th Dist. 1985)

[94] Although this case illustrates the problem of establishing mental status at the time of an accident - there is no record of the patient's mental status until several months after the accident. Id. at 1259.

[95] This case is especially important because it is one of the few that deal with negligent injuries caused by a PWD. Most cases involve with intentional torts and murder by an insane patient. See: Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1983); Cites??

[96] Id at 1261.

[97] "Nevertheless, the retirement home personnel attempted to immobilize the car by letting air out of the tires, removing the battery cable, barricading it with Jane Rush's car and confiscating Tom's keys. However, Tom obtained a second set of keys and always managed to get the car back into operational condition." Id at 1259.

to control the patient.[98] Based on this ability to control and the failure of the defendant to control, the court found a duty to the plaintiff.[99] It is difficult to generalize from this decision because of, as the court described them, the "peculiar facts":

"Granted the duty of a retirement home to its residents is not the same as that imposed upon the operator of an insane asylum or a hospital facility. Nevertheless, the evidence revealed that most of the Garrison residents were senile. The gates were kept locked for the protection of the residents who were not able to take care of themselves if they got outside. Some of the people, including Egan, had physical infirmities. Tom could not walk without aid; he refused a walker but used two canes. He had periods of 'rage reaction' and hallucinatory periods. According to Rush, the administrator of the home, Egan's driver's license and car tag had expired. He needed a pillow to see over the steering wheel and Rush testified that she believed him to be a dangerous person behind the wheel of a car. The people in charge of the Home were so concerned about Egan's driving that they resorted to taking his keys, disconnecting his battery, flattening his tires, and finally blockading the car so it could not be moved."

The court may be saying that a controlled living home obviously has a duty to control any patient this badly impaired who tries to drive. This is a logical inference, but the opinion can also be read as acknowledging the principle that defendant must carry out assumed duties non-negligently, but that there is no general duty to prevent patients from driving. The court states that while the regulatory rules do not give the home the right to restrict the patient, they also provide that patients that endanger others are not permitted to stay in such

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[98] Interestingly, defendant may not have had the legal right to interfere with the patient's car: "Jane Rush, the administrator of the retirement home, became concerned about Tom Egan's potential use of the automobile. Both the car's license tag and Tom's driver's license had expired. Consequently, Jane Rush inquired of her licensing authority, the Department of Health and Rehabilitative Services (DHRS), regarding rules or regulations prohibiting Tom's use or ownership of his automobile while he resided at the retirement home. She was informed by Betty Gunter, DHRS administrator, that under DHRS rules and regulations, she had no right to prevent Tom's use of his car, or prevent him from leaving the facility." Id at 1259.

[99] The court found that a group home for transients and ex-convicts did not have the power to control its residents and thus was not liable for their crimes. The court justified this as a necessary rule to allow non-governmental charity organizations to operate such homes as a service to the residents and the state. Lighthouse Mission of Orlando, Inc. v. Estate of McGowen, 683 So. 2d 1086, 21 Fla. L. Weekly D2456 (Fla. Dist. Ct. App. 5th Dist. 1996), reh'g denied, (Dec. 13, 1996) and review denied, 697 So. 2d 510 (Fla. 1997).

homes.[100] Thus the court implies that defendant had a duty to act, but that this duty might have been satisfied by moving the patient to a more secure facility.

The case leaves open the question of whether, in the absence of a regulation preventing such patients from residing in the home, the home could have avoided liability to plaintiff if it had not assumed the duty to prevent the patient from driving. Mitigating against this is interpretation is the duty to protect the residents themselves.[101] This home, and most like it, have locked grounds to prevent patients from injuring themselves by wandering away. Such precautions clearly indicate the assumption of a duty to protect the patients from inadvertent injuries related to sojourns off the grounds.[102] If such patients are at risk from walking, they are clearly at greater risk from driving and the home would clearly have a duty to prevent them from driving. While the duty to the patient does not automatically inure to the benefit of a third party, public policy supports merging the duty to the patient and the duty to society because they are mutually reinforcing.

