Neutral Citation Number: [2015] EWCA Civ 673

Case No: B3/2014/0832

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
His Honour Judge Saggerson
OTQ01378

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2015

Before:

LADY JUSTICE ARDEN
LADY JUSTICE RAFFERTY
and
LORD JUSTICE VOS

- -

Between:

TERRY DUNNAGE	**Claimant/ Appellant**
- and -	
KATHLEEN BERNADETTE RANDALL **UK INSURANCE LIMITED**	**Defendants/ Respondent**

- -
- -

Mr Richard Spearman QC and **Mr Stuart Nicol** (instructed by **Kitsons LLP**) for the **Claimant**
Mr Michael Davie QC and **Mr Peter Oliver** (instructed by **Keoghs LLP**) for the **Respondent**

Hearing dates: 17th & 18th March 2015

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Approved Judgment

Lady Justice Rafferty:

1. I have had the advantage of reading the judgments of Arden and Vos LJJ with each of whom I respectfully agree.

2. On 24th February 2014 following a trial on liability in which the Claimant Terry Dunnage sought damages for negligence for his injuries, HHJ Saggerson dismissed the claim against the First Defendant estate of the Claimant's uncle Vincent Randall and the Second Defendant ("the Insurer"). The Insurer provided household cover for sums for which Vince became legally liable in damages for accidental bodily injury, and assumed control of the defence. The trial was conducted entirely on the papers. Throughout this judgment I have adopted the Judge's style and referred to the Claimant's uncle as "Vince".

3. A précis of events on 14 October 2007 reveals that in his kitchen the Claimant, a rescuer, was extremely seriously burned to face and body as a result of Vince pouring petrol over himself. He struggled unsuccessfully to prevent Vince igniting the petrol, and both were engulfed in flames. Vince died at the scene, the Claimant jumped to safety from a balcony. Vince post-mortem was diagnosed as having suffered florid paranoid schizophrenia.

4. The Claimant's case was that Vince despite his incapacity owed him a duty of care and mental illness was no bar to recovery of damages. Vince did not intend the Claimant harm, rather it was a consequence of his unsound mind and was accidental. The claim was founded on section 3 of the Policy issued to Vince's widow, which provides:

> *"We will indemnify …your family against all sums which you become legally liable to pay as damages for … accidental bodily injury… to any person … in the circumstances described in the contingencies."*

5. The Claimant contends that the Judge was wrong when he (a) held that an individual who acts as a result of insane delusions satisfies the objective standard of the ordinary reasonable person, (b) equated unwilled acts resulting from physical causes or third party intervention with willed acts directed and controlled by a conscious mind which is confused, disordered or disorientated, (c) found that because Vince's mental illness was extreme, the case did not need consideration within the wider context of tortious liability of the mentally ill and (d) paid no regard to broader issues of policy and justice.

6. The Claimant now puts the question raised as "What is the liability of a person suffering from mental illness for an act which is on the face of it negligent and a tort?" or, more narrowly "Is a person suffering mental illness to the extent that his actions are entirely directed by his deluded and deranged mind liable in damages to a person injured?".

7. The Respondent Insurer's case was that there was no cover under the Policy since Vince was not legally liable to the Claimant, and for other reasons based on the wording. It pleaded:

   i) Vince's actions were deliberate and/or wilful and/or malicious, alternatively reckless, and did not cause "*accidental bodily injury*" within the meaning of the Policy.

   ii) If accidental the injury was an accident in the course of threatening and/or actual unlawful violence by [Vince], excluded by implication from cover.

   iii) Vince's actions were wilful and/or malicious within the meaning of the Policy, and liability was excluded.

   iv) Vince acted deliberately and formed an intention to cause wilful and malicious harm, simultaneously acting involuntarily and without control of his actions, the consequence of insane delusions. Vince was not personally or legally responsible for that harm by reason of his mental incapacity, so that (i) he was not negligent and not otherwise liable and (ii) had no legal liability in damages and no right of indemnity.

   v) In breach of the general conditions Vince did not take all reasonable steps to prevent loss, damage or accident, and/or was reckless, and therefore had no claim under the Policy.

   vi) It would be contrary to public policy to allow recovery under the Policy in respect of the harm.

   vii) Because Vince's mental incapacity did not prevent his actions from being deliberate and the harm from being intentional, any liability was not covered by the Policy. Alternatively were he not so unsound of mind as to preclude legal responsibility those actions were non-accidental and/or wilful and/or malicious.

   viii) Any liability arose from accidental bodily injury to Vince – namely (a) mental disease, paranoid schizophrenia and/or (b) the infliction of injury and death by Vince upon himself - excluded under s3.

8. Having given short shrift to the citing of no fewer than 77 authorities articles, texts and policy discussions which were nevertheless agreed as not directly determinative, the Judge decided Vince's legal liability could be determined without regard to broader considerations, since, due to his extreme mental illness, his actions were involuntary.

Events of 14th October 2007.

9. Vince unknown to his family had made suicide attempts in the months prior to his death. On 14th October 2007 unannounced he visited the Claimant at the latter's home. The Claimant's partner Natasha Butler described Vince as unusually agitated and making allegations against the Claimant. Reassurance seemed to have a calming effect. Neither the Claimant nor Miss Butler, although finding Vince's suspicious speculations tedious, was concerned for their personal safety.

10. Vince went out announcing that he would retrieve a copy of Autotrader from his car. He returned without the magazine but with a petrol can and a cigarette lighter. He put the can on the table. Suddenly and unexpectedly he began demanding the Claimant and Miss Butler tell him the truth about who was following him and what was happening to him. He was convinced Miss Butler had been talking about him on the telephone. He accused her and the Claimant of playing a part in his (Vince's) stepson's imprisonment. She had become the Claimant's partner and the pair had moved to Devon so as to "stitch him up". He accused the Claimant of theft and of using their friendship to keep enemies close.

11. As he became angrier he knocked over the open can whilst rolling the lighter trigger. He said "Tell me the truth or we are all going to go up". In an angry exchange with the Claimant he became increasingly incoherent and repetitive and after some moments said "It's too late, I don't want you to tell me anything", stood and poured the petrol over himself. The Claimant tried to grab the lighter and was splashed with petrol. In a struggle both men went to the floor and as the Claimant tried to drag Vince outside the latter ignited the lighter. The Claimant, badly burned, kicked free and jumped from the balcony. Vince died at the scene.

12. The medical experts criticised the care he had received, the diagnosis of paranoid schizophrenia not reached in life but plainly indicated on a review of evidence available to health professionals. The Judge, impressed by the courage and selflessness of the Claimant, paid tribute to him. I echo his admiration.

The structure of the judgment.

13. In issue was whether those suffering mental illness owe a duty of care and if they do whether it is to be judged by the objective standard.

14. The Judge formulated the duty of care owed by an adult social visitor to the Claimant's home as including "…reasonable care in respect of [his] voluntary actions to avoid creating the risk of causing foreseeable injury to [others]". The claim he said turned on whether Vince's acts were voluntary.

15. He considered that factors determining whether a duty is recognised include whether it is fair just and reasonable to impose one in all the circumstances: *Caparo v Dickman* [1990] 2 AC 605 ("*Caparo*"). He found no justification for exempting Vince from the objectively defined duty. Any adjustment to reflect his mental frailty lay within a next step in the legal process. Were Vince's mechanical actions wholly involuntary he could not be in breach of the duty, by reason of its not including involuntary acts. No-one, he said, is subject to a duty of reasonable care in respect of acts he could not, or could not reasonably be expected to, control unless the situation included actionable voluntary behaviour, for example deciding to drive when aware of the risk presented by illness.

16. The other approach was from the standpoint of the standard of care. A visitor's voluntary actions should be measured objectively. He quoted from *Carrier v Bonham* (2001) QCA 234 ("*Carrier"*), infra, before concluding that there are good reasons for preserving the objective approach to duty (reasonable foreseeability) and to standard (reasonable care) in respect of the mentally ill, particularly since an objective approach left a margin for those behaving involuntarily.

17. He summarised his reasons thus: No measurement of the actions of the ordinary prudent person suffering mental illness justified a qualified standard, as was the case with children; the abilities of those suffering mental illness to intend foresee or appreciate the consequences of or to control their actions are likely to be infinitely various; the objective standard emphasises that there is no general exemption from liability for a person mentally ill, rather the important time is when the harm occurs; whatever the concepts, including responsibility blame or culpability, the mentally ill person is much more likely to be considered comparatively more accountable for damage than is the sufferer, justifying a view of the former as legally at fault. The objective approach to the standard of care can balance the sometimes competing demands of fault-based and risk-based theories of tortious liability. Finally, the Judge thought it difficult if not impossible to see why someone whose capacity to judge, form intent, or foresee consequences is diminished by mental illness should attract treatment different from that of someone who endures educational deficiency, lacks experience, or is stupid, or whose physical disadvantages compromise ability to comply with an objective standard.

18. He quoted in extenso from *Corr v IBC Vehicles Ltd* [2008] 1 AC 884 (*"Corr"*) infra, before concluding that its dicta neither dilute the objective test for the standard of care nor import a subjective element.

19. He considered that *Corr*, *Mansfield* v *Weetabix* [1998] 1 WLR 1263 ("*Mansfield*") , *Roberts* ("*Roberts"*) and *Waugh* v *James K Allan Ltd* [1964] 2 Lloyds Rep 1 ("*Waugh*") recognise that whether induced by severe acute and engaged symptoms of mental illness or an hypoglycaemic state, coronary thrombosis, or other physically irresistible impulse, on rare occasions evidence will show the alleged tortfeasor not in any meaningful sense the agent for the damage since autonomy and ability to reason and act was wholly eliminated. Distinction between physical and mental illness is unlikely to matter, likewise the trigger for the impulse being a third party or a natural unavoidable event. In such rare cases elimination of autonomy may lead to a finding that there was no duty of care, in others that there was no breach of it. Much would likely depend upon the expert evidence. There was nothing to be learned from a comparison of criminal and civil approaches to mental illness.

