Whose Fault in an Aging World?: Comparing Dementia-Related Tort Liability in Common Law and Civil Law Jurisdictions

Trevor Ryan

Wendy Bonython

Follow this and additional works at: https://digitalcommons.law.uw.edu/wilj

Part of the Comparative and Foreign Law Commons, and the Torts Commons

Recommended Citation

Available at: https://digitalcommons.law.uw.edu/wilj/vol27/iss2/4

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
WHOSE FAULT IN AN AGING WORLD?:
COMPARING DEMENTIA-RELATED TORT LIABILITY
IN COMMON LAW AND CIVIL LAW JURISDICTIONS

Trevor Ryan†
Wendy Bonython‡

Abstract: Age-related dementias have been identified as a global health priority, based on their rapidly rising incidence and associated economic burden. Behaviors symptomatic of dementias, such as wandering, potentially expose sufferers to increased likelihood of experiencing harm or causing harms to others. Yet what jurisprudence and case law exists on the issue of tortious liability of people with dementia is largely derived from the broader principles governing tortious liability of those with mental illness or otherwise impaired capacity. Those principles are themselves problematic, reflecting absolutist models of either personal liability (common law jurisdictions) or statutory personal immunity accompanied by imposition of delegated liability on caregivers (civil law jurisdictions), rather than a more nuanced model capable of reflecting the fluctuating nature of capacity in people with dementia, and the variety of models of care arrangements. Similarly, those principles fail to adequately address tensions between paternalism and individual autonomy. This Article provides a comparison of the various models of personal or caregiver liability found in a number of key jurisdictions (primarily Japan and the United States) and offers some suggestions for jurisdictions considering legal reform in this increasingly critical area.


I. INTRODUCTION

Dementia—defined broadly as a “clinical syndrome of cognitive decline that is sufficiently severe to interfere with social or occupational functioning”¹—presents significant challenges at all levels of society, including for the affected individual, family and friends, caregivers, and greater communities. It is a condition that highlights the tensions between a paternalistic societal compulsion to protect individuals from harm to themselves or others and the human rights-mandated autonomy of the individual—including risk taking. At the forefront of these challenges is
dementia’s effect on legal personhood, aspects of which include decision-making ability and culpability.

In 2012, the World Health Organization (“WHO”) identified dementia as a global health priority. Its costs to health systems alone were estimated at $604 billion USD per year, a figure that will inevitably increase as the world’s population ages further given the increasing incidence of dementia later in life. The WHO demanded “sustained action and coordination . . . across multiple levels and with all stakeholders—at international, national, regional and local levels.”

The non-economic impact is harder to quantify, yet it is clear that the challenges presented by the increasing disease burden of dementia affect caregivers and communities significantly. In seeking to meet these challenges, many jurisdictions increasingly favor informal models of care (which are provided altruistically by family members), or alternative models of community-based care over institutionalized alternatives. These models have the advantage of being more consistent with the human rights of the patient than older models, which rely more extensively on involuntary mechanisms of containment and control. The greater presence in the community of persons with reduced capacity does, however, raise a number of challenges.

One challenge is that harm may arise from behaviors such as wandering: the movement of a person with dementia away from their care environment without the knowledge of caregivers. Wandering may cause the individual harm when the person becomes disoriented and lost and, in severe cases, injury or death can result from exposure, attacks by animals, collisions with vehicles, and other risks. Wandering can also lead to the violation of personal and property rights of others, triggering litigation against the wandering person. In jurisdictions where an ongoing mental impairment such as dementia is regarded as a defense to tortious liability, the person legally or actually responsible for his or her care may be sued. In cases where the person who wanders is in formal protective care, such as a nursing home, that liability can also be borne by the facility if its policies and practices for patient containment are found to be inadequate. Even without wandering, harms

---

3 Id.
5 At least one author has estimated that so-called “elopement” cases—involving patients who abscond either intentionally or through wandering—account for 10% of all cases involving litigation against nursing
may occur in the confines of the person’s own home or in care facilities, with or without the direct supervision of caregivers. Dementia complicates the question of intent on the part of the person to engage in particular behaviors or cause consequent harm. Harm-causing behaviors may also be isolated from formation of any intention to engage in the behavior, much less to cause the consequent harms. Attributing liability for harm caused by the wandering behaviors of defendants with dementia is therefore a challenge for multiple jurisdictions.

