SUPREME COURT OF QUEENSLAND

CITATION:	*Carrier v Bonham* [2001] QCA 234
PARTIES:	**KEITH DARREL CARRIER** (plaintiff/respondent) v **JOHN LLEWELLYN BONHAM** (first defendant/appellant)
FILE NO/S:	Appeal No 7606 of 2000 DC No 788 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 June 2001
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2001
JUDGES:	McMurdo P, McPherson JA, Moynihan J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal against the judgment given on 4 August 2000 dismissed with costs.** **Appeal against the order made on 11 August 2000 allowed, by substituting "on the standard basis" for "on an indemnity basis" where those words appear in paragraph 1 of that order**.
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – PARTICULAR CASES – OTHER PARTICULAR CASES – UNSOUNDNESS OF MIND – whether person of unsound mind is at common law capable of being legally liable in negligence for conduct that causes injury and loss to another – whether the appellant's act was "calculated" in the ordinary sense to cause harm TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – PARTICULAR PERSONS AND SITUATIONS – whether a person of unsound mind is to be judged by the standard of the ordinary and reasonable person.

Criminal Code, s 27
Mental Health Act 1974 (Qld), Part 4
Supreme Court Act 1995 (Qld), s 253

Adamson v Motor Vehicle Insurance Trust (1957) 58 WALR 56, considered
Bunyan v Jordan (1936) 36 SR(NSW) 350, applied
Bunyan v Jordan (1937) 57 CLR 1, considered
Cook v Cook (1986) 162 CLR 376, considered
Elford v FAI General Insurance Company Limited [1994] 1 Qd R 258, applied
Jaensch v Coffey (1984) 155 CLR 549, considered
McHale v Watson (1964) 111 CLR 384, considered
McHale v Watson (1966) 115 CLR 199, considered
Morriss v Marsden [1952] 1 All ER 925, considered
Northern Territory v Mengel (1995) 185 CLR 307, applied
Victorian Railways Commissioners v Coultas (1888) 13 App Cas 222, distinguished
White v White [1949] 2 All ER 339, considered
Wilkinson v Downton [1897] 2 QB 57, applied

COUNSEL: P Keane QC with D Kent for the appellant
H Frazer QC with F Forde for the respondent

SOLICITORS: Public Trustee for the appellant
Quinn & Scattini for the respondent

[1] **McMURDO P.** I agree with McPherson JA generally, for the reasons he has given, that the appellant was liable to the respondent in negligence despite his mental illness. I wish only to add the following brief comments.

[2] The criminal law recognises that a person is not criminally responsible for acts or omissions done without capacity because of mental illness or mental disability.[1]

[3] In negligence involving children, the High Court has recognised that whilst the standard of care is objective, the standard is the objective standard to be expected of an ordinary child of comparable age: *McHale v Watson*.[2]

[4] There is initial attraction in the view taken by some academics that, as for criminal wrongs, those suffering from a diagnosed mental illness affecting their capacity, like children, should not be liable for their civil wrongs.[3] For example, in Trindade and Cane, *The Law of Torts in Australia*, the learned authors note:

> "Children are not and are not expected to be as responsible as adults. Adults who are suddenly attacked by illness or bees can be forgiven because and to the extent that they have no chance to exercise responsible control over their actions. On this basis the insane

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1 *Criminal Code*, s 27; *Mental Health Act* 1974 (Qld), Part 4.
2 (1966) 115 CLR 199, 209-211, 215, 230-231.
3 2nd ed, Oxford University Press, Melbourne, 1993.