20. Vince's legal liability the Judge reduced to a question he said was simply expressed: Did Vince act as a conscious agent deliberately purposefully or recklessly in setting the fire albeit driven by delusions, or was his freedom of thought and action so subverted by illness that his capacity to think and act freely was eliminated so that he was not the causative agent of events leading to the damage?

21. Of the agreed evidence of the expert psychiatrists he said it permits only one conclusion, that Vince's actions were not voluntary. His conclusion was that:-

> "By reason of the extreme nature of the manifestation of his mental illness, Vince was not acting voluntarily and accordingly is not within the scope of the duty neither is he in breach of that duty. Furthermore, voluntary or voluntarily informed acts were not the cause of the events that led to the damage. This result is no different than would have been the case had Vince fallen as a result of a stroke and knocked

> [Terry] into the flame of the kitchen gas hob or had Vince been pushed into Terry by a violent third party with the same result"

22. He acknowledged that this did not reflect the thrust of the Insurer's arguments. The focus of its case had been that Vince should not be held responsible in law due to his mental illness, despite his mechanistically purposeful actions.

23. He ruled in favour of the Claimant on all other issues, holding:

    i) The standard of care is that of the ordinary reasonable man, not "a subjectivised standard that takes proper account of the particular features of [the actor's] mental incapacity."

    ii) The injury was "accidental" in accordance with authority and the wording of the Policy.

    iii) The Insurer could not rely upon the exclusion in section 3c for "*Liability arising from … any wilful or malicious acts by you or your family"*

    iv) The Insurer failed in its argument that it would be contrary to public policy to allow Vince to recover indemnity.

The agreed evidence of the experts.

24. Professor Bruce Moore is a consultant in general and neuropsychiatry, Dr Peter Wood a consultant forensic psychiatrist. They were in complete agreement on all matters, the court receiving their views within two joint statements ("JS") and replies to 26 questions. In the more detailed JS they set out Vince's long history of mental health problems.

25. The evidence indicated that in the weeks preceding the incident he was floridly psychotic and in particular highly paranoid. The experts reviewed the inquest notes which included in the summary of the evidence:

    i) Vince had come back in with the lighter and unsealed petrol can and said "Right, you better be honest, who are you telling? Why did you fucking move here? Why have you got my Hoover?"

    ii) He could not be placated. Miss Butler heard him say to the Claimant "You fucking get back in here. You're not going anywhere. You're staying. You're something to do with it". Vince included her in his delusional state (sic).

    iii) He said (to someone) "No that's not right. You're trying to stitch me up. You're all playing games with my head" and later "Tell me the truth or we're all going to go up".

    iv) DC Foster recounted the Claimant's account in interview that when the two men went to the ground Vince had one hand round the Claimant's throat.

26. The experts concluded that Vince would not have been of sound mind. His unflappable and intransigent delusional state would have been so overwhelming as to render him incapable of formulating any rational alternative action. His intensely

delusional mind was governing his actions and he was not in control of them by reason of his grossly impaired state associated with intense paranoid delusions. He was most unlikely to be capable of forming a rational plan or intention to cause harm although it might be argued he was capable of forming an irrational and delusional plan. He was almost certainly incapable of forming a rational intention to carry out a reasoned deliberate act. He was suffering from a defect of reason from a disease of the mind insofar as mind refers to the apparatus of thinking.

27. Vince was floridly psychotic and at the height of his delusional state unable to consider rational alternatives; his psychotic state would not necessarily have deprived him of the ability to understand the nature and quality of the act and there was no reason to conclude that he was unable to understand that what he was doing would cause serious and catastrophic harm.

28. However, it was likely that in his floridly psychotic state he would have felt completely overwhelmed by the effects of his delusions which drove him inexorably to a course of action he felt compelled to pursue believing he had no option. Vince may have understood that what he was doing was wrong but his delusional state would likely have led him to believe his actions were less wrong than the intolerable torment of perceived relentless persecution. However, his state of mind would probably have been so deranged that he was most likely beyond meaningful capacity to exercise "free will" such that he felt overwhelmed and compelled to act as he did without benefit of moral or rational thinking to deter him.

29. Whilst technically he might have had the capacity to form the intention to kill, that is have known that by his action he and his nephew would be seriously harmed, his deranged state of mind almost certainly deprived him of the capacity to consider an alternative so any "wilful" intention must have been governed by his delusional state robbing him of forming any sane or reasonable alternative intention. Put another way his state of mind may have encompassed the ability to intend an action in a mechanistic manner but would not have allowed him to form a rational or sane intention.

30. A driver might steer into an obstacle with intent (an immediate mechanistic intention) knowing that serious harm might result. However, if he believed he saw a child his actions would have been governed by that belief even if there were no child. The driver might be in control and capable of forming an intent to swerve but his belief or perception of reality would govern his actions. Thus like the driver Vince might technically have been in control of his actions and capable of forming an intent but that and his actions were actually governed by his delusional beliefs.

31. This reasoning suggested an inference that it was not he who was responsible for his actions but his illness. Another way of looking at responsibility was to consider how he would have behaved when in possession of his own mind. When well he would not have contemplated or committed the offence. His illness, specifically delusional belief, dispossessed him of his own mind.

32. On 31st October 2013 the experts responded to 26 questions designed, we were told, to reflect what counsel thought emerged from the authorities as either a legal test or as in the minds of the court. In many cases the answers are already reflected in the account I have set out. In the ordinary way I would have drawn the entire antiphony

into a narrative. However, the vocabulary of the interrogatives may go some way to explaining how the Judge reflected the expert evidence in reaching his conclusions. Consequently, though it risks repetition, with minimal editing I set out the majority.

> *"Did he intend to cause harm to himself and the Claimant?* He was not capable of rationally intending to cause harm to himself and the Claimant.
>
> *Was he capable of forming an intention to carry out a deliberate act?* He was not capable of forming a *rational* intention to carry out a deliberate act. The consequence of the defect of reason he suffered meant that he did not understand or appreciate the nature and quality of the act he was doing. As a direct consequence of his delusional state Vince was not capable of discriminating right from wrong, actions driven by his delusional state.
>
> *Was he capable of forming an intention to harm the Claimant?* No, as he was not in possession of his own mind. He could not have foreseen harm resulting from his actions, insofar as he was not in possession of his rational mind. It is probable his florid paranoid schizophrenia prevented him from considering the consequences of his action.
>
> *Was he acting in direct response to delusions without regard of his situation or what was likely to occur as a result of spreading petrol and holding a lighter ready to strike a flame*? It is most likely he was acting in direct response to delusions without regard for the consequences.
>
> *Is it likely his actions were voluntary?* Not in the sense that he was not a healthy and rational individual. In the absence of his rational mind he was most likely driven by his delusions rendering his actions involuntary.
>
> *Were the acts directed and prompted by his mind*? They were, but by his mind in its floridly delusioned state, not his healthy but his deranged mind.
>
> *Did he understand and appreciate the duty to take care or was he disabled as a result of his delusions in the discharge of it?* No and yes.
>
> *If he did, did he know what he was doing was wrong*? In the strictly medical sense he did not.
>
> *Was his capacity to make a reasoned and informed judgment affected by his mental condition?* Yes, adversely.
>
> *How did his mental condition affect his ability to intend the acts and to intend the harm?* His florid psychotic state with

intense paranoid delusions so deranged his reasons and judgment as to render him unable to intend either.

How did his mental condition affect his ability to choose to do the act? His florid psychotic state so deranged his reason and judgment as to render him effectively unable to choose to do the acts.

How did his mental condition affect his ability to control the actions? His state so deranged his reason and judgment to render him effectively unable to control them.

How did his mental condition affect his mental ability to appreciate what he was doing when he committed the acts? As above.

How did his mental condition affect his ability to assess the danger, risk and consequences of his action? His state so deranged his reason and judgment as to make him effectively unable to assess each.

Was his capacity to make a reasoned and informed judgment eliminated by reason of his mental condition? Almost certainly eliminated meaning beyond reasonable doubt.

Was his capacity to make such judgment impaired by reason of his mental condition? It was at least grossly impaired and probably eliminated.

If his capacity to make a reasoned and informed judgment were impaired and on a spectrum between at one end a person of sound mind acting voluntarily and at the other, one whose will and appreciation was completely overborne by his condition, where would he be? On a spectrum between complete healthy volition and absent volition he would likely be at least 95% impaired volition and probably 100% absent volition.

Is it probable he was acting under an irresistible impulse when he committed the acts? Highly probable by virtue of his thinking being dominated by delusions.

By reference to whether he had any real choice or control over the acts and to his understanding at the time, was his personal autonomy wholly overborne by the effects his mental condition had on his mind? Most likely it was.

The authorities.

33. *The McNaghten Rules*, M'Naghten's Case 1843 10 C&F 200, applied in criminal trials, are that if the defendant did not know the nature and quality of his acts or if he did not know that what he was doing was wrong, he is not guilty by virtue of insanity.