Though sure to change as the prevalence of dementia increases alongside unprecedented population aging, the case law in this area is undeveloped. Jurisprudence examining the impact of impaired reasoning on legal liability has typically centered on criminal liability rather than civil liability. In criminal law, many jurisdictions have adopted or modified the MacNaughton rules, which focus on what the defendant subjectively understood or intended. In contrast, jurisprudence governing liability for tortious harms caused by people with impaired reasoning as a consequence of behaviors associated with their disease is less developed or coherent, often relying on objective standards—what the reasonable person, without the impairment, would have understood, rather than what the person with the impairment did understand—with no adjustment for impaired reasoning. Some jurisdictions began with a subjective standard but have since moved to an objective one.

Academic commentary is divided between the need to compensate blameless victims and the injustice of holding an impaired defendant liable

---

6 It has been estimated that the incidence of wandering by people with dementia in community settings, for example, is as high as sixth percent. See Tony Hope et al., Wandering in dementia: a longitudinal study, 13 INT’L PSYCHOGERIATRICS 137 (2001).
7 Reasons for the comparatively small body of law may be that many potential cases are resolved through settlement, such as those arising from motor vehicle accidents; or that defendants may choose not to raise their impairment as factor in mitigation of liability, for fear of stigmatization.
8 We note the extensive body of case law and scholarship on issues such as contractual and testamentary capacity but distinguish it in this context on the basis that a finding of impaired capacity in these contexts tends to result in invalidation of the relevant act or decision, rather than providing a defense against liability for the consequences of that act or decision, as is the case in tort or criminal law.
9 Sometimes spelled “M’Naghten.”
11 See, e.g., Carrier v Bonham [2001] QCA 234 (Austl.).
12 Gerhard Wagner, Comparative Tort Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1028 (Mathias Reinmann & Reinhard Zimmerman eds., 2006).
for the consequences of actions he or she may have no ability to control. Some jurisdictions (typically code jurisdictions) have granted personal immunity from negligence suits to people with impaired capacity, and instead impose secondary “caregiver” liability on those who are deemed to have been negligent in exercising control over the individual with dementia. This could be a public or private institution, community care provider, family member, or other volunteer.

Either approach is problematic when considered against the principles underpinning the Convention on the Rights of Persons with Disabilities (“CRPD”), which entered into force in 2008. The Convention applies to people with a broad range of disabilities: physical, mental, sensory, and intellectual. Article 1 of the CRPD states the following:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

It is clear, therefore, that the CRPD’s emphasis on “full and equal enjoyment of all human rights and fundamental freedoms” applies to people with cognitive impairment, including dementia. Most academic and public commentary on the implications of compliance with the Convention has focused on issues such as involuntary detention and treatment of people with mental illness. That focus is now broadening to encompass other implications for legal systems engaging with people with mental and cognitive impairment disabilities including: the franchise, financial management, and liability.

---


Article 12 of the CRPD—Equal recognition before the law—requires, among other things, that persons with disabilities “enjoy legal capacity on an equal basis with others in all aspects of life.”¹⁵ It also requires that States provide people with disabilities appropriate supportive measures to exercise that legal capacity and safeguards to prevent abuse, “proportional and tailored to the person’s circumstances” for “the shortest time possible” and subject to “competent, independent and impartial” oversight.¹⁶ For the purposes of interpreting the Article, legal capacity has been defined as “the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency).”¹⁷ Included within that range of legal rights and duties are likely to be the rights and duties forming the substrate of tortious liability, at least as far as involves relationships between people with dementia and public or state entities, such as care providers and other state agencies. It may be argued that the CRPD only formally affects relations between the state and the individual rather than between private individuals. Yet many institutional care providers and potential plaintiffs, such as transportation services, are publicly funded or owned. Therefore, countries seeking full compliance with the Convention must adopt a consistent approach to all litigation involving claims of harm caused by people with dementia—regardless of the public or private nature of the respective parties. Alternatively, they must accept a two-tier system of determining liability, where litigation between private actors—as claimants or caregiver defendants—is determined according to one set of rules, and litigation involving a public actor is determined under another.

