

THE LAW RELATING TO PEOPLE WITH MENTAL DISORDERS: INTER JURISDICTIONAL PERSPECTIVES.

By

Dennis Odigie, PhD, MC Arb, Notary Public, Professor of Law and Dean, College of Law, Western Delta University, Oghara, Delta State. Tel:08035060050,
Email:duodigielaw@gmail.com

And

Augustine U. Amadasun, PhD, FCAI
Lecturer, Department of Private and Property Law, College of Law, Western Delta University, Oghara, Delta State
Tel: Whatsapp: 08064392946 and 08055967273

Abstract

A person suffering from any form of mental disorder is subject to various disabilities. Hence the law provides mechanisms for dealing with matters concerning such persons. For example, until the abolition of the “sign Manual” by the Mental Health Act, 1959 in England, the Crown had the power and the process to make decision in the “best interests” of a person not competent to decide or take decision. This paper, presents the general principles of law relating to people with mental disorders. It asserts that there are two basic areas of law in handling matters relating to mentally disordered offenders in tort law – decision-making/action taking (competence), and the law of responsibility in relation to liability in criminal offences and the tort of negligence. It asserts that there is a dearth of judicial decisions in regards to the tort of negligence in relation to mentally-ill offenders. The discourse provides statutory provisions and illustrative available judicial authorities. It provides the criticism and review of available case law which states that as against the position of criminal law which allows mental illness as an excuse to crime, tort law does not admit same as a defence in negligence actions. The paper concludes that as mental illness constitutes an excuse for non-culpability in crime, the same principle should be adopted in apportioning liability in tort of negligence.

Keywords: *Negligence, Critical Appraisal, General Principles, Mental Disorders*

1.0 Introduction

Every adult is deemed to be liable for his action or omission. The general principle of law is that no man can be guilty of an act without a fault.¹ Hence, the Latin Maxim of common law *Actus non facit reum nisi mens sit rea* meaning “the act does not make a person guilty unless the mind is guilty”.² In other words, the mere doing of an act will not constitute guilt unless there is a guilty mind.

It has long been accepted as inhuman to subject a person to trial when that person is incapable of offering any defence. A defendant is deemed incompetent to stand trial on

¹ *Fowler v Padget* (1988) 7 T.R. 509 at p. 514

² Padfield C. F. *Law Made Simple* (London, The Chancer Press, 973), p. 319.

account of mental illness, and unable to understand the charge against him or participate meaningfully in his own defence.³

The general rule is that every man is presumed to intend the natural consequences of his act, and also, is presumed innocent until the contrary is proved. It is the duty of the prosecution to prove the guilt of the accused person.

When a person is charged with a crime, endeavours to raise defence(s) he looks to his defences including the fact that he is the wrong person; was not at the scene; or even if he did the act complained of, it was done by accident; or is justified in law, or that what he did was not an offence at all.

However, the law recognizes certain circumstances, which if proved, exonerate the offender, and in some cases could reduce the prescribed punishment that follows the act. The general excuse or exemption from criminal liability include insanity, mental illness diminished responsibility, automatism, drunkenness, mistake, compulsion or duress, justification and necessity.⁴

1.1 The Law Relating to People with Mental Disorders

Basically, two areas of law exist in the analysis of law that provide some of the general principles that operate in relation to mentally disordered offenders. These includes:

- (a) The law concerning decision-making and other action-taking to which the concept of competence is crucial; and
- (b) The law of responsibility in relation to liability for criminal offences and the tort of negligence.⁵

1.2 Decision-making and action-taking law

The law in relation to decision-making and action-taking, that is the common law (developed by the judges) and statute law might take one of three approaches to mentally-ill offenders:

- (a) The law might adopt the same approach for mentally abnormal offenders as for anyone else.
- (b) The law might adopt an approach recognizing the impact of being a mentally abnormal offender that may be based upon the effects or mere status of the mental state.

³ Onyeama W.P.C “The Law and Mental Ill” in *Medical Malpractice and the Law in Nigeria*, Umerah B. C. (editor)(Longman Nigeria Ltd, Ibadan, 1989), p. 163.

⁴ Padfield C. F. *Law Made Simple* op cit pp. 322-338.

⁵ Gelder, M. G. Lopez-bor J, L, and Anderson N., *New Oxford Textbook of Psychiatry* Vol. 2, (2nd edition) (Oxford University Press, 2000), p. 2019.

- (c) The law might adopt an approach dependent upon the competence of the individual that might be affected by the mental state of the mentally abnormal offender.⁶

1.3 Competence as a concept in Relation to Mental Disorders

Competence is a broad concept, encompassing many legal issues and contexts. Its definition, requirements, and application can vary, depending upon the context, such as health care decision making (consent to treatment). This was the issue in the case of *Re*

C.⁷ A 68-year old man serving a seven-year prison sentence was found to be mentally ill, and transferred to Broadmoor Hospital. He was diagnosed with gangrene in the right foot and it was considered that he would die if his leg was not amputated below the knee. He refused to consider the medical opinion objecting to even future amputation as the hospital authority refused to give him an undertaking that it would not amputate in any future circumstances. *C* sought an injunction to restrain the hospital from amputating his right leg without prior consent in the event his right leg in future threatened his life. Thorpe, of the English Family Division, on the question of decision-making capacity said:

The decision-making process could be analysed into three stages; First, comprehending and retaining the treatment information; second, believing it; and third, weighing the information, balancing risks, and needs to arrive at a choice. Applying that list, the presumption that *C* has the right of self-examination had not been displaced. Although his general capacity was impaired by schizophrenia, it had not been established that he did not sufficiently understand the nature, purpose and effects of the treatment he refused. Accordingly, the court granted the injunction order in *C*'s favour respecting future medical treatment.