34. *Donaghy v Brennan* (1900) 19 NZLR 289 (*"Donaghy"*) a decision of the Court of Appeal of New Zealand was pleaded in trespass and thus strict liability. The court found insanity no defence to a claim for damages for assault. The defendant, a lunatic of unsound mind, was unconscious of and incapable of understanding the nature and consequences of his acts. Stout CJ delivering the judgement of the court said at p 299:

> "…the question …is whether a person…labouring under disease of the mind to such an extent as to render him incapable of understanding the nature and quality of the act and of knowing that such was wrong shoots another and injures him, is liable in damages to the person injured. …Insanity would not it has been said in many cases exempt from liability for a wrong if an essential ingredient of that wrong was not intention or malice. ….Stout CJ said in Weaver v Ward "if a lunatic kill a man or the like this is not felony because felony must be done animo felonico …and therefore if a lunatic hurt a man he shall be answerable in trespass". Hale's Pleas of the Crown [sets out that] those incapacities or defects that …. the laws of England take notice of …are of three kinds: i) natural ii) accidental iii) civil incapacities or defects. Natural includes infancy and accidental includes madness and Hale says ordinarily none of these do excuse …from civil actions …[for] trespasses batteries wounding etc. … There may be distinctions made according to Holmes [in his lectures on the common law] between the liabilities of the insane. …Once such a distinction is made it will be very difficult to draw the line. To a medical man a man subject to delusions or with a depraved or weakened will should not be expected to act as the normal man and his liability both criminal and civil should be less that that of the same man with a normal will. But our law…has not adopted this medical point of view. ….And Holmes's statement as to liability for torts states the law more broadly than has been accepted in English Courts. "

35. In *Slattery v Haley* [1923] 3 DLR Middleton J said:

> " ….an act ..merely negligent…must …have been the conscious act of the defendant's volition. He must have done that which he ought not to have done or omitted that which he ought to have done as a conscious being. …When a tort is committed by a lunatic he is unquestionably liable in many circumstances but under other circumstances the lunacy may shew that the essential mens rea is absent; but when the lunacy …is of so extreme a type as to preclude any genuine intention to do the act complained of there is no voluntary act at all and therefore no liability: Salmond 5th Ed……..Lord Esher MR in Hanbury v Hanbury (1802) 8 Times LR 559 [said] "whenever a person did…either a criminal or a culpable act which.. if done…with a perfect mind would make him civilly or criminally responsible… if the disease in the mind ..was not so

> great as to make him unable to understand the nature and consequences of the act…that was an act for which he would be civilly or criminally responsible…"

36. In *White v White* [1949] 2 All ER 339 ("*White")* the court allowed the husband's appeal against the dismissal of his petition for divorce based on the cruelty of his wife. In his dissenting judgment Denning LJ said:

> "… insanity is to be regarded differently in the civil courts from…the criminal courts……In the case of torts such as trespass and assault it is also settled that a person of unsound mind is responsible for wrongful conduct….even though …influenced by mental disease which was unrecognised at the time …even if….he did not know what he was doing or that what he was doing was wrong. The reason is that the civil courts are concerned not to punish him but to give redress to the person he has injured. It has ever since [Bacon and Hale] been accepted as the law not only in this country…but also in the United States…in Canada… and in New Zealand…..where all the English authorities are collected. …Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability but on whom the risk should fall. …where a specific intent is a necessary ingredient of the wrong a man may not be responsible if he was suffering at the time from a disease which made him incapable of forming that intent…….but the cases I have cited show that assault and trespass, to which I would add negligence, do not fall within that exception."

37. In *White v Pile* 68 W.N. (N.S.W.) 176 (1950) the certified schizophrenic defendant went into the plaintiff's house, told her she was his wife, attacked her and left. The medical expert said he would not have had a full appreciation of what he was doing and that the normal Pile was not there. The integrated self was pro tem broken up. The court held that some element of intent was necessary to establish the tort of injury to the person. One whose act was involuntary, eg an epileptic or somnambulist, would escape liability. The general current of opinion favoured immunity where the mental disease brought the case within rules analogous to the McNaghten rules. It was more in accord with common sense to allow immunity from tortious liability in assault by an insane person where his insanity would provide a defence to a criminal charge.

38. In *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56 (*"Adamson"*) the Supreme Court of Western Australia considered liability of an insane person for an act prima facie negligent and a tort. Clerk and Lindsell on Torts (10 Ed 1947) set out the then modern textbook writer's view:

> "lunatics are liable for torts to the same extent as sane persons provided [they are] in that condition of mind …essential to liability in sane persons. In its absence there is no voluntary act."

39. The court cited *Buckley and Toronto Transportation Commission v Smith Transport Ltd* (1946) 4 DLR 721 ("*Buckley*") in which disease of the brain leading to unexpected paralysis convinced the driver of a streetcar that his vehicle was controlled remotely and that he should not use the controls. The Court of Appeal found no tortious liability because his mind was entirely bereft of the mental power to control the car. This was described as a decision reached on a rational basis, that his mind was so diseased as to lead to and be the cause of his actions. That said, the court found much in support of the theory that a lunatic should be responsible for his tortious acts. The position left untouched cases in which the act was during a state of amnesia or mania. Logically even that defendant should be liable. The driver was liable in negligence. He understood what he was doing and that what he was doing was wrong.

40. In *Beals v Hayward* 1959 NZLR a sixteen year old trespasser was hit in the eye by a gun. The jury found the defendant's discharge of the gun was not an intentional assault. His disease of the mind did not leave him incapable of understanding the nature and quality of his act but did leave him incapable of knowing his act was wrong. The injury must flow from the voluntary act of the defendant. Were the act of firing involuntary or accidental there would be no liability.

41. In *Williams v Williams* [1964] AC 698 (*"Williams")* a husband, certified, returned to the status of voluntary patient and during home leave resumed cohabitation. His wife's petition pleaded cruelty by unjust accusations of misbehaviour with men. He suffered paranoid schizophrenia, knew what he was doing when making the accusations but not that they were wrong or untrue. By a majority the House of Lords held that in a charge of cruelty against an insane person the test is whether after allowance for his disabilities the character and gravity of the acts amounted to cruelty and that proof of insanity is not necessarily an answer.

42. Lord Reid said:

> "…the man who knows that he is injuring his wife's health and persists….is clearly blameworthy unless he has adequate justification. But what if he did not realise the damage he was doing? … the reasonable man and what he would have realised…… would throw no light on whether this man was blameworthy…..But then we come to the really difficult cases if blameworthiness is to be a test. There are many…husbands and wives not insane but either sick in mind or body or so stupid selfish or spoilt that they plainly do not appreciate or foresee the harm they are doing…. Certainly allowances have to be made particularly when their condition is due to misfortune…...In my judgment decree should be pronounced against such an abnormal person not because his conduct was aimed at his wife or because a reasonable man would have realised the position….but simply because the facts are such that after making all allowances…..the character and gravity of his acts were such as to amount to cruelty…."

43. Lord Evershed said:…

> "the test …is to be applied wholly objectively and … insanity (.. ..unaware through mental disease or disorder of the nature and quality of his acts) is not necessarily an answer ….The mental derangement…cannot…. be wholly disregarded…..But the test will still be objective .... "

44. In *McHale v Watson* (1966) 115 CLR 199 the defendant twelve year old hit a nine year old in her eye when he threw a rod at a post off which it glanced. He had no intention of hurting her. The court referred to the American Restatement of the Law of Tort which divided infants into three categories: babies and children of very tender years, incapable of perceiving risk; those who as adults could foresee the probable consequences of their acts for whom the standard of care was as per an adult; and infinitely various capabilities of those between for whom the standard would be that of a reasonable child of like age intelligence and experience. The defendant was nearly thirteen but playing as a child. It was no answer for him any more than for an adult to claim the harm was due to his being abnormally slow-witted quick-tempered absent-minded or inexperienced. He could however rely upon a limitation personal to himself as characteristic of this stage of development, normal since this was an objective standard. The concept of normality was of rising levels until the achievement of years of discretion. The age at which liability would bite was case-specific. No individual English authority was of help and US and Canadian jurisprudence varied in result and reasoning.

45. In *Roberts* the defendant suffered a cerebral haemorrhage of which he was unaware and drove. After one collision he drove away, colliding with a second vehicle injuring its driver and passenger who sued him in negligence. He argued that he had driven in a state of automatism and was not responsible for his actions.

46. Neill J said:

> "…..automatism involves a complete loss of consciousness…. The driver will…escape liability if his actions ..were wholly beyond his control. The most obvious case is sudden unconsciousness. But if he retained some …albeit imperfect control and his driving judged objectively was below the required standard he remains liable. His position is the same as a driver who is old or infirm. … the driver cannot avoid liability on the basis that according to some malfunction of the brain his consciousness was impaired. [Counsel] put the matter accurately…when he said: "One cannot accept as exculpation anything less than total loss of consciousness"

47. In *AG of Canada v Connolly* 64 DLR (4th) 84 the bipolar defendant injured a police officer by driving away as the latter's arm was pinned in the car. The expert evidence was that he knew someone was standing beside the car, arm inside, but not that what he was doing was wrong or would cause harm. He was severely delusional. The court held those as ill as he had severe impairment of their capacity for the required foresight. If incapable of foreseeing that his act involved a significant risk of harm he had insufficient awareness of consciousness of the nature of his act to make it truly

voluntarily negligent. Negligence perhaps more than most other torts is about fault and mental state, an approach in line with the evolution of the law away from the common law rule affording no relief in tort to a defendant suffering severe mental illness.

48. In *Mansfield* a lorry driver unaware he suffered a condition leading to hypoglycaemia drove into the plaintiff's shop. The court held that there was no reason why the disabling event should absolve him from liability for damages where it was gradual, provided he was aware of it. The standard was that of the reasonably competent driver unaware of a potentially disabling condition. To apply an objective test otherwise would be to impose strict liability. *Roberts v Ramsbottom* was disapproved, Neill J having erred in treating civil and criminal cases indifferently and in assuming that to escape civil liability automatism had to be shown.

49. In *Carrier*, who had a long history of schizophrenia, left hospital and attempted suicide by throwing himself under a bus. The driver, citing *Wilkinson v Downton* ("*Wilkinson*") relying on acts calculated to cause harm or done with needless indifference to the harm likely, sued in negligence both the hospital (for letting him out) and Bonham. The Queensland Court of Appeal held that the standard of the ordinary and reasonable person applied and Bonham's mental condition did not diminish or reduce his liability in negligence. The evidence was that whilst unable to appreciate that what he was doing was wrong and to appreciate the possibility of injury to the plaintiff, his "*capacity to control his actions was seriously impaired but not lost.*"

50. Macpherson JA described Bonham's reliance on "calculated" [per *Wilkinson*] as importing a need to show intention or at least foresight of causing harm and that his mental condition precluded it. The expert had said Bonham was not capable of awareness that his actions might injure those on the bus. He would have no concept of what his actions might do to another. Macpherson JA said that though *Wilkinson* was often relied on to show that in an intentional act reasonably foreseeable consequences were not foreseen in all their severity, that was commonly so; most everyday acts of actionable negligence are wholly or partly a product of intentional conduct.