> should be excused too, unless we see insanity as some sort of wages of sin."[4]

[5] The courts have taken a different view. Denning LJ considered this interesting question in *White v White*:[5]

> "In my opinion, both on principle and authority, the effect of insanity is to be regarded differently in the civil courts from what it is in the criminal courts. …
>
> … innocent third persons may have been injured by the sufferer. He may have made contracts and broken them, or he may have committed civil wrongs … If he is a man of wealth or is insured, are not the injured persons to be compensated from his estate? If the matter were free from authority I would say that they clearly are. …
>
> I venture to think that the authorities support these views. In the case of ordinary contracts it is settled law that a person of unsound mind is liable on his contract unless the other party, at the time of the making of the contract, was aware of his incapacity: see *Molton v Camroux* [1849] 4 Exch 17 and *Imperial Loan Co v Stone* [1892] 1 QB 599. 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 committed by him before he was known by the injured person to be of unsound mind, even though it has since become apparent that such conduct was influenced by mental disease which was unrecognised at the time, and this is so even if the mental disease was such that he did not know what he was doing or 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. This was laid down long ago, not only by the Full Court in *Weaver v Ward* 1616, Hob 134; 33 Digest 141, 187; in Canada (*Taggard v Innes* (1862) 12 CP 77; 33 Digest 141; and in New Zealand (*Donaghy v Brennan* (1901) 19 NZLR 289 where all the English authorities are collected). I am aware that these rules of law have been criticised by some jurists who would make responsibility in contract depend on real consent, and liability in tort depend on blameworthiness, but I venture to think that this criticism is somewhat out of date. 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. … I can understand, of course, that 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, e.g. *Public Prosecutions Director v Beard* [1920] AppCas 479. But the cases which I have cited show that assault and trespass, to which I would add negligence, do not fall within that exception."

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4 fn 3.

5 [1949] 2 AllER 339, 350-351.

[6] Wolff SPJ, in *Adamson v Motor Vehicle Insurance Trust*[6] also seemed to favour this view:

> "… there is much to be said in support of the theory that a lunatic should be responsible for his tortious acts. 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 Hayes* has much to commend it."[7]

[7] The appellant intentionally jumped in front of the bus, intending to harm himself but did not turn his mind to the reasonably foreseeable potential effect of his actions on others. Impulsive acts of suicide or attempted suicide are common amongst those, like the appellant, who are diagnosed as suffering from chronic schizophrenia.

[8] Whilst a child's actions in a negligence claim can be judged by the objective standard to be expected of an ordinary reasonable child of comparable age, the action of an adult lacking capacity because of mental illness in a negligence claim cannot be similarly judged by any objective standard of an ordinary reasonable person suffering from that mental illness; if the mental illness has deprived the person of capacity then the person has also been deprived of rationality and reasonableness. The standard of care must be the objective standard expected of the ordinary person.

[9] On the facts of this case, the appellant was liable to the respondent in negligence.

[10] Although this is sufficient to dispose of the appeal, I am also of the view that the respondent was liable for the tort described as an action on the case, the principles of which were first set out in *Wilkinson v Downton*[8] and referred to with approval in *Bunyan v Jordan*[9] and *Northern Territory of Australia v Mengel*.[10] The mental element of the tort was described in *Wilkinson v Downton* as established where:

> "The defendant has … wilfully done an action *calculated* to cause physical harm to the plaintiff – that is to say to infringe her legal right to personal safety and has in fact thereby caused physical harm to her … This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.
>
> … One question is whether the defendant's act was so plainly *calculated* to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind."[11] *(my emphasis)*

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6 (1955-57) WALR 56.
7 At 67.
8 [1897] 1 QB 57.
9 (1937) 57 CLR 1, 11.
10 (1996) 185 CLR 307; Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 347.
11 At 58-59.

[11] The key to the required intention is the meaning of "calculated" in this context. In *Mengel*, which involved the tort of misfeasance of public office, Brennan J concluded that the mental element in that tort is satisfied either by malice or by knowledge, adding:

> "Another state of mind which is inconsistent with an honest attempt to perform the functions of public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is *calculated* to produce. The state of mind relates to the character of the conduct in which the public officer is engaged – whether it is within power and whether it is *calculated* (that is, naturally adapted in the circumstances) to produce injury."[12] *(my emphasis)*

[12] The same meaning should be given to "calculated" in the context of the intention required for liability under *Wilkinson v Downton*. Where "calculated" describes a set of words, as in *Wilkinson v Downton*, "calculated" describes the quality of those words and means "likely to have that effect", rather than "intending to have that effect": *Howard v Gallagher*[13] and cf *O'Sullivan v Lunnon*.[14]

[13] On the facts of this case, the appellant's actions were calculated (that is, likely, naturally adapted in the circumstances) to cause injury to the respondent driver. The appellant was liable to the respondent in both negligence and on an action on the case.