Similarly, the issue of competence and decision-making arose in the case of *re Quinlan*.⁸ Karen Quinlan, a 22-year old patient who had suffered severe brain damage, perhaps as a result of consuming alcohol and drugs, became comatose and remained for several months in a chronic vegetative state. She "suffered from cortical damage"⁹ that resulted in "total loss of cognitive functions".¹⁰ Attending physicians employed a mechanical respirator to aid her breathing. Since she was incapable of making decision for herself, her father sought to act as her substitute decision-maker and sought court permission to discontinue the artificial respirator for treatment. The New Jersey trial court denied Mr. Quinlan's request to be appointed Karen's guardian and terminate the use of the

⁶ Gelder, M. G. Lopez-bor J, L, and Anderson N., *New Oxford Textbook of Psychiatry* Vol. 2, (2nd edition) (Oxford University Press, 2000), p. 2019.

⁷ (1994) All ER 819

⁸ 355 A 2d 664 (NJ. 1978)

⁹ Southwick, A. F. "The Law of Hospital and Health Care Administration" (2nd edition) (Michigan Health Administration Press, 1988), p.318.

¹⁰ Emiri, F. O. *Medical Law and Ethics in Nigeria*, (Malthouse Press Ltd, 2012), p. 233.

respirator holding in effect, that the decision was solely that of the attending physicians acting in accordance with prevailing medical standards.

On appeal, the New Jersey Supreme Court reversed the decision holding that Mr. Quinlan was entitled to be appointed guardian of his daughter, could select a physician of his choice to take care of her, and could participate with their physician and the hospital's medical ethics committee in a decision to withdraw the medical respirator. The legal basis for the decision was the patient's constitutional right to privacy, specifically her right to decline treatment under the circumstances of her situation as it is often the case in all "right to die" cases.¹¹ Most significantly, the court said;

Where the patient is so incompetent that she cannot express her right to privacy on her own behalf, her father as a guardian may do so under the doctrine of substituted judgment. And under the substituted judgment doctrine, the decision-maker substituting for the patient (in this case – the guardian) was to determine what the patient herself would decide under these circumstances.

Competence also extends to executing a will, standing trial or confessing to a crime.¹² Competence is crucial in decision-making because for a decision to be made and relied upon by another, the person making it must be competent. Competence is one that is related to a specific decision at a specific time as the question of competence to make given decision is to be determined in relation to that particular decision alone.¹³

2.0 The Position in Nigeria

There is a dearth of decided cases in Nigeria emphasising on competence of the mentally ill offender. A recent analysis of all cases involving the insanity plea, for example, "reported in Nigerian Law reports revealed that 100% of them were homicide cases".¹⁴ The courts have justified this assertion in a plethora of cases:

In *Haruna v State*,¹⁵ the appellant in this case was arraigned before the High Court of Kaduna State a one-count charge of culpable homicide punishable with death contrary to **section 221 of the Penal Code Law of Kaduna State, 1991**. It was alleged that on or about August 13, 2013, the appellant attacked one Musa Bello (the deceased) by hitting

¹¹ See *Saltz v Peremutter*, 379, So 2d. 389 (Fla. 1980) – (where a 73 year-old competent patient had right to have respiratory removed where all affected family member consented. In *Re Melidco*, 88, Misc-jd 974, 390 N.Y.S.Dd3,523 (Supp. 4 1970) (Jehovah's Witness was permitted to refused blood transfusion, even though death was likely to result; *Lane v Candara*, 6 Mass, App. 377, 376, N. E. 2d 1232 (1978) (Court would not order computation of the gangrenous leg of the 77-year old incompetent woman over her objection even at the risk of her life).

¹² Simon, R. I. "Ethics and Forensic Psychiatry: Legal Issues in Psychiatry" in *Kaplan and Sadockes Comprehensive Textbook of Psychiatry*, 7th edition, vol. 2, (New York, Lippincott

¹³ Gunn, M and Wheat K., "General Principles of Law Relating to People with Mental Disorder" in *New Oxford Textbook of Psychiatry*, Vol 2; (2nd edition), (New York Lippincott H. Williams and Wilkins, 2000), p.3283

¹⁴ Adegboyega Ogunmole, Letitia Pjenaar, and Oluwaseun Oluwaranti, "Plausible subjective Experience versus Fallible Corroborative Evidence: The Formulation of Insanity in Nigerian Criminal Courts" in <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10155230> accessed on 15/8/2023 at 9.37 pm.

¹⁵ (2023) 1WRN 75 SC

a pestle twice on his head while he was asleep in his room. As a result he sustained injuries and subsequently died. The appellant pleaded not guilty to the charge.

At the trial, the prosecution/respondent called witnesses in proof its case, and tendered for exhibits at trial. The court, in its judgment delivered on July 28, 2016 found the appellant not guilty of the offence, and consequently discharged and acquitted the appellant. Dissatisfied with the judgment, the respondent filed a notice of appeal on October 11, 2016, at the Court of Appeal, Kaduna Division The Court of Appeal found merit in the appeal, reversed the judgment of the trial court, and sentenced the Appellant to death. Aggrieved by the Court of Appeal decision, the Appellant appealed to the Supreme Court which unanimously dismissed the appeal.

In *Madujemu v State*¹⁶, the appellant was arraigned for the murder of his wife. He pleaded not guilty to the charge. At the conclusion of the trial, the court found him guilty as charged and sentenced him to death on grounds that, from available evidence, there was no proof that the appellant was insane or that he was suffering from natural mental infirmity that deprived him the capacity to control his actions, understand what he was doing, or know that he ought not to do the act or to make the omission. He appealed to the Court of Appeal where the Appeal was dismissed. He further appealed to the Supreme Court which further dismissed the appeal and upheld his conviction.