51. He preferred the approach in *Donaghy*, *Adamson* and the American and Canadian authorities which were almost at one in holding a person liable in tort even though of unsound mind. Almost the sole exception was *Buckley* where the driver escaped liability because his delusions deprived him of the ability to understand his duty of care and his power to discharge it. Opinion to the contrary was in Clerk & Lindsell, (16th Ed 1969) which equated the man of unsound mind with the young child. The court found it difficult to see why a person should be liable for battery or assault but not for negligence, the last requiring no particular state of mind, only a departure from the objective standard. One justification for the contrary view was that rare cases contemplated exemption from liability when enduring a fit or hypoglycaemic episode. Those decisions turned not on state of mind but on automatism when the act was not that of the individual at all. The special category into which childhood foresight falls was different from unsoundness of mind, neither a normal condition nor a stage of human development.

52. In *Fiala et al v MacDonald et al* (2001) 201 DLR (4th) 680 a defendant later diagnosed as bipolar jumped on a car sunroof, the driver involuntarily accelerated into

another car and its injured occupants sued in negligence. The court found the driver incapable of appreciating the nature or quality of his actions or his duty of care. One expert said assessment of rightness or wrongness, if it had little to do with emotion or affect, would probably be unimpaired but if to do with emotion could be almost totally impaired. Another said his brain was over-activated, misfiring, and sending him misinformation. Totally out of control the mind was driving the physical activity which the man could neither stop nor control.

53. The court quoted AM Linden, Canadian Tort Law 6th Ed:

> *"Persons suffering mental illness may not have to comply with the reasonable person standard, the theory being that it is unfair to hold people liable for accidents they are incapable of avoiding."*

The court said the extract arguably emphasised the "fault" requirement underlying tortious liability. In contrast, several authors considered the compensatory nature of tort law paramount so that those suffering mental illness should not attract a lowered standard. When two innocent persons are involved in an accident he who caused it should be liable for the damage.

54. There was judicial recognition in Canada of the need to relieve the mentally ill of tortious liability in some circumstances. To find negligence the act must have been voluntary and the defendant have possessed the capacity to commit the tort. If he understood the duty of care and could discharge it his actions would be voluntary and the capacity would exist. To be relieved of tortious liability when affected suddenly and without warning he must show either that his mental illness led to his having no capacity to understand or appreciate the duty of care or that he was unable to discharge it as he lacked meaningful control. This test would not erode the objective standard but would preserve the notion that a defendant must have acted voluntarily and had the capacity to be liable. Fault would remain an essential element.

55. In *R v Sean Peter C* [2001] EWCA Crim 125 the appellant schizophrenic argued he should not have been convicted of harassment (abusive letters to an MP) since his compulsive behaviour drove him to write them. He was a long-term abuser and under the self-induced influence of strong cannabis. He wished to be measured against a reasonable schizoid individual. Before moving to the effect of his drug consumption the court first considered the effect if any of his mental condition. It rejected the suggestion that the standard of the reasonable man should be modified for the mentally ill to take account of illness. The standard objective test was apposite.

56. In *Corr* after head injuries from malfunctioning machinery and consequent post-traumatic stress disorder a suicide risk suffering severe anxiety and depression jumped to his death. His employer conceded negligence but contested liability for his suicide. The court found the employer owed a duty to take reasonable care to avoid causing him injury (including psychiatric injury) and that foreseeability of physical injury was sufficient to establish liability. His suicide had been a direct result of his depressive illness which impaired his capacity to make reasoned and informed judgments about his future. The suicide was not a novus actus.

57. Lord Bingham said Corr's suicide was not a voluntary informed decision by an adult of sound mind but by a man suffering a severely depressive illness impairing his capacity to make reasoned and informed decisions. Tort did not require so blunt an instrument as *The McNaghten Rules*. The cursoriness of arguments in the court below on contributory negligence made it inappropriate to enquire into the factual basis for it. Were Lord Bingham making a finding he would assess the deceased's responsibility as 0%.

58. Lord Scott eliminated automatism, since the power of choice was retained. Had Corr jumped and in disregard of their safety injured people, fault would have been attributed. Lord Scott would have set his responsibility at 20%.

59. Lord Walker considered Corr still had the capacity to manage his affairs, was not deprived of his autonomy and made his own decision to end his life because of his feeling of worthlessness and hopelessness, the result of his depression, in turn the result of his accident. He would make no deduction for contributory negligence.

60. Lord Mance preferred to leave open contributory negligence. A conclusion that someone suffering depressive illness has no responsibility for his suicide and is an effective automaton might in law be questionable when the capacity to make a reasoned and informed judgment is impaired not eliminated. He agreed with Lord Scott that liability could not be escaped unless the suicide were an automaton.

61. Lord Neuberger found contributory negligence would not reduce damages where the suicide was not of sound mind. He quoted with approval Lord Hoffman in *Reeves v Commr of Police for the Metropolis* [2000] 1 AC 360 ("*Reeves*") where he said:

> *"The difference between being of sound and unsound mind whilst appealing to lawyers who like clear-cut rules seems to me inadequate to deal with the complexities of human psychology in the context of the stresses caused by imprisonment."*

62. Lord Neuberger thought there exists a spectrum of sanity normalcy or autonomy. At one end would be a man of sound mind whose suicide could be said to be a voluntary act, at the other a man whose will and understanding were so overborne that he had no real choice as he had lost his autonomy, did not appreciate what he was doing and had no real control over his action. In the middle, the man of not entirely sound mind had a degree of control over his emotions and actions and would appreciate what he was doing when he killed himself. He would have lost a degree of autonomy. Corr's capacity was impaired not removed, and the question was the extent to which his autonomy had been overborne.

63. In *Coley v R* [2013] EWCA Crim 223**,** the 17 year old defendant was convicted of attempted murder. Having gone to bed he later, in dark clothing, a balaclava, and carrying a knife entered the bedroom of his next-door neighbours' home and as both sleepers awoke stabbed the male repeatedly. He said he had blacked out and awoken pushing open their bedroom door. He claimed that having heard the female scream he blacked out again and had no further memory until finding himself in the garden. The issue was whether the Crown could prove his intention to kill. He had that day taken a good deal of strong cannabis. Three psychiatrists excluded mental illness or disorder

or personality disorder. There was a real possibility of an unusually brief psychotic episode induced or triggered by the cannabis. Automatism was not left to the jury. Had the jury found it made out the defendant must have been acquitted since the act would not have been his but wholly involuntary, better expressed as his voluntary control being completely destroyed.

64. Hughes LJ giving the judgment of the court said:

> "Automatism, if it occurs, results in a complete acquittal on the grounds that the act was not that of the defendant at all. It has been variously described. The essence of it is that the movements or actions of the defendant at the material time were wholly involuntary. The better expression is complete destruction of voluntary control: Watmore v Jenkins [1962] 2 QB 572 and Attorney-General's Reference (No 2 of 1992) [1994] QB 91. Examples which have been given in the past include the driver attacked by a swarm of bees or the man under hypnosis. "Involuntary" is not the same as "irrational"; indeed it needs sharply to be distinguished from it."

The court said that on its facts "consciously" was an adverb importing some risk of difficulty. Coley was not unconscious in the sense of comatose. Automatism does not require such a state. On the other hand his detachment from reality some might describe as an absence of conscious action, but that fell short of involuntary, as distinct from irrational, action. A psychotic episode, as the doctors hypothesised had occurred, would not preclude complex organised behaviour. He made the decision to dress as described, arm himself, find the keys and let himself in. Those actions were not involuntary, whether or not driven by delusion. One expert said that if in a psychotic state the defendant was conscious and in control of his body, another that he would be in voluntary control of his limbs and aware of what he did physically. The third thought that even if he had assumed the role of a video game character and it was the character acting, nevertheless he was conscious in the belief that he was that character. He lacked an awareness of what he was doing. The court described this last opinion as a description of irrational behaviour, the mind deluded or disordered, not of wholly involuntary action.

65. Other materials placed before the Judge in this case included:

66. Jules L. Coleman, Mental Abnormality, Personal Responsibility and Tort Liability, in Brody and Englehart, Mental Illness: Law and Public Policy,

> "The common law holds that the mentally defective are liable for their torts" "And if we feel that at least some mentally abnormal persons are genuinely incapable of measuring up to the higher standard of care, they may be both legally at fault and morally blameless. Posner wrote that insane people are liable for negligent conduct though incapable of behaving carefully…..negligence liability is based on acts (or conduct) not a state of mind: "Lack of moral fault is no defense, however, to tort liability. Fault, especially negligence, is conduct not a state of mind" and "That the injurer is at fault

> implies no more than that his conduct is in an appropriate sense undesirable … [and] unjustifiable…..The objective test…provides….a tool for identifying faulty action, …mental abnormality does not and…ought not to defeat the judgment of fault upon which liability is based" "

67. Goudkamp, Insanity as a Tort Defence, 31 OJLS:

> "All …major common law jurisdictions withhold insanity as an answer to liability in tort…the standard of the reasonable person excludes mental illnesses …from consideration. Cooley wrote "A wrong … consists in the injury done, and not commonly in the purpose, or mental or physical capacity of the person or agent doing it….if a defendant's insanity is imputed to the reasonable person, the court would be required to ask how the reasonable insane person would have acted in the circumstances. This is an absurd question since the notion of a reasonable insane person is oxymoronic".

The arguments expanded.

68. Mr Richard Spearman QC for the Claimant identified his only point as that Vince failed to measure up to the standard of the reasonable man.

69. He argued that the law should be bold and say that insanity is not a defence in tort, and that liability of the mentally disabled should balance legal responsibility and the interests of the public on the one hand against the interests of victims of injury on the other. He relied upon *McFarlane v Tayside Health Board* [2000] 2 AC 59 where Lord Steyn described tort law as a mosaic in which the principles of corrective and distributive justice are interwoven and a choice sometimes has to be made between the two.