Article 12 has been widely interpreted to require that states replace “substituted” decision-making with “supported” decision-making. A “supported” decision is one in which the person with the disability (including what might traditionally be viewed as a lack of capacity) is provided assistance to reach his or her own decisions. A “substitute” model is one in which an appointed decision-maker makes decisions on his or her behalf.¹⁸ In many jurisdictions, efforts to comply with Article 12 have included widespread reform of legal mechanisms for substituted and delegated

¹⁵ Id. at art. 12.
¹⁶ Id.
¹⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 1, Art. 12: Equal Recognition before the Law, UN Doc. CRPD/C/GC/1, at ¶ 13 (2014).
decision-making, particularly where such decision-making power is vested in a substitute by a tribunal or other legal mechanism, rather than by the person’s own nomination through a prior enduring power of attorney appointment.19

Understandably, most of the reform has focused on people with impaired decision-making capacity in the context of major considered or deliberative decisions, such as financial or legal decision-making. Few reforms have considered the impact Article 12 should have on the personal liability of people who are unable to foresee the consequences of their actions due to their disability, impairing their short-term decision-making ability. Decisions of this type—those that are affected by the person’s inability to foresee the consequences of a decision—have the highest probability to result in harms giving rise to a negligence claim.

Retaining personal liability is problematic from a CRPD perspective in both common law and civil law systems. The common law model holds people with a disability (such as dementia) to a standard those without a disability are unlikely to encounter, that is to avoid harm beyond one’s capacity to foresee or prevent. Such liability may also be a failure to ensure no “arbitrary deprivation of property” under Article 12. The civil law model is a paternalistic approach that denies dementia-affected people autonomy, and instead subjects them to the control of others, while imposing liability for the negligent exercise of that control on people who may not willingly—or knowingly—assume it.

Wandering—and dementia more broadly—also raises new and enduring questions of policy and principle for tort law. With regard to policy, Professor Edward P. Richards frames the issue as finding a judicious path through the poles of liability and immunity and exploring alternative forms of compensation and prevention.20 The optimum balance, he says, will ensure that the law protects and compensates victims without creating disincentives to undertake caregiver roles21 or incentives for excessive restraint or

---

21 Id. at 622.
surveillance of dementia sufferers,\textsuperscript{22} lest this contravene the fundamental rights of persons with disabilities.

With regard to principle, wandering and the advent of the CRPD bring a new lens to familiar controversies about the fundamental justifications for tort law. If sanction for fault is considered the key justification for attributing liability, difficult questions emerge such as the capacity of a person with dementia to meet a reasonable standard of care\textsuperscript{23} and the moral culpability of altruistic caregivers. If general or specific deterrence of accidents is the fundamental concern, the question is whether the law of unintentional torts can realistically shape the behavior of dementia-affected persons and their beleaguered caregivers. Finally, if compensation and fair distribution of loss are the primary goals, the question arises as to whether tort law is the best means of achieving these goals. This is particularly the case where the victim of an accident is reluctant to sue those with dementia or their families, or where there are difficulties ascertaining the details of an incident where a party to an accident suffers from dementia.\textsuperscript{24} Instead, collectivized, no-blame models of social insurance, such as New Zealand’s accidental injury liability scheme,\textsuperscript{25} may provide useful guides for grappling with this emerging social issue.