[14] I agree with McPherson JA's reasons and conclusion that the appeal as to quantum should also be dismissed.

[15] Finally, I turn to the appellant's appeal against the costs order. Although there are no reasons for the costs order in the Appeal Record Book, the learned primary judge ordered the appellant to pay the respondent's costs on an indemnity basis, apparently because the respondent had offered to settle his claim under Chapter 9 Part 5 UCPR for a lesser sum than that awarded. It is not submitted the offer was not within this Part of the UCPR. UCPR 361(2) places the onus on the appellant to show that a different order for costs than that made by the learned primary judge was appropriate.

[16] I agree with McPherson JA that this case raises an unsettled and difficult point of law and in these most unusual circumstances the trustee of the first respondent acted reasonably in requiring a court ruling on liability and should not be burdened with an indemnity costs order. I agree that the appellant's appeal as to the costs order should be allowed.

[17] I agree with the orders proposed by McPherson JA.

[18] **McPHERSON JA**: On 10 January 1996 Keith Carrier was driving a City Council bus along Bowen Bridge Road when John Bonham stepped out in front of it. He applied the brakes but was unable to stop it from hitting Bonham. As a result Bonham sustained some physical injury; but it was Carrier who in the end suffered

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12 At 357.
13 (1989) 85 ALR 495.
14 (1986) 163 CLR 545.

more. Because of his experience on that occasion he now has an adjustment disorder, which compelled him to give up bus driving. As a result he has sustained both personal injury and economic loss, in respect of which he brought this action for damages in the District Court.

[19] The action was instituted by Carrier as plaintiff against Bonham as first defendant and the State of Queensland as second defendant. The State was joined as defendant because it was responsible for the nearby Royal Brisbane Hospital from which Bonham had escaped. He was then what is termed a regulated patient, some 45 years of age, who had a long history of chronic schizophrenia, which had first been diagnosed when he was 26 years old, and on the evening in question, he absconded from the hospital with the intention of committing suicide. The plaintiff failed in his claim against the State because the trial judge found that, although the incident was foreseeable, those in charge of Bonham had not been negligent. There has been no appeal against that decision, but Bonham has appealed against the judgment at trial holding him liable for the plaintiff's loss, which was quantified in money terms at $113,061.00.

[20] The appeal squarely raises the question whether a person of unsound mind is capable at common law of being legally liable in negligence for conduct by someone with the mental condition of Bonham that causes injury and loss to another. At the trial his Honour held that Bonham's actions did not amount to either a battery or an assault on Carrier. That conclusion has not been challenged on appeal, and we are not here concerned with it. However, on the question of negligence, the learned judge decided that, being a person of unsound mind, Bonham was not liable for the injury inflicted on Carrier.

[21] Essentially his Honour's reason for reaching that conclusion was that, for the purpose of the law of negligence, the legal position of a person of unsound mind ought to be equated with that of an infant; that Bonham was not capable of assessing the effect of his actions on someone else; and that his conduct was therefore not to be judged by the objective standard of the ordinary person. In respect of that conclusion, a notice of contention was filed by the plaintiff. Among the matters contested by the plaintiff on the appeal are his Honour's findings that:

(d) the first defendant's mental condition had an effect on the standard of care owed by him to the plaintiff;

(e) his mental condition had an effect on his liability in negligence; and

(g) his attempted suicide did not constitute a breach of his duty of care to the plaintiff.

[22] Having, however, determined the matter of liability in negligence against the plaintiff, the learned judge went on to hold that the first defendant was liable to the plaintiff on the authority of *Wilkinson v Downton* [1897] 2 QB 57. That is the well known case in which the defendant as a practical joke told the plaintiff's wife that the plaintiff had been seriously injured in an accident, with the consequence that she suffered shock and illness, pain and suffering. Saying that the defendant would be liable for having "wilfully done an act calculated to cause physical harm to the plaintiff", and which had in fact done so, R S Wright J held that the

defendant's act was "so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant" ([1897] 2 QB 57, 58-59). He added that it was no answer in law to say that more harm was done than was expected or anticipated "for that is commonly the case with all wrongs".