70. He concentrated on five cases; *Donaghy*, *Adamson*, the judgment of Denning LJ in *White*, *Williams,* and, most confidently, *Carrier***.** *Donaghy* and *Adamson* followed English authorities. In *Carrier*, the Court cited Denning LJ in *White,* and followed *Donaghy* and *Adamson.* Mr Spearman argued that the Judge in this case did not consider or apply *Donaghy, Adamson* or *White* and misunderstood *Carrier.*

71. He distilled his reliance on the authorities thus: *Donaghy* held that a man who injures someone when disease of the mind renders him incapable of understanding the nature and quality of the act and of knowing it was wrong is liable in damages as set out in *William v Hays* 143 NY 442 (1894) at 446:

> "….an insane person is just as responsible for his torts as a sane… and the rule applies to all torts except perhaps those in which malice, and therefore intention, actual or imputed is a necessary ingredient",

72. In *Adamson*, after a review of caselaw in several jurisdictions, and of the textbooks, Wolff SPJ said:

> "The ancient rule of liability, based on the good of the community, which seems to have been part of the ratio decidendi in the case of William v Hays has much to commend it. This leaves untouched cases where the act is committed in a state of amnesia or mania where the actor is entirely disorientated. If the law is to be logical it ought to fix the actor with liability even in these cases."

The defendant was liable in negligence, regardless of whether he understood what he was doing, or knew that what he was doing was wrong.

73. In *White* Denning LJ considered there was compelling evidence that the wife was *M'Naghten* insane. He said:

> "……..innocent third persons may have been injured by the sufferer.... If he is a man of wealth or is insured, are not the injured persons to be compensated…?.....free from authority I would say that they clearly are … the authorities support these views"

74. In *Carrier***,** where the medical evidence was that Bonham would have had absolutely no concept of what his actions might do to someone else, his mental condition had no effect on the standard of care owed, which was to be judged by the standard of the ordinary and reasonable person and is to be distinguished from insanity, McPherson JA said:

> "There is no such thing as a "normal" condition of unsound mind in those who suffer that affliction. It comes in different varieties and different shades or degrees. For that reason it would be impossible to devise a standard by which the tortious liabilities of such people could be judged as a class".

75. Finally, Mr Spearman reminded us that McPherson JA considered that if those who suffer mental illness do not have their conduct judged according to society's standards including the duty of exercising reasonable foresight and care for the safety of others, that will militate against allowing them liberty of movement in normal society.

76. Mr Spearman argued that *Carrier* sets out the correct understanding of the position. The person who loses control and injures another in consequence of a stroke or of being pushed is not liable in negligence because he does not fall below the objective standard of care. One who loses control and injures another as a result of insane delusions cannot escape liability by application of the objective standard since the ordinary, reasonable person does not suffer insane delusions and would not lose control and cause injury.

77. Mr Spearman criticised the Judge for looking only at the result of an individual losing control, not at the reason for the loss. Accurate analysis would have shown that the objective standard applies to all the ordinary person's actions, voluntary or involuntary: *Mansfield.*

78. Although the Judge said his conclusion *"reflects no more than what has been English law for centuries"* no authority using his formulations was cited or identified. To the contrary, Mr Spearman argued, the authorities make plain that where injury is by an individual disabled from controlling his actions, liability depends on whether the ordinary reasonable man would be so disabled, not on whether acts are involuntary, nor on mental capacity.

79. The agreed medical evidence Mr Spearman summarised as not that Vince's actions were unwilled but the willed product of a diseased mind. The JS of October 2012 included:

> *"…[Vince's] actions were not voluntary in the sense that he was not a healthy and rational individual at the time, and in the absence of his rational mind he was most likely driven by delusions, thus rendering his actions involuntary…The…acts.. were directed and prompted by [Vince's] mind in its floridly deluded state (ie it was not his healthy mind but his deranged mind that was responsible for causing the fire and the injury to Mr Dunnage). …if [his] capacity to make a reasoned and informed judgment about his actions was placed on a spectrum between complete (healthy) volition and absent volition, then it would be at least 95% impaired volition and probably totally (100%) absent volition"*.

80. Mr Spearman submitted that there is no material distinction between these factors and those considered in the cases *supra* said not to defeat a claim in tort. In *Donaghy* the defendant was incapable of understanding the nature and quality of his act and of knowing it was wrong. Such a person does not act "voluntarily" in the sense discussed in the JS and reflected in the Judgment. *Adamson* was liable for driving triggered by his frenzied fear and irrational compelling impulse to get away to save his life, actions no more voluntary than were Vince's. In *White* Denning LJ questioned why the wife should be denied relief. Mr Spearman submitted that by parity of reasoning a defendant suffering a disease which made him incapable of forming intent would not have a defence in negligence. Acts of the type contemplated by Denning LJ, like those in *Adamson*, were no more voluntary than those of Vince. In *Carrier*, Bonham was liable although incapable of being aware that his actions might injure passengers and lacking any concept of what his actions might do to another.

81. Mr Spearman argued that nothing in the judgment supports the suggestion that, where the defendant suffers insanity, the test in negligence depends on whether his actions are "voluntary" as that word was used by the Judge. The only way Vince's actions could be measured against an objective standard is by applying a standard of the ordinary, reasonable person of unsound mind. However, as per McPherson JA there is no such thing as a normal condition of unsound mind. Lord Hoffmann in *A v Hoare* [2008] 1 AC 844 said:

> "Judges should not have to grapple with the notion of the reasonable unintelligent person."

82. Mr Spearman argued that neither should the reasonable man of unsound mind trouble the law.

83. He submitted that whether mental illness deprives the individual of the capacity to make a reasoned and informed decision about his actions is beside the point. Even if the product of his deranged mind they remain his actions, and they are not the same as involuntary bodily movements.

84. He criticised the Judge as wrongly regarding *Corr* as of assistance in reliance upon:

> "there will be rare occasions when the factual and expert medical evidence lead to the conclusion that the alleged tortfeasor was not in any meaningful sense the agency through which the damaging event has occurred. This is because his or her autonomy and ability to reason and act has been wholly eliminated".

85. *Corr* he argued did not involve insanity, and none of the cases on insanity was considered. The issue was the extent to which, when committing suicide whilst suffering depression brought on by personal injuries in an accident for which the defendant was liable, the deceased were "to blame" (Lord Bingham) or "at fault" (Lords Scott and Neuberger) or "blameworthy" (Lords Walker and Mance) and whether that should be reflected in a reduction in damages. The answer Mr Spearman contended cannot safely be applied in other contexts. As Lord Hoffman said in Reeves at 372:

> "The law of torts is not just a matter of simple morality but contains many strands of policy, not all of them consistent with each other, which reflect the complexity of life. An apportionment of responsibility "as the court thinks just and equitable" will sometimes require a balancing of different goals".

86. Mr Spearman in oral submissions posed two rhetorical questions: What is the liability of someone suffering mental illness for an act on the face of it negligent and a tort? Is a person suffering mental illness such that his actions are entirely directed by his deluded and deranged mind liable in damages to someone he injures?

87. He agreed that the rational aspect of Vince's mind was not operative by the time the petrol was splashed and particularly by "It's too late I don't want you to tell me anything". By then, he accepted, Vince had crossed a boundary.

88. The Judge thought Vince lacked volition and that in consequence his actions were mechanical from the time he left the kitchen announcing his intention to fetch Autotrader. Putting it another way, the Judge considered that by that stage Vince's actions were involuntary or that he was irrational. Mr Spearman challenged that conclusion, however expressed, submitting that Vince's overwhelming irrationality came later. I shall return to the use of so many descriptors, an aspect of this case which troubles and sometimes puzzles me.

89. Mr Spearman argued that unlike the individual enduring a stroke, there was a mind directing Vince's actions, but it was diseased or deranged. He is thus liable even were his actions involuntary.

90. For the Insurer Mr Michael Davie QC supported the Judge in all aspects of his conclusion.

91. He began with first principles. It is implicit that capacity to fulfil a duty is a pre-requisite for its imposition. In the ordinary case of a person injuring another, the criterion for the imposition of a duty is foreseeability of harm: *Donoghue v Stevenson* [1932] AC 562 per Lord Atkin p. 580:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

92. Mr Davie reminded us that the experts, by way of their JS with the addition of their answers to the twenty-six questions, were agreed -Vince was not in control of his actions (*Roberts v Ramsbottom*); he was unable to intend his actions or intend harm (*Morriss v Marsden**:*** each element of the M'Naghten rules was satisfied; his ability to foresee harm resulting from and to consider the consequences of his actions was prevented by his illness (*AG of Canada v Connolly**)***; his actions were not voluntary (*Morriss v Marsden* inter alia); Vince would not have been aware of his propensity to cause harm (*Mansfield v Weetabix**);*** Vince did not understand or appreciate the duty so was disabled from discharging it **(***Fiala*); he lacked ability to choose to act, control his actions, appreciate what he was doing, and assess risk and consequences; his will and appreciation of what he was doing and his autonomy were completely overborne (*Corr).*

93. Three aspects he contended supported the conclusion of the Judge: Vince was not at fault, he lacked the normal mental capacity for abstaining from forbidden action, and it would be wrong to impose liability where he had no real choice in the way he acted. His lack of normal mental incapacity when he deteriorated was gross and justified disapplying the objective standard.

94. Mr Davie submitted that the Judge was right to find, on the evidence and as was common ground, that Vince did not act voluntarily and that the scope of the duty did not extend to involuntary acts. Mr Davie defined actions as involuntary where there is no free choice or control over them. Vince's acts were involuntary because his capacity to think and act freely was eliminated by reason of his sudden deterioration. Because of that, and because there was no basis for a finding of fault against him, it is not *Caparo* fair, just and reasonable for acts and harm neither meant nor under his control to be within the scope of the duty.