Furthermore, in *Aiworo v The State*,¹⁷ the accused was standing trial for the murder of his six-month old son and two other persons. He raised the defence of insanity. He claimed not to have understood what happened at the time he committed the offence. He attributed his actions to a wrap of Indian Hemp which he claimed a friend had given to him. He however failed to call the friend who gave him the Indian Hemp or any other witness. A psychiatric who saw him eleven months after the commission of the offence testified on his behalf that he suffered from a disease of the mind called schizophrenia. The expert testimony was neither based on medical nor clinical examination of the accused, but on facts obtained from the accused's relations about his background. The court rightly rejected the medical evidence on the grounds of hearsay. In *Saidi Oseri v The State*,¹⁸ the defendant killed a woman by striking her with a cutlass. He had strange beliefs that his supposed lover was being hidden from him by the deceased. He claimed "he felt he was possessed by a spirit on the day of the offence and believed he was under a spell cast upon him by a witch (contemporaneous acts) and this led to his attacking the woman".¹⁹ The overall opinion of the expert was that the patient, at the time of killing, was suffering from symptoms of "paranoid schizophrenia" which robbed him of capacity to know that his

¹⁶ (2001) FwLR, (pt. 52) 2210 SC – See also *Nwabo v State* (1994), 9 SCNJ 114; *Kare v State* (1988) 1 NWLR (pt. 171) 404; *Karimu v The State* (1989) 1 NSCC 88, *Garba Mailayi Usman Sokoto v The State* (1968) All N.G.R. SC, 295/67.

¹⁷ (1988) 1 NWLR (pt. 72) p. 565

¹⁸ (2017) LCN/10139 (CA)

¹⁹ Adegboyega Ogunmole, Letitia Pjenaar, and Oluwaseun Oluwaranti, "Plausible subjective Experience versus Fallible Corroborative Evidence: The Formulation of Insanity in Nigerian Criminal Courts", op. cit p. 88.

act was wrong, as well as the capacity to control himself. The history obtained from the defendant revealed that he had previously been treated for mental disorder in a private hospital, but no records were available. Based on the claim of the defendant, a social worker visited his village and obtained a family history of mental illness on the mother. Despite all these, the court held that the defendant was not “insane in the legal sense” Adegboyega Ogunwale et al²⁰ enumerated the reason for the court’s decision to include:

- (i) Accounts of the abnormal state of mind came from the defendant himself (‘suspect’ and ‘not taken seriously’ per **Guobadia**);
- (ii) The opinion of the expert witness could not be relied upon since there was no ‘conclusive diagnosis’ of insanity;
- (iii) The history of mental illness in the mother not backed up by ‘scientific’ or ‘medical’ analysis and that neither the mother of the patient nor the social worker who got this history of mental illness in the mother testified in the case;
- (iv) There was no cogent evidence of the past mental state of the accused person before the alleged incident.

Additionally, in *Guobadia v State*²¹, a man was charged with the murder of his 2-year-old step-brother. His plea of insanity was made on the basis of a strange experience of being in ‘dream land’ and being ‘pursued by someone’. He thereafter ran into ‘something’ and found that he had stabbed the two-year-old. The appellant’s father testified for the prosecution and indicated that the defendant had a history of mental illness treated by traditional healers. The psychiatrist who saw the accused in custody (1 year and 2 months after the crime) found no evidence of mental disorder. However, the investigating police officer who took the defendant’s statement observed that the behaviour of the appellant was ‘abnormal’. The trial court disbelieved the appellant’s testimony that he did not know what he was doing. The case went on appeal up to Supreme Court where it was held that ‘evidence of insanity tendered by an accused person himself is suspect and not usually taken seriously’.

2.1 The Concept of “Competence”

Competence is to be interpreted functionally – meaning that the status of the decision maker is not ‘determinative of the question of his or her competence’.²² The mental state of the decision-maker may be the reason why competence is put into question, but mental status in itself is rarely, if ever, sufficient to determine the matter. Mental state may have relevance to decision-making in that certain situations will impact on the ability to understand and process information.²³ The functional approach requires that the fact of competency is related to the particular decision to be made.

²⁰ Adegboyega Ogunmole, Letitia Pjenaar, and Oluwaseun Oluwaranti, “Plausible subjective Experience versus Fallible Corroborative Evidence: The Formulation of Insanity in Nigerian Criminal Courts”, op. cit p. 88

²¹ (2004) 6 NWLR 360

²² Gunn, M, and Wheat, K, “General Principle of Law Relating to People with Mental Disorder” op. cit p. 2019.

²³ Ibid.

There is a range of abilities that competence might involve. Much of the work on competence has been taken in the context of the health care law, and in particular, to consent to treatment.²⁴ Gunn cites two leading thinkers, Grisso and Appelbaum to have identified four abilities that can be involved in competency to include;

- (a) Evidencing a choice
- (b) Understanding
- (c) Appreciation
- (d) Reasoning or Rationality²⁵

Competency is usually narrowly defined legally as cognitive capacity. No firmly established criteria exist for determining a patient's competence. A minimal level of decision-making must exist in which the patient can at least 'understand the particular treatment being offered; make discernable decision, one way or another regarding the treatment being offered, and communicated that decision verbally or not verbally.'²⁶ The determination of whether a defendant is competent to stand trial is left for the judge. The judge must decide competency before trials or as soon as reasonably possible after it comes into question.²⁷ The following can be used as a type of evidence of competency:

- (1) Presentations
- (2) Witness statements
- (3) Reports
- (4) Photographs
- (5) Videos
- (6) Case studies and real-life scenarios, case-based discussions
- (7) Observations, among others.²⁸

If an individual is found to be incompetent, the criminal case against him is usually put on hold until he is deemed competent to stand trial. Competency is a global assessment and a legal determination made by a judge in court. Capacity on the other hand is a 'functional assessment regarding a particular decision'.²⁹

2.2 The Law on Status Approach

The functional approach is often also adopted in regards to competence. First, some English Law examples can best illustrate this approach because there is a dearth of judicial cases on this concept.