[23] The decision has since been applied throughout the common law world on occasions too numerous to mention. In *Bunyan v Jordan* (1936) 36 S R (NSW) 350, 353, Jordan CJ said:

> "Whenever a person does an act which has the effect of causing physical injury to another in circumstances which do not amount to trespass to the person, he is legally responsible if the act was done negligently (that is, if it was done carelessly in circumstances which created a legal duty to be careful) and the injury was attributable to the negligence."

It was not a case involving unsoundness of mind on the part of the defendant, except perhaps in the limited sense that, if there was madness, then as with Prince Hamlet there was method in it. On appeal in *Bunyan v Jordan* (1937) 57 CLR 1, 10, Latham CJ said that if a person "deliberately does an act of a kind calculated to cause physical injury … and in fact causes physical injury to that other person, he is liable in damages". In *Northern Territory v Mengel* (1995) 185 CLR 307, 347, their Honours referred to *Wilkinson v Downton* as conceptually illustrative of "acts which are calculated in the ordinary course to cause harm ... or which are done with needless indifference to the harm that is likely to ensue". See also *Khorasandjian v Bush* [1993] QB 727, 735.

[24] The appellant Bonham seizes on the word "calculated" in these passages as demonstrating a need to show an intention to cause, or at least actual foresight of the likelihood of causing, harm of some kind. From there he submits that no such intention or foresight can, because of his mental condition, be attributed or imputed to him. Dr Joan Lawrence, whose evidence on this matter was accepted by the trial judge, considered that Bonham would not have been capable of being aware of the fact that his actions might cause injury to people on the bus. She did not believe, she said, that that would have been in his mind at all; he would have had absolutely no concept of what his actions might do to someone else.

[25] To my mind, however, the problem is that the expression "calculated" which is used in those passages is one of those weasel words that is capable of meaning either subjectively contemplated and intended, or objectively likely to happen. See, for example, *O'Sullivan v Lunnon* (1986) 163 CLR 545, 549. The implication I draw from the context in which the word appears in the passages quoted is that it was being used in the latter and not the former sense. That seems plainly to be so in what was said by Latham CJ in *Bunyan v Jordan* (1937) 57 CLR 1, 11, where, reverting to *Wilkinson v Downton*, his Honour remarked that the words in that case were of such a character and spoken in such circumstances that "it was naturally to be expected that they might cause a very severe nervous shock". Certainly that seems to have been the view of Dixon J who, in contrasting the facts of *Bunyan v Jordan* with those of *Wilkinson v Downton*, concluded (57 CLR 1, 17) that the harm which was said in fact to have ensued in the case before the High Court, was "not a consequence which might reasonably have been anticipated or foreseen". It must be recalled that in 1937 the common law was still labouring to

some extent under the shadow of the decision in *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222, which appeared to deny liability for damages for "pure" fright or nervous shock on the ground that it was too "remote": see *Wilkinson v Downton* [1897] 2 QB 57, 59-61. From that particular species of intellectual bondage, courts in Australia were perhaps not completely set free until the decision in *Jaensch v Coffey* (1984) 155 CLR 549. It is considerations of that kind that also explain the rather cautious tone of Dean Roscoe Pound's statement, to which Dixon J referred in his judgment in *Bunyan v Jordan* (57 CLR 1, 16).