95. Mr Davie criticised the Claimant for electing not to challenge head-on the Judge's finding that Vince's actions were not voluntary, but to argue that the agreed evidence was not that his actions were unwilled but the willed product of a diseased mind. He submitted that such distinction is not between involuntary and voluntary acts since if a "diseased mind" precludes the ability to choose to act or to control an act the individual does not act voluntarily.

96. In any event, he submitted, the medical evidence is inconsistent with Vince's actions being willed, the willed product of his mind, or voluntary. The experts' opinion was that Vince "*was most likely beyond any meaningful capacity to exercise free will"*, his psychotic state so deranging his reason and judgment as to render him effectively unable to choose or control the actions that caused harm. The doctors thought it highly probable he was acting under an irresistible impulse, and probably totally absent volition.

97. In *Mansfield*, though the hypoglycaemic driver, ignorant of his condition, did not fall below the standard, his reason was unaffected. Had he taken leave of his senses the position would have been no different.

98. Mr Davie argued that "voluntary" admits of two possibilities: one is that an electrical stimulus to the brain causes the action. A second is that an exercise of free will not only prompts the action but imports an understanding of it and of its consequences. That, he said, is in one sense where the contest in this case lies. He submitted that the approach of the Judge though couched in terms of voluntariness nevertheless employed the lens of a more rounded view, that is, of true choice.

99. Mr Davie relied on what he argued was one feature of overriding control. The Judge said:

> "Following from the opinion of Prof Moore "at the material time Vince Randall would probably have been so deranged that he was most likely beyond any meaningful capacity to exercise free will such that he felt overwhelmingly compelled to act as he did without the benefit of moral of rational thinking to deter him" he was not capable of discriminating right from wrong and did not know that what he was doing was wrong: he did not know the nature and quality of the act he was doing: he was not able to understand and appreciate the (legal) duty upon him to take care and was disabled from discharging any such duty."

100. The Judge adopted the view of the experts that Vince's capacity to make a reasoned and informed judgment about his actions had at least 95% impaired volition. Mr Davie relied on this conclusion as pinpointing what he described as the core question: Was the integrated person still there, capable of bringing together those diverse considerations which allow a decision? The answer he says must be "No". Vince could not act freely.

101. The question Mr Davie argued is not "Has his will caused a bodily movement we call an act?" but "Has there been a loss of free will?" His answer to his own question was: Two fundamental capacities have been removed, that to make an informed and reasoned decision, and that to control one's acts. One can thus conclude that Vince's actions were not informed by his free will.

102. Mr Davie posed the core question thus: Was the integrated person still there, capable of bringing together those diverse considerations which allow the making of a decision? The answer he contended must be that in this case he was not. Consequently there was complete elimination of Vince's capacity to think and to act freely.

Discussion and conclusion.

103. The task for this court is in my view less stratified than submissions tended to suggest. First, a comparison of criminal with civil defences. Liberty of the subject imports a particularity of approach of no jurisprudential relevance let alone of any assistance when the issue is tortious liability. If that were not enough to dispose of the topic, the outcome in the criminal courts is. Reliance on the *McNaghten Rules* if "successfully" advanced results in a verdict of not guilty by virtue of insanity but the disposition of the accused is generally far from welcome to him or her. Like the Judge I would put aside such comparison.

104. Next, I would reject as unhelpful any attempt to differentiate mental from physical illness for the purposes of this argument. It is the effects of a condition or illness which ought properly to be in play, not its label. Medical science for years has acknowledged the same, and if I needed more vindication of my view I should find it in for example a consideration of epilepsy and of Downs Syndrome, each featuring both physical and mental abnormalities.

105. Next, I would concentrate on why the matter came to court in the first place. The policy excluded cover for any acts by Vince which were wilful or malicious. It is to the noun "acts" and to the adjectives "wilful or malicious" that argument should profitably be addressed.

106. I begin with "acts". Did Vince do an act, when he doused himself in petrol? Of course he did. He used his hands and at least one arm to raise direct and upend the opened can. He elected to take it from the table, to move it through an arc and to position it so that liquid would come from its neck. Those were choices he made. This was always a difficulty facing Mr Davie in his answer to his own chosen question. When Vince came in from the car he must have had mental capacity. He knew he had the petrol in its can. He made at that stage at least one decision, that is not to use it immediately. That evidence suggests that he had at that stage control which later he lost.

107. Turning to "wilfulness" and "malice", I have identified no authority for the proposition that, unwell as he was, the assessment of whether Vince was wilful or malicious should be measured against the standards of the ordinary unwell man. Vince was not a child, the one category attracting moderation of the comparator.

108. Thus, not only is Mr Davie in difficulty but so too is Mr Spearman. His description of the nub of this case - whether a person suffering mental illness such that his actions are entirely directed by his deluded and deranged mind is liable in damages to a person injured - is not how I would phrase the central question.

109. Vince was under a duty of care. The issue is simply whether, unwell as he was, he breached that duty since he did not measure up to the objective standard of care. So expressed the position immediately becomes less shrouded in terminology and in reliance on increasingly refined adjectival descriptors.

110. I am as I earlier indicated uneasy about the proliferation of terms, all seeking to pin down in words not what Vince was enduring, florid paranoid schizophrenia, but its effect in the context of tortious liability. I am particularly anxious about use of

"involuntary" and "irrational" almost as synonyms. Even if not quite synonymic they are certainly attached to nouns seeking to describe the same condition.

111. I select but two examples of how troubling I find the vocabulary. The Judge concluded that so long as incapacity altogether removes rational motivation there is no liability. He found that when Vince returned with his can he was not acting rationally. "Rational" might suggest synonymity with "voluntary".

112. Vince's "Tell me the truth or we're all going to go up" might, taken in isolation, suggest he knew what was happening when he said it. However the experts had more than simply an account of his words. They had reviewed the inquest notes and, taken together, all the available evidence revealed, they felt, a sequence of involuntary mechanical acts. I should have welcomed their views on how if at all "rational" featured. They might for example have been invited to comment on the words of Hughes LJ in *Cole*y:

> "Involuntary" is not the same as "irrational"; indeed it needs sharply to be distinguished from it. …..his detachment from reality some might describe as an absence of conscious action, but that fell short of involuntary, as distinct from irrational, action."

The court concluded that a psychotic episode, as the doctors hypothesised had occurred, would not preclude complex organised behaviour.

113. The criteria the Judge used for determining "voluntary" include the following: intolerable levels of mental distress that can lead to extreme behaviours; a mental condition which prevented Vince from considering the consequences of his actions; being so deranged that he was most likely beyond any meaningful capacity to exercise free will such that he felt overwhelmingly compelled to act as he did without the benefit of moral or rational thinking to deter him; being incapable of discriminating right from wrong; not knowing that what he was doing was wrong; not knowing the nature and quality of the act he was doing; lacking capacity to make a reasoned and informed judgment about his actions; and acting under an irresistible impulse.

114. A further area which concerns me is that the experts allowed a small margin at the end of "complete elimination". Once there is introduced any qualification of 100% impairment, as there is for example by use of the adverb "probably", difficulties flow. Where is any line to be drawn? At 99% impairment? At 95% or 90%? What is the lowest percentage to which the court could descend before its findings were affected? Unless a defendant can establish that his condition entirely eliminates responsibility - I avoid use of "fault" so as to emphasise my point – he remains vulnerable to liability if he does not meet the objective standard of care. It is the entirety of the elimination which drives this conclusion, and once that entirety is eroded or diminished, he is fixed with the standard. The evidence was that Vince's responsibility came very close to complete elimination, but the experts stopped short of finding that it was complete.

115. Vince was protected from liability if he did nothing. If, akin to the man holding a knife whose arm was gripped by another and directed, Vince had no part to play in his physical acts, he would escape liability, as contemplated in *Corr*. Likewise, had he been in a state of automatism or were he a sleepwalker.

116. Here, however, Vince's condition amounted to a position far less stark. There is what to me is a troubling proliferation of terms in play, in the judgment and the evidence of the experts. Whilst I understand the motive behind the 26 questions to the latter, the distillation of what counsel thought emerged from a consideration of the authorities has contributed to a scattering of nouns and adjectives which leaves me unconfident in the foundation for the judge's conclusion.

117. At least the questions I have set out should have been put to at least one of the experts in oral evidence. In my view the wrong ones were posed or the right ones not included. (Counsel's application to call the experts was refused in interlocutory proceedings before a different judge.). That said, ours is an adversarial system in which parties identify the questions for experts and the courts proceeds accordingly.

118. Here, in reliance upon two Joint Statements and agreed responses to twenty-six questions, the Judge reached a conclusion which on my analysis was not open to him. I would allow the appeal.

Lord Justice Vos:

119. I agree with the judgment of Rafferty LJ, but wish to add a few words of my own because of the importance of the issue that we have been called upon to decide. I have had the opportunity of seeing the judgment of Arden LJ in draft, which looks at the matter from a slightly different angle, but with which I also agree.

120. Mr Richard Spearman QC, leading counsel for the claimant, sought to identify the key issue in the appeal as "whether a person who is suffering from mental illness to the extent that the person's actions are entirely directed by his/her deluded and deranged mind is liable in damages to a person who is injured by those actions"? This formulation betrayed a slight reluctance to focus on the tort of negligence in which his client's claim had been pleaded. It is important, I think, to ensure that this court does not go beyond the parameters of what needs to be decided to dispose of this case. Moreover, many of the cases that we have been referred to are cases in other areas. That is not to say that they are irrelevant, but it is important, in my view, to keep one's eye firmly on the claim that is being advanced in this case on these (peculiar) facts. It is also important to note that the reason the case has been pleaded in negligence is because of the terms of the deceased's liability insurance cover in his household policy, under which the claimant hopes to recover. Those terms indemnified the deceased for "all sums which [he became] legally liable to pay as damages for … accidental bodily injury … to any person", but excluded liability arising from "any wilful or malicious acts by [the deceased]".