In England and Wales, a person's ability to undertake Jury Service, an important signal of citizenship is limited on the basis of mental state in accordance with the **Juris Act**

²⁴ Ibid.

²⁵ Ibid, p. 2020.

²⁶ Simon, R. I. "Ethics and Forensic Psychiatry: Legal Issues in Psychiatry" op.cit p. 3284.

²⁷ <https://www.nolo.com> – Competency to stand trial/Nolo accessed on 1/8/2023 at 11:45am.

²⁸ Ibid.

²⁹ <https://www.thehospitalist.org>>ho... accessed on 1/8/2023 at 11:45am.

1974.³⁰ Consequently, a person is ineligible for jury service, that is, not currently permitted to serve, if he or she ‘suffers or has suffered from mental illness, psychopathic disorder, mental handicap or severe mental handicap and because of that is either resident in a hospital or similar institution or regularly attends for treatment by a medical practitioner’.³¹

A person is also ineligible if he is under guardianship, or whose property and affairs are administered by court.³² In Nigeria, the extant Law is the Mental Health Act, 2023. It came into effect on January 6, 2023, and provides for Property and affairs of persons with mental health conditions.

Section 49(1)³³ provides for the application of property of persons with mental health conditions. It reads:

The provisions of this part shall apply in respect of a person, who in the considered opinion of a High Court judge based on competent medical evidence is incapable by reason of mental disorder of managing and administering his property and affairs, and a person whom the judge is satisfied to refer to as a person with the mental health condition for purpose of this part for –

- (a) the maintenance or other benefit of the person with mental health condition;
- (b) the maintenance or other benefit of members of the family of the person with the mental health condition;
- (c) making provision for other persons or purposes for whom or which the person with the mental health condition might be expected to provide if he were not mentally incapacitated;
- (d) making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally incapacitated; or
- (e) administering the affairs of the person with the mental health condition.

A person suffering from mental disorder or insanity is subject to various disabilities. For example, in English Law, a marriage contracted by an insane person is void if at the time of contracting it, he was unable to appreciate its nature.³⁴ In Nigeria, one of the notable exceptions to the Right to Personal liberty provided in **section 35** of the 1999 Constitution (as amended) is:

...in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or

³⁰ Gunn, M, and Wheat K., “General Principles of Law Relating to People with Mental Disorder” op. cit, p.204

³¹ Ibid, p. 2021.

³² Ibid.

³³ National Mental Health Act, 2023.

³⁴ Frank, W. F., *The General Principle of English Law* (6th ed) (London, Harrap & Co. Ltd 1975), p. 78

the protection of the community.³⁵

Furthermore, contracts made by an insane person are voidable at his option if at the time of contracting it, he was unable to understand the nature of his acts and the other party was aware of it. Similarly, insane persons may make valid Wills only during lucid intervals.³⁶

A further example of status is in relation to vote. This is not in relation to exercising the vote itself but of being on the voters' register itself.³⁷ In England and Wales, for example, electoral officers do not register 'persons known not to be competent to vote' but this is exercised rarely in part because the register is in effect for a year and so the electoral officers would have to be very confident that such a person might not be competent sometime during the given year. Similarly, detained mental patients would not be able to register for the vote.³⁸

2.3 Sexual Relations

Another example of law, this time, in a private area that is dependent on status is the ability of some people to enter into sexual relations.³⁹ This is a matter that is dependent on consent of the female partner in sexual act. Therefore, it is rape for a man to have carnal knowledge of, or vaginal sexual intercourse with a woman without her consent. Mentally disordered persons present more complex issues in this regard because they are vulnerable to sexual abuse because of lack of capacity to demonstrate consent.

In appreciation and recognition of this default, section 55(1) of the Nigerian National Mental Health Act 2023 forbids medical personnel from having sexual relationship with mental patients in their care; in the following words:

An officer, staff or employee or a health worker attending to a person receiving care for a mental health condition or a mental health practitioner at a facility shall not have sexual relationship with any person who is –

- (a) for the time being receiving treatment for mental health condition in the treatment facility;
- (b) subject to his or her guardianship or otherwise in his or her custody or care under this Act in psychiatric hospital or in a non-specialized setting or other facility for the treatment of mental health conditions;
- (c) for the time being receiving treatment as an out-patient.

³⁵ Section 35(1)(e) 1999 Constitution (as amended).

³⁶ Ibid, pp. 78-79.

³⁷ Gunn, M and Wheat K., "General Principles of Law Relating to People with Mental Disorder" op. cit p. 2021.

³⁸ Gunn, M and Wheat K., "General Principles of Law Relating to People with Mental Disorder" op. cit p. 2021.

³⁹ Ibid.

Section 55(2)⁴⁰ provides appropriate punishment for offenders. It states:

Any person who commits an offence under this section is liable on conviction to life imprisonment with no option of fine and this shall not be prejudicial to any other sanctions and such a person may be liable to penalties from professional bodies to which he may belong as a member.