[26] *Wilkinson v Downton* is still sometimes described as being an action "on the case", as if that would serve to distinguish it from actions for negligence. The implication seems to be that it does not quite fit the traditional dichotomy between liability in trespass for intentional wrongs, and liability in negligence for those that involve conduct that is merely inattentive. Despite the debate generated by *Fowler v Lanning* [1959] 1 QB 426, the distinction that was recognised by the late 18th century did not correspond to that between intentional and unintentional harm. As is evident from the differences of judicial opinion in the famous case of *Scott v Shepherd* (1773) 2 Wm Black 892; 96 ER 525 (the Squib Case), the difference was between harm that was immediate and direct, and harm that was caused indirectly. See *Platt v Nutt* (1988) 12 NSWLR 231. Even that distinction has been shown by Professor Milsom to be historically astray, in (1954) 12 CLJ 105, where the learned author points out that trespass was originally the generic name for all "wrongs" or, as we would now say, torts. See also J H Baker *Introduction to English Legal History* (3rd ed) at 71-75, 454. In that broader sense of the word, we still ask to be forgiven our "trespasses".

[27] The feature that is often singled out as peculiar about *Wilkinson v Downton* is that it was an intentional act which had reasonably foreseeable consequences that were apparently not in fact foreseen by the defendant in all their severity; but that is, as R S Wright J pointed out in *Wilkinson v Downton*, "commonly the case with all wrongs". Most everyday acts of what we call actionable negligence are in fact wholly or partly a product of intentional conduct. Driving a motor vehicle at high speed through a residential area is an intentional act even if injuring people or property on the way is not a result actually intended. *Wilkinson v Downton* is an example of that kind. The defendant intended to speak the words in question to the plaintiff's wife. Even if he did not intend to inflict the harm on her that followed, or perhaps any harm at all, he was plainly negligent as regards the result that followed. It is only when injury ensues from inaction or omission to act that problems may still arise at common law about whether the wrong is, properly speaking, the act or conduct of the defendant. Otherwise, since the Judicature Act which, in Maitland's famous phrase, buried the forms of action, it no longer matters whether the act was done intentionally or negligently, or partly one and partly the other. What matters is whether the consequences of the conduct, whether foreseen or not, were reasonably foreseeable and are such as should have been averted or avoided. What we really have now is not two distinct torts of trespass and negligence, but a single tort of failing to use reasonable care to avoid damage however caused. Negligence, if narrowly understood, is something of a misnomer.

[28] It follows, in my opinion, that if the defendant Bonham in this case was, because of his mental condition, not legally responsible for the foreseeable consequences of his action in throwing himself at or under the bus, he was no more

liable under the decision in *Wilkinson v Downton* than he was according to ordinary principles of the law of negligence. On either approach, he was, according to the evidence accepted by his Honour, actually unable to foresee that harm might result to the occupants of the bus, including the plaintiff Carrier, from his intentional act. Under Roman law, and the legal systems of continental Europe derived from it, the rule is that a person of unsound mind is not legally liable for his wrongs. There is a famous passage in the Digest (D 9.2.5.2) in which Ulpian describes as "undoubtedly right" the opinion of another Roman jurist that there can be no liability in such a person under the *lex Aquilia*; for how, he asks, can there be any "accountable fault" in him who is out of his mind (Watson's translation (1985) vol 1, at 278-279). Under the *lex Aquilia*, liability was recognised as arising either *dolo* or *culpa*, of which the latter did not precisely mean negligence but rather conduct that was "blameworthy".

[29] It was typical of English law that it seldom asked itself theoretical questions like that, but resolved them, often as narrowly as possible, only when they presented for determination in court. An early case commonly quoted in this context is *Weaver v Ward* (1617) Hob 134; 80 ER 284, where a member of a London trained band accidentally discharged his musket into the plaintiff during military exercises. In the course of holding the defendant liable, the Court, rather uncharacteristically, used the occasion to say that if "a lunatick hurt a man, he shall be answerable in trespass", and that therefore "no man shall be excused of a trespass … except it be judged utterly without his fault". It was in reference to that dictum that in *McHale v Watson* (1964) 111 CLR 384, 388, Windeyer J said:

> "The words 'utterly without fault' mean, as the context and later decisions make clear, not an absence of all ground for blame and censure of any kind but an absence of any kind of such negligence as constitutes fault at law".