This Article evaluates existing models for the treatment of wandering-related accidents in tort law and makes recommendations for reform in this area. Part II describes the default common law position of imposing liability for harm caused by persons with mental impairment. This Article examines an underlying tension between policy goals that promote care-giving behavior on the one hand and concern for public safety on the other, but also the potential for how these goals can be pursued simultaneously. Part III analyzes the concept of caregiver liability in lieu of direct liability for persons with mental impairment. It identifies in the divergent approaches among jurisdictions common tensions in matters of principle and policy. In Part IV, the Article focuses on the evolving position of Japan because of its recent appellate consideration of this issue, legal hybridity and eclecticism, and its status as the world’s most rapidly aging society, which has made wandering a recognized social problem. Police statistics for 2015 indicate that a record

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Masuda Jun, Anzen, anshin na shakai to kōreisha jiko no hōri [Legal Principles of a Safe and Secure Society and Accidents Involving the Elderly], 6 CHŪO LÔ JANJI [CHÛO L.J.] 39, 44 (2009) (Japan).}
\item Injury Prevention, Rehabilitation, and Compensation Act 2001 (N.Z.).
\end{enumerate}
\end{footnotesize}
12,208 people suffering from dementia were reported missing and 479 of these were deceased when located, having met with accidents or due to exposure or dehydration.\textsuperscript{26} One newspaper reports that 115 people with dementia died in train accidents alone between 2004 and 2012.\textsuperscript{27} Part V attempts a deeper comparative analysis of the nature and justifications for caregiver liability and introduces competing models of how interventions can be justified in the lives of persons with mental impairment in the name of public safety. The Article concludes that, absent a publicly funded no fault compensation scheme, the fairest option is a model that apportions joint liability between caregivers and people with dementia based on a subjective assessment of the parties’ circumstances. Such a model would permit recognition of fluctuating and variable capacity on the part of the person affected. It would also comply with human rights norms and the primacy of the rights and interests of the person under care without imposing an intolerable burden on altruistic or professional caregivers. The Article also proposes some strict conditions to allow derivation of caregiver liability from the care relationship in the name of compliance with the CRPD and contemporary expectations.

This introduction ends with a note of caution, namely that the jurisdictions considered in this Article differ in significant ways, including legal tradition, culture, and the social-policy context. In Japan, Australia, and the United Kingdom, for example, professionally provided aged and acute care is often fully funded or subsidized by the state or compulsory insurance premiums, and there are typically extensive state-based licensing and accreditation requirements imposed on care providers. Findings of caregiver liability, therefore, could potentially result in damages awards being borne by the taxpayer, both directly and through liability claims directed at the state regulator for failure to adequately regulate.\textsuperscript{28} Conversely, in jurisdictions such as the United States where aged care is typically privately funded, there may be greater appetite to hold professional caregivers liable, as damages awards

\textsuperscript{26} Record 12,000 people with dementia reported missing in Japan in 2015, JAPAN TIMES (June 16, 2016), https://www.japantimes.co.jp/news/2016/06/16/national/social-issues/record-12000-people-dementia-reported-missing-japan-2015/#article_history.

\textsuperscript{27} Ninchishô: 115-nin tetsudō jikoshi, izoku ni baishō seikyū mo [Dementia: 115 Deaths from Railway Accidents, Even Compensation Claims Against the Bereaved], MAINICHI SHIMBUN (Jan. 12, 2014), http://mainichi.jp/select/news/20140112k0000m040087000c.html. In the 2014–2015 Japanese financial year, 1165 persons with dementia had their licenses revoked under new rules introduced to ensure that drivers do not pose a threat through illness. 7711 driver’s licenses revoked, suspended due to illness, JAPAN TIMES (July 16, 2015).

\textsuperscript{28} Noting that the latter obstacle could be overcome by implementation of a statutory provision granting immunity from negligence for the regulator.
will not be funded by the taxpayer. Another significant difference is that some jurisdictions, such as the United States, typically do not award damages for pure economic loss, but this is not the case in other jurisdictions, such as Japan and many common law jurisdictions.