Informal Caregivers

With the demise of interfamilial tort immunity, there are no legal bars to persons suing their informal caregivers for torts related to their care.[103] Given the

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[100] "As mentioned previously, one of the HRS rules provides that a resident who manifests behavior destructive of property, to himself or others should not be allowed to remain in the Home. Another prohibited residents from bringing unsafe equipment on the premises. The administrator suggested to Dr. Garrison that he get rid of Tom, but he declined because, according to the administrator, the facility was not filled and they needed Tom and his money. On this record, it appears to us that Garrison owed a duty to Egan, to Hancock, and others to prevent Egan from operating his car in view of the knowledge it had regarding his driving capabilities." Id at 1262.

[101] The classic line of cases involve patients who commit suicide while in mental or general medicine facilities. See: Muse v. Charter Hosp. of Winston-Salem, Inc., 117 N.C.App. 468, 452 S.E.2d 589 (N.C.App. 1995); Wackwitz v. Roy, 244 Va. 60, 418 S.E.2d 861 (Va. 1992); Mahoney v. Lensink, 213 Conn. 548, 569 A.2d 518 (1990); Brandvain v. Ridgeview Institute, Inc., 188 Ga.App. 106, 372 S.E.2d 265 (Ga.App. 1988);

[102] For case involving liability for allowing minors to wander from a facility and injure a third party, see: Nova University, Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986).

[103] For a recent review of the doctrine, see: Herzfeld v. Herzfeld, 732 So. 2d 1102 (Fla. Dist. Ct. App. 3d Dist. 1999), review granted by Herzfeld v. Herzfeld, 740 So.2d 528 (Fla. Aug 23, 1999), no further disposition. See also: Broadbent v. Broadbent, 184 Ariz. 74, 907 P.2d 43 (Ariz. 1995); Hartman v. Hartman, 821 S.W.2d 852 (Mo. 1991); Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (Cal. 1971); but see Ascuitto v. Farricielli, 244 Conn. 692, 711 A.2d 708 (1998).

dependence and impairment of most of the PWDs in the care of their families, they are unlikely to bring such suits on their own. It is more likely that they would be brought by legal representatives of their estates, either court appointed or other relatives. The major legal issues in such claims would be establishing the standard of care for an informal caregiver, and the extent to which an informal care has the ability or even the legal authority to prevent the PWD from driving or other risky activities. There do not appear to be any reported cases using these theories, but it may be that they are masked because they are brought as spousal abuse cases or other tort claims that do not involve caregiver issues.

There are more cases involving liability to third parties. One of the rationales for holding the insane liable for their torts was that it would encourage their families to keep them confined so that they would not injure others. This was only an indirect incentive, in that it depended on the insane defendant having assets that the plaintiff could reach and that the family had an interest in protecting these assets. It might be expected that the courts would further this policy by holding the family members personally liable for the torts committed by persons under their care. In contrast to their rhetoric on encouraging the family to take responsibility, the courts have been very reluctant to find family caregivers directly liable for the torts committed by mentally impaired persons under their care.

The case of Emery v. Littlejohn[104] is a good review of the law as of 1915 and illustrates the traditional view of third party liability for informal caregivers. Plaintiff was shot by defendants' adult son, who the defendants were caring for after he had been released from a mental institution. Plaintiff sued defendant parents for negligence in overseeing plaintiff's actions, based partly on an assumption of responsibility signed by defendants when they took the son home from the institution.[105] The court assumed that there was some general duty to the public,[106] but that this duty was defined by the extent that the son's violent

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[104] 83 Wash. 334, 145 P. 423 (Wash. 1915)

[105] "This is to certify that I have taken O. W. Pence on parole from Western Hospital for Insane. Knowing that he is not fully recovered, I assume all responsibility for his actions while in my charge, and agree to care for him and return him to the hospital at my own expense if it becomes necessary." Id at 329 and 424.