[30] If that is so (as I respectfully think it to be), then the principle embraced by Ulpian has no place in our law. The decided authorities at common law are relatively few, but they lend support to a different approach to the question. In *Donaghy v Brennan* (1900) 19 NZLR 289 a strong Court of Appeal (Stout CJ, Williams, Edwards, and Martin JJ, affirming the decision of Connolly J) held that unsoundness of mind was no defence to a civil action for assault and battery involving injury caused by firing a loaded gun, in respect of which the defendant had already been convicted. The Court distinguished the position taken by Roman law on the basis that it viewed an insane person in a way that was quite different from English law and extended the same attitude to persons who were drunk (19 NZLR 289, 300-301). In *Morriss v Marsden* [1952] 1 All ER 925, a defendant was held liable for damages for battery although he was insane. The reasons of Stable J in that case, which was not a reserved decision, proceeded on the basis that the tort was not one that required a specific state of mind. In *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, Wolff SPJ held that the defendant, who like many of those considered in the reported cases, was schizophrenic, was liable for negligence in driving a car into a pedestrian who was crossing the road. The American and Canadian authorities are almost at one in holding persons liable for their tortious wrongs even though they may be suffering from unsoundness of mind. Instances like malicious prosecution may be exceptional. See Spenser Krause Gans, *The American Law of Torts*, vol 1 §5:17; *Prosser & Keeton on the Law of Torts* (5th ed) §135; Restatement of the Law (2nd); Torts §23B (1964). As observed by Wolff

SPJ in *Adamson's* case, almost the only exception to this general trend of decided authority is *Buckley & Toronto Transportation Company v Smith Transport Limited* [1946] 4 DLR 721, where the Ontario Court of Appeal held a truck driver not liable because he was suffering from delusions which deprived him of the ability to understand his duty to take care and of his power to discharge it.

[31] Somewhat surprisingly, academic opinion seems, on the whole, to be the other way. *Clerk & Lindsell on Torts* (16th ed. 1989), at 168, says that the liability of a person of unsound mind seems to stand on the same footing as the liability of a young child., which was the view adopted by the primary judge here. *Winfield & Jolowicz on Tort* (15th ed 1998), at 840, suggests that the question is whether the defendant was possessed of the requisite state of mind for liability in the particular tort. Professor GHL Fridman propounds a similar view in (1964) 80 LQR 84, 94, as does Brazier in *The Law of Torts* (9th ed 1993), at 570. Compare Trindade & Cane, *Law of Torts in Australia* 206-207, in which the authors are careful to relate the question to individual torts rather than treating it as a matter of general principle. If some such test were to be applied, it is difficult to see why a person should be liable for a battery or assault but not for ordinary negligence, which requires no particular state of mind but only a departure in conduct from the objective community standard of a reasonable person.

[32] One reason that seems to be suggested for abandoning the norm is that there are rare cases in which it has been held or contemplated that a person might not be tortiously liable for injury caused as a result, for example, of an unexpected epileptic fit or hypoglycaemic episode; but in my view those decisions turn not on the state of mind of the defendant, but on the presence of a state of automatism, with the result that the act or conduct in question is considered not to be the act of the defendant at all, as with the behaviour induced by the bee sting in *Scholz v Standish* [1961] SASR 123. It is more like what, in an earlier and more reverend age, was called an act of God, and in the field of criminal law is now regarded as an unwilled or involuntary act: cf *Falconer v The Queen* (1990) 171 CLR 30. That was the view taken by Stable J in *Morriss v Marsden* [1952] 1 All ER 925, 927-928; by McGregor J in *Beals v Hayward* [1960] NZLR 131, 138; and also by Neill J in *Roberts v Ramsbottom* [1980] 1 WLR 823, 830-833. Such a condition is regarded in law as in a different category from the states of mind that constitute insanity.