3.0 The Law of Responsibility in relation to Liability for Criminal Offences and the Tort of Negligence

Indeed, two concepts in criminal law that are often confused and misunderstood by mental health experts involved in the judicial process are criminal responsibility and competence to stand trial. Criminal responsibility refers to the state of the defendant's mind at the time of the alleged crime, and includes the related concepts of insanity and diminished capacity.⁴¹ Diminished capacity focuses on the ability to form a specific intent, that is "*mens rea*". An argument of diminished capacity may be used to reduce a criminal sentence, but the individual can still be found guilty.⁴²

On the other hand, Competence to stand trial refers to the state of mind of the defendant at the time of trial. It includes such concept as 'guilty but mentally-ill' and may be a negative bias when the person comes up for parole.⁴³

Mental disorder is relevant to criminal liability in a variety of ways.

First, the presence of a mental disorder may be a reason to convince the decider of the fact that, contrary to external appearance, the defendant did not have the mental element for the crime with which he or she has been charged. Lack of mental element, is, of course, a complete defence.⁴⁴

Second, the presence of a mental disorder may give rise to a defence. This will arise either by it being raised by the defence (even if the defence does not have the formal burden to prove it, but will have the burden of raising the matter for consideration), or by the prosecution challenging a point made by the defence (if the defence raises mental disorder as an explanation for lack of criminal intent).⁴⁵ The first formal test of criminal

⁴⁰ Section 55(2), National Mental Health Act, 2023.

⁴¹ Meyer R. G. and Wearer C. M., *Law and Mental Health: A Case-Based Approach* (London, The Guilford Press, 2006), p. 114.

⁴² *Ibid*, p. 115.

⁴³ Meyer R. G. and Wearer C. M., *Law and Mental Health: A Case-Based Approach* op.cit. p.114. This means the conditional release of a prisoner from imprisonment before the full sentence has been served. Although not available under some sentences such as murder, parole is usually granted for good behaviour in the condition that the pardon regularly report to a supervising officer for a specific period. See Garner, A. B. *Black's Law Dictionary* (9th edition), p. 1227.

⁴⁴ Gunn, M and Wheat K., "General Principles of Law Relating to People with Mental Disorder". Op. cit. p. 2022.

⁴⁵ *Ibid*, p. 2022.

responsibility was in *Re M'Naughten (1843)* – the British legal case that set forth the first formal legal test of insanity.⁴⁶

The defence of insanity demands that the defendant must have a disease of the mind; the disease of the mind must cause a defect of reason; and the consequences of these must be that the defendant either did not know what he was doing, or did not know that what he did is legally wrong.⁴⁷ The M'Naughten rule provides that *every person is presumed sane until the contrary is proved*. In Nigeria, **section 27** of the Criminal Code also provides for presumption of insanity. It states that:

Every person is presumed to be sound in mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.⁴⁸

Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he is under the same degree of responsibility as if the facts were as he imagined them to be.

Historically, insanity was seen as a ground for plea of leniency. In pre-Norman Times in England, there was no distinct code – a murderer could pay compensation to the victim's family under the principle of “buy off the spear or bear it”.⁴⁹

In Norman Times, insanity was not seen as a defence, but a special circumstance under which the Jury could deliver a guilty verdict and refer the defendant to the king for a pardon. The position was expressed thus:

...eo quod sensu carent et ratione, non magis quam brutum animal iniuria facere possunt nec feloniam, cum non nec infum distent a brutis, secundam good videri poterit in minore, qui sialium interficeret in minori actate, indicium non sustineret –

Meaning ... since they are without sense and reason and can no more commit a tort or a felony than a brute animal, since they are not far removed from brutes as evident in the case of a minor, for if he should fall another while under-age, he should not suffer judgment.

The presumption of sanity was stated in the case of *Edoho v State*⁵⁰ where the court held that –

⁴⁶ Meyer R. G. and Wearer C. M., *Law and Mental Health: A Case-Based Approach* op.cit. p.116. M'Naughten, the paranoid wood turner in Glasgow who killed Edward Drummond in mistaken identity for Prime Minister Robert Peel.

⁴⁷ Gunn, M and Wheat K., “General Principles of Law Relating to People with Mental Disorder” op. cit p. 2022.

⁴⁸ A. M. Adebayo, *Criminal Code Act and other Related acts (Annotated with cases)* (Princeton Publishing Co., Lagos, 2012), p.129.

⁴⁹ M'Naughten Rules – available at <http://en.wikipedia.org/wiki/m%27Naughten-rules> accessed on 23/8/2023.

⁵⁰ (2010) All FWLR (pt. 530) 1262.

In all criminal cases, every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved. Accordingly, there is no duty on the prosecution in criminal cases to establish what the law presumes in its favour, that is to say the sanity of an accused person.

In *Madujemu v State*⁵¹, the appellant was arraigned for the offence of murder of his wife. He pleaded not guilty to the charge. One of the issues before the Supreme Court was whether from the circumstances of the case the defence of insanity could avail the appellant. The Supreme Court held that the “raising of the defence of insanity as provided in **section 28** of the **Criminal Code** is *prima facie* an acceptance of responsibility for the act complained of”.⁵²

Most societies the world over take mental illness into account in their legal system because mental illness is a factor in determining the criminal responsibility and competence to face trial of mentally ill offenders.⁵³

The law of excuses is deeply entrenched in Anglo-American jurisprudence which had persisted since the Middle Ages. The excusing conditions of necessity, duress, mistake and diminished mental capacity all entrenched the accepted principle that a “person is not culpable, and cannot be held criminally responsible if he had no control over his behaviour”.⁵⁴ An excuse is based on the assumption that the accused’s behaviour is damaging and is to be deplored, but “internal or external conditions which influence the act deprived the actor of choice, this negates or mitigates penal liability”.⁵⁵ Mental disability is the most personal of the excuses.⁵⁶

The defence of insanity exists to the extent that mentally disordered persons should not be punished for offences committed while insane. It is a defence at the disposal of those who are by all standards, insane and as such incapable of understanding what they are doing. To this end, there must be a clear case of inability to reason and act properly before the defence of insanity is allowed. In consonance with this assertion, Obaseki, JSC, in *Saliu v State*,⁵⁷ described insanity as:

⁵¹ (2001) FWLR (Pt. 52) 2210 SC.