Certainly, the difference between common law and civil law jurisdictions should not be ignored, no less the apparent schism between the civil law delict and the common law of torts. On the other hand, this overlooks common developments within each tradition and shared roots in Roman law, which are examined below. It is also possible to speculate that common law courts (especially in the United States) are reluctant to impose liability upon caregivers because of a stronger ethos of individualism and self-responsibility. In contrast, Japanese law may be imbued with more collectivist or communitarian values. Yet, even if this is true, shared demographic and industrial changes may be forging convergence toward collectivization of loss beyond the immediate parties and their families, that is, through liability insurance and greater support for caregivers in the wider community. While contextual differences must be accounted for, there is a danger that they may be overstated to the detriment of fruitful comparative analysis. After all, accidents occur in all jurisdictions, which may explain why tort law continues to be a major area of comparative law and a focus of regional harmonization efforts.

II. LIABILITY OF PERSONS WITH MENTAL IMPAIRMENT

This Part examines the approaches of selected common law jurisdictions to the tortious liability of persons with mental impairment, prefaced by a discussion of the legal status of these persons more generally.

---


30 Wagner, supra note 12, at 1007.


33 Wagner, supra note 12, at 1007.
A. Legal Status of People with Mental or Cognitive Impairment

Common law responses to people with mental impairment have been somewhat incoherent. While it is well established that people who commit crimes while “lacking reason” should not be punished for those crimes, it was not until the sensational trials of Hadfield\(^\text{34}\) and MacNaughten\(^\text{35}\) in the Victorian era that the formal framework of the insanity plea, coupled with provisions for “protective” imprisonment, emerged.\(^\text{36}\) Although the MacNaughten defense, as it came to be known, has since undergone significant reform in many common law jurisdictions, the crux of the defense still rests on the basis that it is wrong to punish someone for criminal conduct when their mental impairment prevented them from knowing that such conduct was wrong, or prevented them from resisting that conduct.

Rather than being predicated on a formal diagnosis, access to the insanity-type defenses in criminal matters rests on questions of subjective functional capacity: what did the accused understand or intend? If the accused has a diagnosed mental illness or impairment, for example, but the impairment did not affect the accused’s ability to understand the nature or criminality of his or her act at the time of commission, the defense will not be available. Conversely, in the absence of a specific diagnosis, but with clear evidence of an impairment affecting the accused’s ability to understand the nature of the act, an accused will be able to access the defense. This emphasis on functionality over formality is also reflected in the common law response to many other aspects of self-determination and legal personhood, such as testamentary capacity and the appointment of guardians.

The starting point for this common law response is the 1869 decision of Banks v. Goodfellow, which established the common law test for testamentary capacity:

\(^{36}\) Significantly, a successful pleading of the insanity defense generally results in the defendant being acquitted of the offence; however, unless the defendant can demonstrate successfully that they no longer pose a risk of further offending, they are likely to be referred to a forensic tribunal which, in many jurisdictions, has the power to impose a period of hospitalization or psychiatric treatment, potentially of longer duration than the maximum sentence for the offense.
[A] testator [a] shall understand the nature of the act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, [d] that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.  

This test has been modified in various contexts related to guardianship and decision-making law more broadly through legislative and common law reform. The United Kingdom’s Mental Capacity Act 2005, for example, defines someone as “unable to make a decision for himself” (lacking capacity) as a person with an inability “(a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).” The section also formally recognizes that a requirement for simplified explanations of relevant information and that an ability to retain the relevant information for only a short period does not prevent someone from being regarded as “able to make a decision,” thereby specifically addressing circumstances commonly encountered by people with dementia. The common law has also embraced a rebuttable presumption of capacity in adults, which is commonly reflected in legislation.