[33] What is in issue here is the significance of the defendant's mental incapacity to foresee that his actions might cause injury to someone else. Ever since the decision in *Vaughan v Menlove* (1837) 3 Bing (NC) 468; 132 ER 490, the established rule of our law has been that the standard for judging negligence is "the conduct of a man of ordinary prudence" (Tindal CJ, at 474). The decision is directly relevant here because the defendant who, against all advice, had risked spontaneous combustion in his hayrick, obtained a rule nisi for a new trial on the ground (at 471) that "he had acted bona fide to the best of his judgment; [and] if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence". It also appears from the report (at 472) that, a few years before, he had been successfully sued for burning weeds so near the boundary of his land as to set fire to and destroy his neighbour's wood. The point being made by the defendant there was that he was a man of reduced intelligence; but the rule nisi for a new trial was nevertheless discharged by the Common Pleas. The decision has been

"generally recognised ever since" as having set an objective standard of conduct that is independent of the idiosyncrasies of particular individuals: *McHale v Watson* (1964) 111 CLR 384, 396-397 (Windeyer J).

[34] What remains to be considered is the analogy sought to be drawn with the tortious liability of children. For Australia that question was settled in *McHale v Walson* (1966) 115 CLR 199, where the Full High Court, affirming the decision of Windeyer J, but with Menzies J dissenting, held that age was a relevant consideration which, in that instance resulted in the 12 year old male defendant being held not liable in tort to another child for his action in throwing a metal dart which glanced off a wooden post and struck her in the eye. In doing so, their Honours held that his conduct was to be judged, not in terms of the foresight and prudence of an ordinary person, but of the foresight and prudence of an ordinary boy of twelve. In explaining the principle involved, Kitto J referred to a passage in the *History of English Law*, vol 8, p 376n, in which Holdsworth had spoken of inherently "proper" acts, to which liability in law did not attach. His Honour continued (115 CLR 199, 213):

> "In so far as 'proper' is an apt word to use in this connection it connotes nothing but conformity with an objective standard of care, namely the care reasonably to be expected in like circumstances from the normal person exercising reasonable foresight and consideration for the safety of others. Thus a defendant does not escape liability by proving that he is abnormal in some respect which reduces his capacity for foresight and prudence."

His Honour then went on to say:

> "The principle is of course applicable to a child. The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so, he appeals to a standard of ordinariness, to an objective and not a subjective standard."

[35] The subsequent decision in *Cook v Cook* (1986) 162 CLR 376, which was concerned with the duty of care in a relationship that was special, did not, in my view, disturb that general conclusion but tends rather to confirm it. See the reasons of the majority at 162 CLR 376, 383. Sir Frank Kitto's rationalisation of the special category into which childhood foresight falls makes it, to my mind, clear that he would have regarded unsoundness of mind as an abnormality that did not attract special exemption from the ordinary standard of foresight and care expected of other people. Indeed, it could hardly be otherwise. Unsoundness of mind is not a normal condition in most people, and it is not a stage of development through which all humanity is destined to pass. 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 liability of such persons could be judged as a class. As Baron Bramwell once said, insanity is a misfortune and not a privilege.

It attracts human sympathy but not, at least in the case of negligence, immunity under the law of civil wrongs.

[36] In some of the discussions of the topic, there are appeals to the natural sentiment of sympathy for the wrongdoer and his family or dependants. Without invoking similar feelings for the victim and his family, it is relevant to mention the following point in the present case. Part at least of the reason why the defendant Bonham was able to escape from the hospital from which he absconded is that psychiatric practice no longer insists that persons in his condition be kept in strict custody. More humane methods of treatment now prevail, under which greater liberty of movement is, for their own perceived good, permitted to patients in this unhappy state. If in the process they take advantage of that liberty to venture, even if briefly, into "normal" society, it seems only proper that, in the event of their doing so, their conduct should be judged according to society's standards including the duty of exercising reasonable foresight and care for the safety of others. If that principle is not applied, then it is only a matter of time before there is reversion to the older and less humane practices of the past in the treatment of mental patients.

[37] For these reasons I would, for the findings made by the learned trial judge, substitute findings that the first defendant's mental condition had no effect on the standard of care owed by him to the plaintiff, which, on the contrary, is to be judged by the standard of the ordinary and reasonable person, and that it did not diminish or reduce his liability in negligence to the plaintiff.