⁵² A. M. Adebayo, Criminal Code Act and other Related acts (Annotated with cases), op.cit p. 133

⁵³ John Q. Laford “Observations on the Insanity Defense and Involuntary Civil Commitment in Europe” available at <http://digitalcommons.law.seattled.edu/scil/vol7/iss3/3/> accessed on 26/5/ 2015.

⁵⁴ Godin O, LO Gostin, “Justifications for the Insanity Defence in Great Britain and the United States: The Conflicting Rationales of Morality and Compassion” available at <http://wawjappl.org/cotent/9/2/100.fullrpf> accessed on 02/10/2014.

⁵⁵ Ibid, see section 27 of the Criminal Code which provides that “every person is presumed to be of sound mind and to have been of sound mind at any time which comes on in question, until the contrary is proved. Also section 28 provides that “a person is not criminally responsible for an act or omission he is in such a state of mental disease or retard mental infirmity to deprive him of capacity to understand what he is doing.

⁵⁶ Ibid.

⁵⁷ (1984) 10 SC 111 at 116.

... not merely a departure from the normal but a fairly advance degree of disorder of the mind. What the law decides is that; persons who are medically insane are legally irresponsible.

The defence of insanity has been a controversial one because, in most cases, where it is pleaded, the fundamental principles of justice, humanity and morality are jeopardized.

3.1 The Tort of Negligence Introduction

The subject of liability or non-responsibility for civil wrongs have received little attention in Nigeria judiciary. Existing Jurisprudence on the impact of impaired reasoning on legal liability has laid more emphasis on criminal liability than civil liability. Legal scholars and commentators argue that the reasons for the comparatively small judicial decision, if any, on the concept may be that many potential cases are resolved through settlements, or, that defendants may choose not to raise their impairment as factor in mitigation of liability for fear of stigmatization.

In common law countries, although the plea of insanity has long been a defence to criminal prosecution, whether it is a defence in civil action is still in doubt.⁵⁸ In tort, liability is presumed on fault. Since the mentally-ill are not in control of their acts, they should not be liable for their wrongs. But generally, the courts have rejected the mental illness defence to tort liability.⁵⁹ This is so because, the concept of fault in tort law has changed. Previously, a person was responsible for the damage he caused not because he caused the damage, but also because morally, he was to blame. At present, while the fault concept is still a part of tort liability, fault is interpreted in a more objective manner.⁶⁰ Culpability turns more as a “consideration of the societal judgment of the conduct than on the actor’s motivation.”⁶¹ Although there is a dearth of judicial decisions dealing with insanity in the context of negligence,⁶² there exists appreciable authoritative scholarly presentations on the concept.

Consequently, the first common law discourse of insanity in regards to civil action occurred in the ancient case of *Weaver v Ward*.⁶³ The court, in this case, held:

[I]f two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatic kills a man, or the like, because felony must be done *animo felonico*, yet in trespass, which tends

⁵⁸ William R. Casto, “The Tort Liability of Insane Persons, for Negligence: A Critique”, *Tennessee Law Review*,

Vol. 39, HeinOnline-39Tem.L.Rev. 705 1971-1972. Heinonline (<http://heinonline.org>) p. 705.

⁵⁹ Alexander, G. J. and Szasz, “Mental Illness as an Excuse for civil wrongs” available @ <http://digitalcommons.law.sc.edu/cgi/vuwcontent-egi?actill61andcontent-facpubs>, accessed on 27/8/2018, p. 28.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid, p.21.

⁶³ 80 Exg Rep. (C.P. 1616)

only to give damages according to hurt or loss, it is not so, ... and therefore no man shall be excused of trespass... except it be judged utterly without his fault. As if a man by force take my hand and strike you....⁶⁴

The *ratio decidendi* in this case “relied on strict liability”⁶⁵ which “does not depend on an actual negligence or intent to harm, but based on the breach of absolute duty to makesomething safe”.⁶⁶

There have been “controversies and uncertainty regarding the appropriate standards” in determining tort liability for the mentally-ill.⁶⁷ At common law, “an objective standard” is adopted to determine “liability of mentally-ill defendants”, whereas the “subjective standard is used to determine contributory negligence of mentally-ill plaintiff”.⁶⁸

In the early 1900s in the United States of America, there have been divergent views and conflicting authorities on the state of law on the issue of the tort liability of the mentally-ill.⁶⁹ However, there is only one American case, *Williams v Hays*,⁷⁰ where the mentally-ill person was held liable for negligence.

The Reasonable Man’s Standard

An attempt to determine a proper standard of tort liability for the mentally-ill was made in 1934 by the American Law Institute (ALI). In its first *Restatement of Torts* published that year, the ALI excluded insane persons from these “requirement of conforming to thereasonable man standard”.⁷¹ It stated:

The Institution expresses no option as to whether insane persons are required to conform to the standard of behaviour which society demand of same person for the protection of the interest of others.⁷²

It means that the *Restatement* expressed no option as to whether insane persons should be subjected to the objective reasonable person standard.⁷³ However, in 1948, ALI reversed its first 1934 exclusionary position and held that while there were insufficient authorities in 1934 in which to base a definite rule, enough authorities existed now⁷⁴ (1948) to hold the insane to an objective standard.