This functional, transaction-specific approach is a departure from the historical approach. In the past, declarations of incapacity were comprehensive: a person lacking the capacity to make a decision was presumed to lack capacity to make any decision. In more recent periods, the powers of appointed or substituted decision-makers have been less absolute, typically covering specific classes of decisions, such as financial, health, or health care.

---

37 Banks v. Goodfellow [1870] L.R. 5 Q.B. 549 (Ir.).
38 Mental Capacity Act 2005, c. 9, § 3 (Eng.).
39 Id. Similar principles have also been adopted in other jurisdictions through the common law. See, e.g., Hunter and New England Area Health Service v A [2009] NSWSC 761 (Austl.).
41 See, e.g., Guardianship and Administration Act 2000 (Qld.) (Austl.).
welfare-related decisions. Furthermore, appointed decision-makers are increasingly bound by requirements to consider the wishes of the person upon whose behalf they are acting.

Guardianship law continues to evolve in tandem with international human rights norms. The CRPD mandates the development of more nuanced models of “supported” decision-making, in preference to fully substituted decision-making, to ensure that people with impaired capacity retain their legal decision-making powers to the maximum extent possible. This is particularly significant in dealing with people with dementia, who frequently experience fluctuating capacity. That is, depending on the nature of their condition, they may have a greater ability to understand the consequences of particular legal decisions at some times than at others.

Precisely how the CRPD should be complied with is contested by States, with many States adopting different interpretations of the CRPD from those espoused by the CRPD Committee. Article 12 could be superficially interpreted as rendering all tests for legal capacity largely moot, as such tests have operated as the threshold for decision substitution rather than support. A more nuanced view recognizes that such a position would effectively deny people the right and autonomy to have their wishes respected where these are expressed prior to the occurrence of serious illness or disease through an advanced care directive or enduring power of attorney, typically conditional on loss of decision-making capacity. Furthermore, for people who are at the most extreme end of the spectrum of illness and impairment—for example, those who are persistently unconscious—strict applications of Article 12 provide little scope for recognition of their rights under a supportive framework. The practical implications of caring for people who legitimately cannot exercise legal capacity on their own behalf, therefore, means that tests for legal capacity of the type described above are likely to retain relevance for the foreseeable future, even if this capacity is presumed.

The retention of tests for capacity also allows for a certain degree of subjectivity, tailored to the specific circumstances of the person involved. Unfortunately, as described in the next section, principles defining tortious liability of people with intellectual or mental impairment have not developed in a similar manner. Instead, the common law has adopted a rigid approach.

---

42 See, e.g., Mental Capacity Act 2005, c. 9, § 16 (Eng.); Guardianship and Management of Property Act 1991 (ACT) ss 7–8 (Austl.).
to the liability of people with mental impairment for harms committed in tort, disregarding their personal circumstances.

B. Tortious Liability of Dementia Sufferers

Courts in common law jurisdictions generally hold that ongoing mental impairment does not justify any deviation from the objective “reasonable person” standard used to measure any other defendant’s conduct. The standard is therefore neither individual-subjective (reasonableness given the actual circumstances of the person) nor class-subjective (reasonableness adjusted to the type of impairment). This contrasts markedly with the criminal law tests of insanity and well-established jurisprudence permitting adjustment to the “reasonable person” standard of care in the case of physical illness or disability, at least those of sudden onset.

There are a number of arguments in policy and principle for applying an objective standard to defendants with a mental impairment. First, in a criminal context, the test is linked to concepts of mens rea and guilt that have no exact equivalents in civil cases, which apply a different standard of proof and usually have less severe consequences for the liberty of the defendant. Second, a subjective test suffers from a deficit of “administrability.” A finder of fact, especially a jury, may find it difficult to determine what constitutes a reasonable standard of behavior for a person with a particular mental disability or illness. A third doctrinal reason adopted in the Australian case of Carrier v. Bonham is that mental impairment, unlike a given stage of childhood, is too idiosyncratic a condition to warrant a class-subjective standard. A fourth justification, also from Carrier, is that where mental impairment has deprived a person of capacity (here, taken as reason itself), it precludes any prospect of reasonableness, whether assessed subjectively or objectively. A fifth reason is that a departure from a common standard would merely entrench the marginalization of persons who deviate from mainstream society in their degree of mental capacity.