[106] "The duty here involved, if any, was that of Littlejohn and wife to respondent simply as a member of the public." Id at 349, 427.

actions were foreseeable, and that there was insufficient evidence that the son was homicidal.[107] In reviewing the law at the time, the court found:

> "The diligence of learned counsel for respondent has not brought to light a single decision of any court holding a person liable for negligence growing out of his want of care and restraint over an insane person. A remark made by the United States Court of Appeals of the Eighth Circuit, seems quite appropriate here, where they say:
>
> 'The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists.'
>
> We are not prepared to say that a private person having the legal custody and control of a violently insane person with homicidal tendencies could not, under any circumstances, be rendered liable for damages caused by such a person, resulting from want of proper restraint on the part of the person having him so in charge; yet no decision of a court involving even such an extreme case has been brought to our notice."[108]

While a majority of subsequent cases reach the same conclusion,[109] a number of courts have found exceptions when necessary to balance the community's interest in protection against the risk posed by persons under the control of informal care givers. These cases are predicated on the personal negligence of the caregiver and the specific assumption of the duty to care for the relative. No modern courts find vicarious liability for adult family members,[110] nor do the courts find a legal duty to care for adult family members unless it is voluntarily assumed by the

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[107] "We are of the opinion that it must be decided, as a matter of law, from the undisputed facts here shown, that Littlejohn and wife were, as reasonable persons, not bound to anticipate the unfortunate occurrence upon which it is now sought to render them liable in damages." Id at 351, 428.

[108] Id at 351, 428.

[109] See: Hansra v. Superior Court, 7 Cal. App. 4th 630, 9 Cal. Rptr. 2d 216 (Cal. App. 3d Dist. 1992); Kaminski v. Town of Fairfield, 216 Conn. 29, 578 A.2d 1048 (Conn. 1990); Barmore v. Elmore, 83 Ill. App. 3d 1056, 403 N.E.2d 1355 (Ill. App. Ct. 2d Dist. 1980); Fisher v. Mutimer, 293 Ill. App. 201, 12 N.E.2d 315(Ill. App. Ct. 1937).

[110] For a good review of status relationships and the duty to care for a family member, see: Touchette v. Ganal, 82 Hawai'i 293, 922 P.2d 347 (Hawai'i 1996). For a discussion of the legal effect of a formal guardianship, see: Sego v. Mains, 41 Colo. App. 1, 578 P.2d 1069 (1978). For an older case finding a husband liable for his wife's crazy behavior, see: Burnett v. Rushton, 52 So.2d 645 (Fla. 1951).

defendant.[111] While not specifically litigated in most cases, it is clear that there can only be liability if the informal caregiver can actually control the impaired person.[112]

The most important factor is whether the caregiver had notice of the impaired person's dangerousness. A leading case is Alva v. Cook,[113] which involves two sisters caring for their 62 year old mentally ill brother. He was a World War II veteran with a history of mental illness, but not of dangerous behavior. He kept a rifle, and, without warning, shot plaintiff dead when plaintiff drove into defendant's driveway. Plaintiff alleged that defendant were negligent in allowing him to keep the rifle, have access to the rifle, and in not having him committed. The court found first that since California allowed the insane to possess firearms, he could not hold that plaintiff's violated a legal duty in allowing their brother to keep his gun and have access to it.[114] Most critically, the court found, in unambiguous language that defendant's insanity alone, without obvious dangerous behavior did not put defendants on notice that he should be committed or that they should restrict his actions:

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[111] Plaintiffs in these cases must first show that defendants assumed the duty to act as caregiver. This is illustrated by a serious of cases determining whether babysitters had a duty to care for children that they volunteered to care for. See: Barfield v. Langley, 432 So.2d 748 (Fla. 2d DCA 1983); Standifer v. Pate, 291 Ala. 434, 282 So. 2d 261 (1973); and Whitney v. Southern Farm Bureau Casualty Ins. Co., 225 So. 2d 30 (La. Ct. App. 3d Cir. 1969).