121. The elements of the tort of negligence are well known, but it is as well to rehearse them. Clerk & Lindsell on Torts, 21st edition, 2014, describes the 4 requirements at paragraph 8-04 as follows:

> "(1) the existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable;

> (2) breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by the law;
>
> (3) a causal connection between the defendant's careless conduct and the damage;
>
> (4) that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote".

122. The primary question in this case is not whether the deceased owed the claimant a duty of care not carelessly to injure him. He obviously did. The question is whether, taking into account the deceased's mental health, he broke that duty of care by what he did in failing to meet up to the standard of care set by the law. The requirements for causation and foreseeability were also clearly satisfied.

123. The classic statement of the standard of care required by the law was made by Baron Alderson in *Blyth v. Birmingham Waterworks* (1856) 11 Ex. 781 at 784 as follows:-

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do".

124. It has been argued in many cases over many years that the standard of care should be adjusted to take account of the personal characteristics of the particular defendant. So, for example, in Salmon LJ's celebrated dissenting judgment in *Nettleship v. Weston* [1971] 2 Q.B. 691, he would have held that a learner driver's acts should be judged by the standard of a reasonable learner driver rather than a reasonable person generally. But this view has never prevailed (see Lord Macmillan in *Glasgow Corporation v Muir* [1943] A.C. 448 at 457), except in one respect: the standard of care applicable to the liability of children for negligence is established to be that of the ordinary, prudent and reasonable child of the defendant's age, not that of the ordinary, prudent and reasonable person generally (see *McHale v. Watson* (1966) 115 C.L.R 199 in the High Court of Australia, followed in *Mullins v. Richards* [1998] 1 W.L.R. 1304).

125. In advancing the proposition that any degree of incapacity occasioned by mental health problems should provide no defence to a claim in negligence, Mr Spearman somewhat glosses over the real question which requires the examination of what fault is really required before a defendant can be said to have acted in breach of a duty of care undoubtedly owed.

126. In my judgment, the starting point for this analysis must be the cases concerned with an attempt to fix with liability a defendant who sustains unheralded, unexpected and unforeseen physical incapacity. They have not been doubted in argument before us. I need only refer to one of them, namely *Waugh v. James K Allen* [1964] 2 Lloyd's Rep. 1, where Lord Clyde LP decided in the Inner House that the employer of a lorry driver, who had suffered a fatal coronary thrombosis at the wheel of his lorry, killing a pedestrian, was not liable in negligence. Lord Clyde put the matter as follows:-

> "… it seems to me clear on the evidence that the driver was at the time of the accident to the pursuer so completely disabled by the sudden onset of the coronary thrombosis as to have ceased to be responsible for the alarming manoeuvres of his lorry, the Lord Ordinary had ample evidence upon which he was entitled to negative this ground of fault"

Many such cases are ultimately concerned (as was *Waugh* in the House of Lords) with whether the defendant ought to have appreciated that he was likely to suffer a debilitating attack. In this case, that possibility does not seem to have been suggested.

127. I have no doubt, looking at the matter from first principles, that there can be no reason for the law of negligence to draw a distinction between physical health problems and mental health problems. Indeed, even experienced doctors sometimes find it difficult to define where a physical health problem ends and a mental health problem begins. The law of negligence is really only concerned, in cases of this kind, with the one question I have already sought to identify, namely: "was the defendant's duty of care breached in the circumstances of this particular case?" If the claimant's injuries are sustained because the defendant suffers some entirely unheralded, unexpected and unforeseen incapacitating attack, then it would be inaccurate and inappropriate to say that the defendant was in breach of a duty of care. He did nothing. Something happened to him or perhaps was done to him, which caused the accident. In any normal use of language, he cannot properly be said to have been in breach of his duty to take reasonable care to avoid injuring the claimant.

128. I have, thus far, been careful to avoid using any language to describe what happens between the 'attack' sustained by the defendant, on the one hand, and the injury sustained by the claimant, on the other hand. It is in this murky water that the difficulties of this case are to be found. We have been referred to numerous cases that consider what ought properly to be the position when a defendant "loses" control of his actions", "loses any power of choice", "ceases to know the quality and nature of his actions", "ceases to know that what he is doing is wrong", "loses any power to will his own actions", "ceases to act voluntarily", "loses consciousness" and "loses his personal autonomy", to name just a few of the possible linguistic formulations. These formulations emanate variously from the *M'Naghten* rules applicable to insanity as a defence in the criminal law, the defence of automatism in the criminal law, and from elsewhere. I can say at once that I do not find them helpful in deciding the case that we have here.

129. The law of tort exists to compensate victims of wrongful conduct. But the tort of negligence is not a tort of strict liability. When the action for trespass on the case was first permitted, it was to allow liability where damage was indirectly sustained through some fault of the defendant, when there had previously only been liability where there was an action in trespass for direct and unauthorised interference with land, property or goods.

130. Rafferty LJ has undertaken a formidable analysis of the authorities in this area, but it is common ground that none of them binds us as to where the line is to be drawn. But as it seems to me a line must be drawn. The line should be simple, easily understood and grounded in legal principle. I have already sought to set out some of the parameters. Just one remains, namely: is there some principle that requires the law to excuse from liability in negligence a defendant who fails to meet the normal standard

of care partly because of a medical problem. In my judgment, there is and should be no such principle. The courts have consistently and correctly rejected the notion that the standard of care should be adjusted to take account of personal characteristics of the defendant. The single exception in respect of the liability of children should not, I think, be extended. People with physical and mental health problems should not properly be regarded as analogous to children, even if some commonly and inappropriately speak of adults with mental health problems as having a "mental age of 5".

131. In my judgment, only defendants whose attack or medical incapacity has the effect of entirely eliminating any fault or responsibility for the injury can be excused. It is only defendants in that category that have not actually broken their undoubted duty of care. The actions of a defendant, who is merely impaired by medical problems, whether physical or mental, cannot escape liability if he causes injury by failing to exercise reasonable care.

132. What then does it mean to say that a medical condition entirely eliminates any fault or responsibility for the injury? It simply means that the defendant himself did nothing to cause the injury. Mr Michael Davie QC, leading counsel for the first defendant, gave the example of a person whose arm is holding a knife and who is overcome by another forcing him to stab a victim. The person holding the knife cannot have broken his duty of care because he did nothing himself.

133. In my judgment, however, at all intermediate stages where the defendant does something himself he risks being liable for failing to meet the standards of the reasonable man. This approach avoids the need for medical witnesses to become engaged with difficult and undefined terms such as volition, will, free choice, consciousness, personal autonomy and the like. It is only if the defendant can properly be said to have done nothing himself to cause the injury that he escapes liability. This approach is not directly adopted in any of the authorities, but reflects in large measure, I think, the conceptual analysis favoured by at least 3 of the justices in *Corr v. IBC Vehicles Limited* [2008] 1 A.C. 884 per Lord Scott at paragraph 31, per Lord Mance at paragraphs 51-2, and per Lord Neuberger at paragraph 65 (who put the matter in terms of asking whether the deceased had "no real "fault" for his suicide").

134. This approach also has the attraction of not requiring any fine distinction to be made between the effects of physical health problems and mental health problems. Such a distinction seems to me, in the light of modern science, to be outdated and inappropriate. Even mental health problems often have some physical cause or manifestation. There is neither a logical nor a societal reason why the law should differentiate in this area between the two.

135. So where then does that leave this case? The judge held on the basis of the expert evidence that the deceased's "capacity to think and act rationally and independently was wholly eliminated from the time he took the petrol can out of his car" (paragraph 34). It is the use of the word "rationally" that concerns me. A person can still be acting if he acts irrationally; indeed, it is a matter of regret that even the most intelligent in our society sometimes do act irrationally. Nobody would suggest that they should be excused from liability for their negligence whilst so acting.

136. It is for this reason that it seems to me that the decision of the judge cannot stand. I have found the lengthy and detailed questions asked of the experts somewhat confusing. They seemed to me often to beg the real question. Undoubtedly, the deceased was suffering from a severe medical condition in that he was, at the time of the events in question, badly affected by undiagnosed florid paranoid schizophrenia. It seems to me, however, that, even on the basis of the experts' joint statements, Vince was still acting at relevant times. The experts placed his "absence of volition" between 95% and 100%. But, as Arden LJ has pointed out, they accepted that the acts causing the injuries were directed by Vince's deranged mind. Vince himself undoubtedly went to fetch the petrol and the lighter. In bringing those items into the house, he failed to act with the care of a reasonable person. The words that the deceased spoke seem to indicate that he may have been acting, albeit irrationally, when he said: "tell me the truth or we are all going to go up". The fire and the injuries were undoubtedly caused by Vince's own actions. His disease does not excuse him from needing to take the care of a reasonable man, unless he is not acting or is completely free of any fault. That was not the position in this case.

137. I have considered carefully whether this is a conclusion we can reach in the face of the existing expert evidence. It seems to me that we can. It is true that the judge might have been assisted if he had heard oral evidence from the experts. Though the parties had agreed on such a course, it was rejected by HH Judge Madge at a pre-trial hearing on 7th June 2013. But the parties adduced the evidence they each thought necessary to support their case and we operate an adversarial system. In those circumstances, we must do the best we can on the evidence that the parties adduced. On the basis of that evidence, I have clearly concluded that Vince acted in breach of his duty to take reasonable care not to injure the claimant.

138. I agree with Arden LJ's approach to the question of whether the deceased's liability was covered by the policy. The injuries were truly accidental. The expert evidence made clear that Vince did not intend to injure the claimant. As the judge held, his actions were not "intended, deliberate, wilful, malicious or reckless".

139. For these reasons, in addition to those expressed by Rafferty LJ, I would allow this appeal.

LADY JUSTICE ARDEN:

140. I am indebted to Lady Justice Rafferty for her comprehensive judgment in this case. Where possible I will use her definitions. Her exhaustive citation of authority means that I can express my reasons shortly.

First issue – did Vince's conduct attract liability?