---

45 Carrier v Bonham [2001] QCA 234 at ¶ 37 (Austl.).
46 Id. at ¶ 8.
47 Id. at ¶ 37.
More nuanced approaches are available. There is a growing understanding of the diverse types and causes of mental impairment, its prevalence, and how to achieve more reliable diagnoses. As such, greater predictability of the progression of particular conditions such as dementia is increasingly possible, thereby removing it from the scope of “personal idiosyncrasy.” With this knowledge, it should be theoretically possible to group individuals within classes, which are susceptible to class-subjective standards of reasonableness, or to regard mental impairment as comparable to other (i.e. physical) impairments, which are accorded a greater degree of flexibility. Accordingly, factors such as the ability of tortfeasors and potential victims to control for the particular impairment would have a bearing on the question of what is reasonable in the circumstances.

In practice in the case of dementia, however, which is attributable at least in part to physical causes such as organic deterioration of the brain, proposals for recognizing a class-subjective standard have encountered resistance on at least two fronts. First, the progressive, fluctuating nature of dementia complicates the question of what standard of reasonableness should be applied. Second, sufferers impaired by dementia, especially those with Alzheimer’s disease, may be unaware of their impairment itself, which makes it difficult to determine what constitutes a reasonable precaution against harm in the circumstances.

Countervailing arguments supporting recognition of a class-subjective standard include the following. First, the disparate stages of dementia are well documented and could provide a baseline for class-subjective standards. Second, some harms may be causally related to a specific physiological manifestation of dementia that may enliven a sudden incapacitation defense, that is constituting a factor that no reasonable person in the circumstances could have prevented. For example, one U.S. court has accepted expert medical evidence that the cause of a car accident may have been a “sensory overload caused by Alzheimer’s disease.” Finally, the remaining capacity of dementia sufferers to make decisions (and thus to adopt a reasonable standard of care) should be respected in light of the development of international human rights norms relating to mental disability discussed above.

48 Wagner, supra note 12, at 1029. See also Bromberger, supra note 13, at 435.
49 Wagner, supra note 12, at 1029.
A related question is whether to impose any liability at all upon those with significant mental impairments. This raises questions of justice, principle, and policy. In the common law, courts have sometimes invoked the principle that “where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it.” Furthermore, courts have invoked policy reasons for imposing liability: first, preventing false claims of incapacity; and second, creating an incentive for family members with a future stake in the estate of the person liable to “restrain and control” persons who may be dangerous for reasons of mental impairment. In contrast, in a line of cases in the United States, the courts have created an exception from liability for persons with mental impairment for harm caused to professional caregivers in institutions. The policy rationale regarding incentives of family members is not considered applicable because the family has already done everything reasonable to restrain the potentially dangerous person by admitting them to care.

Assistant Professor Sarah E. Light is unconvinced, deriding the American Law Institute’s view that “if mental defectives are to live in the world they should pay for the damage they do.” Light sees in this view a fearful, segregationist view of mental disabilities reflecting a long legacy of discrimination, prejudice, xenophobia, and coercion. Light argues that the doctrine developed by the courts unnecessarily “articulates a norm of confinement.” For example, the “one of two innocents” principle creates incentives for confinement of family members with dementia despite being “inherently unjust,” “nothing more than a statement of strict liability,” and failing to consider alternative forms of compensation. For the same reason, Light is critical of the policy rationale that family members with a stake in inheritance should have an incentive to restrain and control. Light sees in this a mere