[112] "Appellant's liability does not depend solely on her status as the grandmother of the boy who shot the arrow that caused the infant plaintiff's injury, nor on her status as co-owner of the property on which the incident occurred. ... Perhaps her duty to supervise her grandson was not, as an isolated responsibility, as extensive as that of a parent -- a duty probably related to the powers that parents possess to restrain their children's conduct. However, the position the grandmother occupied in the house and household where the accident occurred gave her much greater authority to restrain her grandchild than would be enjoyed by a stranger; and in circumstances where strangers are endowed with relatively slight supervision for control over children they have been held to be under a duty to prevent injury by children to others." Carmona v. Padilla, 4 A.D.2d 181, 183-4, 163 N.Y.S.2d 741, 742-3 (N.Y. App. Div. 1st Dep't 1957). See also: Poncher v. Brackett, 246 Cal. App. 2d 769, 55 Cal. Rptr. 59 (Cal. App. 2d Dist. 1966).

[113] 49 Cal. App. 3d 899, 123 Cal. Rptr. 166 (1975)

[114] The judge also commented that California allowed the insane to walk the streets: "Public policy of this state allows one to walk the streets even if mentally ill (see, e.g., Welf. & Inst. Code, §§ 5150 et seq., 5300 et seq.; In re Gonzales (1971) 6 Cal.3d 346 [99 Cal.Rptr. 17, 491 P.2d 809]), and, in fact, there is nothing in the law which prevents the mentally ill from possessing firearms." Id at 906, 169.

"In the absence of ultimate facts that Malcolm was dangerous to himself and others at least sufficient to warrant a reasonable assumption that a petition for evaluation or commitment under the Lanterman-Petris-Short Act would be granted, we are not ready to equate respondents' assumption of a moral obligation to a guarantee and indemnification agreement in respect of Malcolm's conduct on or off respondents' premises as if he were a dog and to hold that respondents are their brother's keeper but at their risk."[115]

While recognizing the importance of the policy stated in Alva to encourage families to care for their own, subsequent courts have recognized situations where plaintiff has alleged sufficient facts to get to the jury on the issue of whether defendant had sufficient notice of dangerousness to get to the jury.[116] This is based on the Restatement (Second) of Torts sec 319.[117] There is some question about whether just providing a home for a mentally ill and dangerous relative meets the standard of sec 319: "Neither the defendant nor our own research has disclosed any case in which a parent, merely by making a home for an adult child who is a mental patient, has been held to be '[o]ne who takes charge of a third person' for the purposes of § 319."[118]

The archtypical third party liability question for informal caregivers is whether they were negligent in allowing the PWD to drive a car. If the caregiver loans the demented person the caregiver's car, then the case is simply one of traditional negligent entrustment. [119] The more usual situation is that the PWD has his/her own car and the issue is whether, and to what extent, the caregiver has a duty to prevent the PWD from using the car. Irons v. Cole[120] dealt with a legally similar

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[115] Id at 909, 171.

[116] Mathes' Estate v. Ireland, 419 N.E.2d 782 (Ind.App. 3 Dist. 1981).

[117] S 319. Duty Of Those In Charge Of Person Having Dangerous Propensities
One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. 1963-1964 Main Vol.

[118] Kaminski v. Town of Fairfield, 216 Conn. 29, 35-6, 578 A.2d 1048, 1052 (Conn. 1990). This case involved a counter claim against the parents by a police officer who was being sued for shooting the son after being called to the house to subdue him. The court indicated that calling the police to manage their son was clear evidence that plaintiff's were not able to control him.

[119] Frain v. State Farm Ins. Co., 421 So. 2d 1169 (La. Ct. App. 2d Cir. 1982) - the entrustee sued for her own injures, alleging that defendant should have known not to lend plaintiff - a mental patient - a car.

[120] 46 Conn.Supp. 1, 734 A.2d 1052, 25 Conn. L. Rptr. 59 (Conn.Super. 1998)

problem: when does the family have a duty to restrict an adult child's access to guns. The court found the family liable for a murder committed by their son, based on their knowing that he had access to guns in their house and that he was mentally disturbed with a history of violence. Irons is predicated on premises liability, i.e., that the murder occurred on the premises, but the core issue is control of access to physical property rather than control of the son.[121] The court was careful to limit its decision to actions taken on the defendant's property, rather than finding a general duty to the community. Yet the court's analysis is based on general tort duties and is not tied to the traditional common law analysis of premisses liability.[122] It is a small leap to extend it to accidents related to the use of a car off the premises of the caregiver when the access to the car was controlled on the premises, and the accident does not involve the intentional harmful conduct that makes courts very reluctant to extend liability beyond the immediate actor.