[38] This has the consequence that, as to liability, the appeal must be dismissed. The first defendant also appeals against the amount of damages awarded to the plaintiff. The total awarded was $113,061.00 made up as follows:

A:	Damages for pain and suffering and loss of amenities	$18,000.00
B:	Interest on $9,000 at 2% per annum for 3.5 years	$630.00
C:	Past economic loss	$40,000.00
D:	Interest at 4% per annum for 2 years	$3,200.00
E:	Future economic loss	$50,000.00
F:	Special Damages	$1,231.00
	TOTAL	$113,061.00

Criticism on appeal was confined to the award of $40,000 for past economic loss and $50,000 for future economic loss. The award for past economic loss was based on what the plaintiff would have earned as a bus driver, including overtime, during periods for which he was absent from work as a result of his injury when he was earning, if at all, at a lower rate after he discovered in July 1997 that he was no longer able to cope with the stress of continuing to drive buses. After those periods, he engaged in various other occupations including that of a drilling offsider and of a dewaterer at a mine site. Ultimately he commenced a business of his own as a sub-contractor installing TV satellite dishes and cables. As a bus driver he would have earned before trial about $600 per week net or approximately $94,000. His actual net pre-trial earnings were not proved with any precision; but his Honour said he doubted whether they would have been more than $35,000, resulting in a difference of $59,000, which after being discounted by about one third produced the amount of $40,000 awarded for past economic loss.

[39] As to future economic loss, his net income in his present occupation was assessed at $74 per week. Compared with the present value of about $500,000 of

his potential future earning capacity as a bus driver to age 65, the result was a substantial loss under this heading. However, his Honour discounted it to $50,000, a reduction, we were informed, that is of the order of 90%. The appellant suggests that his Honour's findings do not support an assessment on this account of more than $10,000, which involves discounting it by about 98%.

[40] The real question at issue was whether the plaintiff would have remained in bus driving had the incident not occurred in January 1996, or, rather, whether he would have continued with it for longer than the 18 months for which he in fact did; and also perhaps whether he is likely in the future to find better paid employment than his present occupation. Essentially the appellant's submission complains that his Honour did not make a sufficient discount for the vicissitudes of life or their impact upon the plaintiff's vulnerable pre-accident personality, as it was thought to be by the medical witnesses at the trial. This is, however, a matter on which accurate prediction, as distinct from well-founded impression, is virtually impossible; and even if the inquiry were to be renewed on appeal without the benefit of seeing the plaintiff himself, it is unlikely that any impression we might now be able to form would produce the kind of difference in money terms for which the appellant contends. The reduction applied by the trial judge to the potential future economic loss is already so substantial that any alteration in it would probably be so small as not to attract appellate intervention having regard to the principles on which this Court acts in deciding appeals on matters of quantum in personal injury cases. See *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258; and compare, for example, *Brown v Hale* [1996] 1 Qd R 234.

[41] Finally, the appellant takes issue with the order made at or shortly after trial that he pay the plaintiff's costs to be assessed on an indemnity basis. Appeals against orders for costs only made in the Supreme Court may be brought to this Court only by leave (*Supreme Court Act 1995*, s 253). However, by some oversight that restriction has never been extended to appeals from costs orders made in the District Court, as to which it has been accepted that no such limitation applies. See *Timms v Clift* [1998] 2 Qd R 100, 106-107. Here the judgment, apart from costs, was for more than $50,000, and hence within s 118(2)(a) of the *District Courts Act 1967*. In the present case there is no obvious indication of why the order for costs was made on an indemnity basis. The action, as it fell out, raised an unusually unsettled and difficult point of law. In the circumstances, the trustee of the first defendant's assets and affairs could reasonably and prudently have preferred to have the ruling of a court on liability rather than assuming the responsibility of making or accepting an offer in satisfaction of the plaintiff's claim. Cf *Assaf v Skalkos* [2000] NSWSC 935 §§98-108. To that extent the first defendant's appeal should be allowed; but otherwise it should be dismissed.

[42] **MOYNIHAN J:** I have had the advantage of reading the reasons prepared by McPherson JA. I agree with his analysis and reasoning and have nothing which I could usefully add. I agree with the orders he proposes.