⁶⁴ Ibid

⁶⁵ 80 Exg. Rep. (C.R. 1616)

⁶⁶ Ibid. Garner, A. B. Black’s Law Dictionary (9th edition), (West publishing Co, 2004), p. 998.

⁶⁷ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, Yale Law Journal, Vol.93, Issue 1, Article 5, 1983 at <https://digitalcommons.law.yale.edu/yl> accessed on 14/09/2019, p. 154.

⁶⁸ Ibid.

⁶⁹ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, op. cit. p. 154.

⁷⁰ 143. N.Y. 442, 38N. E. 449 (1984). Latermealed, 157 N. Y. 541, 52 N. E. 589 (1999). This case became the most frequently cited authority for holding the mentally-ill liable for their torts.

⁷¹ William R. Casto, “The Tort Liability of Insane Persons, for Negligence: A Critique”, p. 710.

⁷² Ibid.

⁷³ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 155

⁷⁴ ibid.

Finally in 1965, the ALI in the *Restatement (Second) of Torts* published a section that specifically dealt with insane person. **Section 283B** of the statement read as follows:

Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.⁷⁵

The implication of this 1965 *Restatement* is that the mentally ill were to be held liable for their torts of negligence and the courts have consistently adhered to this common law rule.⁷⁶ However, the ALI advanced four “policy factors”⁷⁷ for arriving at the 1965 *Restatement* and the court have traditionally upheld these for holding the mentally-ill to an objective standard” of tort liability.⁷⁸ According to the ALI, the factors include:

1. Mental defectives should pay for the damage they cause rather than allowing this loss to fall on their innocent victims.
2. Liability will stimulate the guardians of insane persons to “keep them in order”.
3. The insanity factor character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned ... and some fear of introducing into the law of torts, the confusion which has surrounded such a defense in the criminal law; and
4. The difficulty of delineating exactly what forms of insanity maybe taken into account in determining negligence.⁷⁹

A major factor which influence the ALI to adopt position of holding the insane person to the “reasonable man” standard in determining liability is the fact that “since insane persons are almost universally liable for their intentional torts, it was thought that the same rule would apply to negligence.”⁸⁰ Another reason adduced by the ALI for the application of the “reasonable man” standard is the protection of innocent victims.⁸¹ It is to the effect that if mentally ill person are to live in the world, they should pay for the damage they do, and that, it is better that their wealth, if any, was used to compensate innocent victims than that it should remain in their homes.⁸²

This reason is the most frequently cited by courts for the application of the “reasonable man” standard to insane persons and probably the strongest rationale for this approach.⁸³

⁷⁵ William R. Casto, “The Tort Liability of Insane Persons, for Negligence: A Critique”, p. 711.

⁷⁶ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 155.

⁷⁷ William R. Casto, “The Tort Liability of Insane Persons, for Negligence: A Critique”, p. 711.

⁷⁸ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 155.

⁷⁹ William R. Casto, “The Tort Liability of Insane Persons, for Negligence: A Critique”, p. 711. See also Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 156.

⁸⁰ Ibid, p. 712.

⁸¹ Ibid, p. 715.

⁸² Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 155.

⁸³ Ibid.

We asserted earlier in this discourse that there is a dearth of judicial decisions on the concept in Nigeria. However, available foreign cases show that most negligence cases involving insane defendants are mainly cases of automobile accidents.⁸⁴ In *Sforza v GreenBus Lines Inc.*,⁸⁵ a bus driver suddenly became insane and lost control of his bus, striking a parked ice truck upon which the plaintiff was chopping ice. The Municipal Court held that the bus company could not utilize the driver's insanity as a defence. In *Johnson v Lambotte*,⁸⁶ the defendant was undergoing treatment in a hospital for a "chronic schizophrenic state of paranoid type". On the day of the accident, she was "crying and begged to go home, insisting that she must leave the hospital".⁸⁷ Subsequently, she escaped from the hospital, stole a car, and had an accident. The court held that the defendant must conform to the "reasonable man" standard.

On the contrary, in *Buckley v Toronto Transportation Company v Smith Transport Ltd*,

⁸⁸ a Canadian case, in which the plaintiff's motor car was ran into by one of the defendant's trucks, the driver of the truck was under the delusion that the truck was being remotely controlled from the defendant's headquarters by an electric beam.⁸⁹ The court citing an earlier Canadian decision,⁹⁰ held that the defendant was not liable because "to create liability for an act which is not willful and intentional but mere negligent, it must be shown to have been the conscious act of the defendant's volition".⁹¹ Similarly, in a Wisconsin case, *Bruenig v American Family Insurance Co.*,⁹² the defendant's insured, while driving a car, came to believe that God had seized control of the steering wheel. When she saw an oncoming truck, she stepped on the gas in order to fly over the truck- "she knew she would fly because Batman does it".⁹³ In the words of the court, "to her surprise, she was not air-borne before striking the truck but at the impact, she was flying".⁹⁴ The court reasoned that since people are generally not liable for actions brought about by sudden illness, such as epilepsy, they should also not be liable when sudden illness takes the form of insanity.⁹⁵

However, one of the reasons the objective standard is deemed appropriate in determining liability in negligence action by mentally-ill persons is the issue of community treatment.

⁸⁴ William R. Casto, "The Tort Liability of Insane Persons, for Negligence: A Critique", p. 719.