Conclusions

Tort law must compensate injured individuals and deter dangerous behavior, while not discouraging desirable behavior. In general, the courts hold PWDs liable for their torts. While some scholars have argued that the mentally impaired should not be liable for their torts,[123] this position leads to the demand for a police power regime that confines or otherwise controls the risky behavior of the mentally impaired outside of the tort system. This is an unjustifiable denial of the autonomy of PWDs who can still function, at some level, in the larger world. While the rule that PWDs are liable for their torts is generally workable, it has unintended consequences when applied in the professional care setting. When the

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[121] "This court specifically did not charge that the defendants had a duty arising from a relationship of control over their son, and the movants' references to Kaminski v. Fairfield, 216 Conn. 29, 578 A.2d 1048 (1990) are simply misplaced, as the charge was based not on custodial control pursuant to 2 Restatement (Second), Torts § 319 (1965), the only claimed source of duty at issue in that case, but on a duty of care of the type explicitly recognized by the Supreme Court in Stewart arising from control of the premises." Id at 1054.

[122] "'We have stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case'" Id at 1054, quoting Zamstein v. Marvasti, 240 Conn. 549, 692 A.2d 781 (Conn. 1997).

[123] For a review of these theories, see: Sarah Light, (Note) Rejecting The Logic Of Confinement: Care Relationships And The Mentally Disabled Under Tort Law, 109 Yale L.J. 381 (1999)

patient has either been confined or sought care precisely because he or she can no longer care for him/herself, it seems unjust to hold the patient liable when caregivers are injured.

At the same time, the tort law is reticent to hold caregivers liable for the injuries that persons in their care inflict on others. There are two main exceptions: 1) when the caregiver is on notice of the dangerous propensities of their charge and has assumed control of the person's actions; and 2) when the caregiver assumes the duty by trying to prevent the dangerous activity, but fails. This rule and exceptions provide insufficient incentive for informal caregivers to take steps to protect the public from PWDs and may discourage such efforts because the courts see them as creating a duty when one would otherwise not exit. A more rational policy would impose liability for inaction, but near immunity when caregivers attempt to prevent injury but nonetheless fail.

As discussed in other papers in this symposia, PWDs pose very difficult legal planning and client counseling problems. In tort law, a central lawyering problem is that the client will often be unable to participate in his/her own defense because of the progression of dementia between the tort and the litigation and trial. Courts should develop procedures that minimize the adverse impact of dementia on the presentation of the defendant's case to the jury. Insurers, who are involved in accident cases long before litigation counsel, should develop legally admissible procedures to document the mental status and functional capacity of PWDs as soon after accidents as possible. This will help show the jury that at the time of the accident the defendant was competent, even if that competency has evaporated by deposition and trial.

One of the central problems with establishing policies for PWDs is the dearth of information about the relationship between dementia and risks to third parties for both negligent and intentional torts. For example, it might be possible to develop driver recertification tests that would identify impaired drivers before they are grossly impaired.[124] It might also be possible to determine if all drivers should be recertified more often after a certain age, or whether everyone over a certain age who has an accident should be evaluated for possible impairment. The objective of these measures would be to tailor the narrowest restrictions on PWDs that are consistent with public safety. Such measures can only be developed if the state systematically collects data on who is diagnosed with conditions such as Alzheimer's disease and how their accident rates compare with the general public

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[124] David T. Levy, Jon S. Vernick, Kim Ammann Howard, Relationship Between Driver's License Renewal Policies and Fatal Crashes Involving Drivers 70 Years or Older. JAMA, Volume 274(13).October 4, 1995.1026-1030.

and with known risk groups such as teenage boys. Only through a combination of careful studies on the impact of Alzheimer's disease on individuals and society and the impact of tort law on PWDs and their caregivers can the United States develop a humane and efficient tort policy for meets the needs of PWDs and society.

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