141. The first issue which the judge had to decide was whether Vince's conduct gave rise to liability in negligence to the claimant. The principal issue, and on this appeal the sole issue, in this connection is whether Vince's conduct was involuntary for the purposes of the legal rule excluding negligence liability for involuntary conduct.

142. In my judgment, the judge fell into error by answering that question in the negative for two reasons: (1) he did not sufficiently analyse the effect of the medical evidence for this purpose; and (2) he assumed that conduct which was involuntary for medical

purposes was necessarily to be treated as involuntary for the purposes of determining liability in law in negligence.

(1) Insufficient analysis of the medical evidence

143. Lady Justice Rafferty has summarised the facts and the expert evidence. Vince clearly knew that he had a can of petrol and a lighter. From what he said, he also was aware that his actions would create a risk of fire and injury. So, subject to his being deluded, he was aware of the nature and quality of his act. What he could not do was to decide to take any alternative action that would obviate the risk. He could not act rationally. He was driven by his delusions.

144. The point which in my judgment the judge did not sufficiently analyse was the equivocation by the experts over the question of lack of control. At some points, the experts said that Vince lacked control over his actions (see, for example, paragraph 56 of their joint report). At other points, they said that he lacked rational control over the actions (see paragraph 57 of their joint report). On the face of it, it is not clear whether the latter point qualifies the former or is additional to it. The answer is in my judgment to be found in paragraph 84 of the joint report, where the experts said:

> " The experts agree that the acts causing the fire and injury to Mr Dunnage were directed and prompted by [Vince's] mind in its floridly deluded state (i.e. it was not his healthy mind but his deranged mind that was responsible for causing the fire and the injury to Mr Dunnage)."

145. As I read this paragraph, it makes it clear that, when the experts say that Vince did not have control over his acts, they meant that he did not have rational control over his actions. They are not saying that he had no physical control over his actions. In my judgment the judge should have treated paragraph 84 as resolving any doubt about the nature of Vince's control over his actions. His mind, albeit deluded, directed his actions. References in their reports to his conduct being involuntary had to be read in that sense.

(2) Was Vince's conduct involuntary in law so as to relieve him of negligence liability?

146. In my judgment, this case is indistinguishable in any material respect from that in *Morriss v Marsden* [1952] 1 All ER 925. In that case, a schizophrenic, who like Vince was deluded, was held liable for assaulting the manager of a hotel where he was staying: like negligence, assault and battery do not require an intention to injure. The attack was unprovoked. His mind directed the attack. It was irrelevant that he did not know that what he was doing was wrong. The court held that the defendant understood the nature and quality of his act even though he was deluded and even though he did not know that what he was doing was wrong.

147. That situation is with respect far removed from the case of a driver who gets into his car or lorry cab mentally and physically fit for the journey but then has an unforeseen episode during the journey which causes him to lose control of the vehicle. It cannot be said that he was negligent because he was acting with due care when he started to drive. This was the situation in *Mansfield v Weetabix* [1998] 1 WLR 1263. The defendant suffered the onset of a rare form of hypoglaecemic attack. He had no prior

experience of this condition which came on gradually, so that he did not perceive the change in his condition. He was held not liable for injuries and damage caused by his inability to control the vehicle due to that episode. *Waugh v James K Allan Ltd* 1964 SC(HL) 102 illustrates the same principle. Vince was not in that position. He was not in control of machinery of which he unforeseeably loses control. Neither party suggests that Vince should have known that he was susceptible to this form of attack, but there is no parallel between *Mansfield* and this case because Vince was never in possession of the petrol can and lighter in the claimant's flat in circumstances when he had performed his duty of care.

148. My conclusion is consistent with the House of Lords' approach to contributory negligence in *Corr v IBC Vehicles* [2008] 1AC 884. Owing to the employer's negligence Mr Corr suffered a head injury and PTSD which caused him to commit suicide. The question arose whether the House of Lords should make any finding as to his contributory negligence ("CN"). Lord Bingham held that the House lacked the material to do this but Lord Scott, Lord Walker, Lord Mance and Lord Neuberger all discussed the question on the basis that although Mr Corr was not in his right mind he could have committed CN, unless in effect his capacity were removed. The response was not that the deceased could not be guilty of CN because of his mental illness. I do not consider that Vince's capacity was removed. He was able to choose to bring the petrol and lighter into the claimant's flat.

149. The next question is whether Vince's conduct breached the standard of care imposed by the law of negligence that is, failed to act as a reasonable person would act. Having come into close proximity with the claimant, Vince clearly owed him a duty of care not to take action which would or might cause him injury. The standard to be expected of Vince is purely objective. It is the standard of a reasonable person, not a person having Vince's disabilities. It does not therefore matter whether the person was in fact drunk or had some disability. The only question is whether he failed to act as a reasonable person would have done.

150. The proposition that failure to comply with the objective test standard of care can give rise to negligence liability may be tested by the following example. Suppose that someone allows another person to use a path across his garden knowing that there is a trap on the path which he has put there in order to catch strangers who come on to his land. If he is sued in negligence, it is no defence for him to say that he is not liable in negligence because he intended to cause injury rather than was simply careless.

151. In my judgment, there is no question but that Vince breached that duty by taking into the claimant's flat the can of petrol and the lighter. Those items clearly created a risk of injury by fire. On this basis, Vince must be liable in negligence to the claimant for the injury caused to him by reason of the fire. I see no reason for a retrial. If the expert evidence has to be re-examined in order to form a view about the level of impairment of Vince's mind, the law may find that it has imposed a standard which is difficult to operate in practice and certainly the costs, complexity and delays of litigation will be increased.

Approach to Vince's conduct reflects the policy of the law

152. The only exception from the objective standard of care in the cases cited to us is made for children of an appropriate age: cf *Jackson v Murray* [2015] UKSC 5.

153. The objective standard of care reflects the policy of the law. It is not a question of the law discriminating unfairly against people with physical or mental illness. The law takes the view as a matter of policy that everyone should owe the same duty of care for the protection of innocent victims. It would after all, in many cases, be open to a person who knows he has reduced abilities to take account of those abilities in what he does: that is why *Mansfield* was decided the other way from *Morriss*. There will be hard cases, as this case may be one, where a person does not know what action to take to avoid injury to others. However, his liability is no doubt treated in law as the price for being able to move freely within society despite his schizophrenia.

Other common law systems may approach policy differently

154. Different common law systems may take a different view on the policy issue. This can be seen from some of the cases which Lady Justice Rafferty has cited: see *Buckley v Smith Transport* [1946] OJ 329, *Attorney General of Canada v Conolly* (1989) 64 DLR 4th 84, and *Fiala v McDonald* (2001) 201 DLR 4th 680 (Canada), and *White v Pile* 68 W.N. (N.S.W.) 176 (1950) (Australia). It is still valid to look at these authorities so long as that point is borne in mind. Although my judgment is brief, I have found the citation of foreign materials assisted me to weigh up the arguments in this case.

Where specific mental state required

155. The position is different if a specific mental state is required, as in the case of intentional torts. In those circumstances it is necessary to take into account a person's special characteristics: see, generally, *Carrier v Bonham* (2001) QCA 234, *Donaghy v Brennan* (1900) 19 NZLR 289, *Slattery v Haley* [1923] 3 DLR 156, *White v White* [1949] 2 All ER 339, *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, *Roberts v Ramsbottom* [1980] WLR 823, *Beals v Hayward* 1960 NZLR 131, and *Williams v Williams* [1964] AC 698.

Second issue: cover provided by Vince's householder policy and policy exclusion

156. The next question is whether damages payable to the claimant fall within Vince's householder policy. The critical matter is whether the injury suffered by the claimant was accidental bodily injury. In my judgment, the injury was accidental because on the evidence Vince had clearly lost control of his ability to make choices and therefore he could not be said to have intended to cause injury to the claimant (see the cases already cited, and see per Lord Clarke of the Outer House of the Court of Session in *Howie v CGU Insurance plc* [2005] CSOH 110 at [11]). I accept Mr Spearman's submission that it would be unrealistic to interpret accidental injury or damage in the policy as limited to that caused by some means external to the insured: that would reduce the cover to significantly less than the parties must have contemplated. It is in any event not shown how the lighter ignited the petrol. It may have gone off accidently in the course of the fight that took place on the floor.

157. For the same reason, Vince cannot be said to have been wilful or malicious within the exclusion for wilful or malicious conduct (see per Tuckey LJ in *Patrick v Royal London Mutual Insurance Society* [2007] Lloyd's IRLR 85). Vince was deluded.

158. I would therefore hold that the judge was correct in law on this issue.

Concurrence with Lady Justice Rafferty and Lord Justice Vos: no distinction between physical and mental illness

159. Since drafting my judgment, I have read the judgments of Lady Justice Rafferty and Lord Justice Vos in the form in which they have been handed down and agree with them. In my judgment, as demonstrated by the authorities cited in paragraph [147] above, the criteria for conduct which is involuntary for legal purposes do not depend on whether the cause of the defendant's condition can be described as mental or physical. The present case demonstrates how difficult it can be to draw that distinction: both experts considered that, while paranoid schizophrenia was conventionally considered a form of mental illness, it arose from chemical changes in the brain and might result from genetic make-up. It thus had a "biological" basis. I agree that the distinction between mental and physical illness should not be relied on for the purposes of the legal analysis of responsibility for tortious conduct.

Conclusion

160. In the result I would allow this appeal. I do not consider that this court should remit the matter to a hearing at which the experts could give further evidence which would enable them to clarify the equivocation to which I have referred. The parties were content that the court should decide the matter on the basis of their reports. They must have intended the court to resolve any difficulties of interpretation. At a pre-trial hearing a different judge had excluded cross-examination but neither party appealed against that order. The parties must therefore be taken to accept the joint report as the totality of the experts' evidence. Now that the trial has taken place and been concluded on the basis of that expert evidence, this court is entitled to make its findings on the basis of that evidence. I would declare that the First Defendant for respondent is liable to pay damages for negligence to the appellant for his injury.