⁸⁵ 150 Misc. 180-268 N.Y.S 446 (N.Y. Mun. Ct. 1934)

⁸⁶ 147. Colo. 203, 363. P. ed. 165 (1961).

⁸⁷ Ibid at 204, 363 p 2d at 165.

⁸⁸ (1946) 4.D.C.R. 771.

⁸⁹ In a conversation with an official of the company, the driver said "that machine was under remote control and when you people put the power on, I could not do anything". The driver was suffering from syphilis of the brain and died within a month of the accident from general paresis

Slattery v Haley (1923) 3.D.L.R. 156 (1922).

⁹¹ (1946) DLR 721, 728.

⁹² 45 Wis. 2d 536, 173 NW. 2d 619 (1970).

⁹³ Ibid at 543, 173, NW. 2a at 624.

⁹⁴ Ibid.

⁹⁵ The court went further to say that there was sufficient evidence to find that the driver was aware of her insanity in advance and therefore should not have driven the car.

As a result of “deinstitutionalization and community treatment, most mentally-ill persons spend most of their time in the community”.⁹⁶ The tremendous increase of the mentally-ill persons now living in the community increased the importance of holding them to an appropriate standard of care in order to meet the present requirements and aim of community treatment.⁹⁷ It is also argued that since the ultimate success of community treatment depends upon community acceptance and support, “holding the mentally-ill to an objective standard of tort liability will facilitate this goal.”⁹⁸

It is therefore believed that allowing a defence of mental illness to tort liability may increase public resistance to having the mentally-ill in the community.⁹⁹

4.0 Critique

Since the inception and adoption of the application of the common law doctrine, of holding the mentally-ill liable for their tort actions, legal scholars and commentators have variously criticized the doctrine.¹⁰⁰

Existing English cases presented “conflicting authority, and contemporary commentators had adopted divergent opinions on the state of the law”.¹⁰¹ In the first American case dealing with the negligence of the insane person, *Williams v Hays*,¹⁰² the court held that a mentally-ill person was liable for negligence. The decision in this case gave rise to numerous appeals, referrals and retrials. In this case, the captain of a ship became insane after remaining on constant duty for more than two days during a serious storm. As a result of the captain’s subsequent actions, the vessel was destroyed. The plaintiff, an assignee of an insurance company charged the captain with negligence in failing to acknowledge obvious damage to the ship’s rudder post, and declining two offers of help from passing ships. The captain pleaded in response that he had remained continually on the bridge for 18 hours during the storm and that upon finally retiring, he had taken Quinine for malaria. He claimed that exhaustion and quinine impaired his faculties and he could not be held responsible for his actions. At the trial, the captain “successfully pleaded insanity as a defence”, but on appeal, it was held that lunatics must conform to “reasonable man” standard.¹⁰³ However, the court made an exception to this rule thus:

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and

⁹⁶ For example, out of an estimated 1,100,000 Schizophrenias in the United States, of the total number of severely mentally ill, 3.1 million are living in the community.

⁹⁷ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 163.

⁹⁸ Ibid at p. 165.

⁹⁹ Ibid.

¹⁰⁰ See Horblower, *Insanity and the Law of Negligence*, 5 Colum. L. Rev. 278, 278 (1905) that (“It is a singular fact and one not altogether creditable to our jurisprudence... that in this twentieth century, the question of the liability of an insane person for tortious conduct... should remain to a large extent an open question”).

¹⁰¹ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 154.

¹⁰² Supra

¹⁰³ William R. Casto, “The Tort Liability of Insane Persons, for Negligence: A Critique”, p. 718.

while it was raging, his efforts to save the vessel were tireless and unceasing, and if he does become mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault.¹⁰⁴

Critics of the rule claim that it was “inconsistent with reason and justice to hold the mentally ill liable for their torts” as such decision violates “the fault principle since the mentally ill could not control their actions and they were morally blameless”.¹⁰⁵ They also believe that given “psychiatric and legal advances”, it is no longer justifiable for society to hold the mentally-ill to a tort standard impossible for them to meet. They argued further that since the mentally-ill are in this view incapable of conforming to a “reasonable person” standard, holding them liable for their torts “violates the fault principle and imposes strict liability upon them without sound justification”.¹⁰⁶

5.0 Conclusion

One of the purposes of tort law is to encourage people to prevent accidents from occurring.¹⁰⁷ Therefore, just as holding average persons liable for their torts may make them behave more consciously, holding the mentally-ill liable for their tortious acts may have similar effect, and if the mentally-ill are not held responsible for their torts, the “community might become concerned that such community would result in an increased number of torts”.¹⁰⁸

Similarly, if the mentally-ill were allowed to escape liability, “there would be a risk that the public might become outraged by the perceived injustice of denying compensation to innocent victims”.¹⁰⁹ This is the compensation rationale most often cited by the courts especially in those cases where there is insurance to cover the judgment or where the defendant has the means to pay.¹¹⁰

However, excuses such as mental illness provide a defence based on the fact that although a defendant committed the act, he is not considered responsible or morally blameworthy, therefore excused from liability. We advocate therefore, that since the criminal law accepts this as a defence, tort law should also come out with a more liberal system where the mentally ill should not be held liable for their negligent tortious acts.

¹⁰⁴ 143 N.442. 38 N.E. 449 (1894) Id at 451-52, 3p N.E. at 402.

¹⁰⁵ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 159.

¹⁰⁶ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 159.

¹⁰⁷ Originally, this was the principal objective of the tort law, although the law has increasingly tended to focus on the need to compensate victims.

¹⁰⁸ Stephanie, I. Splane, “Tort Liability of the Mentally Ill in Negligence Actions”, p. 167.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.