---

52 Id.
55 RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(3) (AM. LAW INST. 1965).
56 Light, supra note 53, at 389–90.
57 Id. at 381.
58 Id. at 386.
59 Id. at 387.
60 Id. at 389.
reinforcement of the norm of confinement toward institutionalization. At the same time, she questions whether this norm is capable of bringing about the precise behavior modification anticipated by the courts. This is because of poor public awareness of this obscure legal doctrine, mistaken assumptions about the capacity for family control, and misapprehensions about both the amounts of inheritable wealth at stake and the relative importance of this in shaping family members’ motives. More insidiously, it entrenches a de facto double standard, where the standard of care exercised by family members in caring is presumably higher where there is potential for the family member to inherit, and lower if the affected relative is impecunious. The negative and discriminatory message sent by the courts through articulating this norm of confinement therefore outweighs any possible benefit to public safety.

III. CAREGIVER LIABILITY

If the person with mental impairment is indeed an unsuitable defendant for legal, moral, or economic reasons, a plaintiff may look to a caregiver as an alternative or joint defendant. The nature of this liability is far from settled. In Roman law, the head of a family owed strict liability for the acts of family members. In other cultures with patrilineal families, such as Japan, similar rules applied, though it is debatable whether the origins were indigenous or traceable to imported codes. Neither strict liability nor vicarious liability are precisely applicable for caregiver liability where harm is caused to a third party by a person with mental impairment. Strict liability on the part of a principal, for example, typically requires the agent to demonstrate fault. Furthermore, vicarious liability is usually wedded to the concept of enterprise liability. Additionally, it is not clear what is meant by a “caregiver” in the concept of caregiver liability. Typically, this term is used to define someone who provides some form of material assistance to another. “Caregiver liability” could equally refer to the less proximate role of watching out for another, in which case “supervisory liability” may be a more appropriate term. For the purposes of this Article, the term “caregiver liability” is used to avoid

---

61 Id. at 400.
62 Id. at 392.
63 Id. at 392–93.
64 Wagner, supra note 12, at 1029.
66 Wagner, supra note 12, at 1029.
67 Id.
begging the question of what the role entails and how it might generate liability to third parties.

Caregiver liability is fraught with the same problems identified by Light above, particularly with the potential expression of a norm of confinement. Indeed, it may conflict with another line of case law that imposes tortious liability on professional caregivers (though not necessarily family caregivers) for unwarranted deprivation of liberty.\(^{68}\) It is also questionable whether caregiver liability is consistent with the common law tradition’s reluctance to impose on defendants a positive duty for omissions or otherwise to take action to prevent harms not of their own making. As explored in greater detail below, this problem may be overcome by positive statutory duties.\(^{69}\) Nevertheless, there are some possible foundations for caregiver liability in the common law.

\(\text{A. The United States}\)

While the basic position in the United States is one of personal liability on the part of persons with mental impairment, there is a line of cases considering caregiver liability. These cases fall within a broader, developing area of negligence law in which a range of defendants, including vendors of weapons,\(^{70}\) spouses of sexual predators,\(^{71}\) schools,\(^{72}\) parents,\(^{73}\) police conducting surveillance,\(^{74}\) and employment referees,\(^{75}\) have been argued to be liable for the harmful actions of a third party.

Due to a range of policy concerns including insurance costs and the realities of care, courts in the United States have, in imposing liability upon caregivers, tended to distinguish between professional caregivers and informal caregivers.\(^{76}\) There are a number of cases relating to care institutions where a person was released from institutional care and then proceeded to cause harm to a third party.\(^{77}\) In these cases, the courts have required specific

\(^{68}\) See P v. Cheshire West [2014] UKSC 19 (Eng.).
\(^{69}\) RESTATEMENT (THIRD) OF TORTS § 38 (AM. LAW INST. 2011).
\(^{74}\) Davidson v. City of Westminster, 649 P.2d 894 (Cal. 1982).
\(^{77}\) Id. at 649.
evidence that the person posed a threat before liability is imposed.\textsuperscript{78} Courts have also been reluctant to allow a concern with protecting third parties to interfere with the rehabilitative goals informing administrative decisions to reintegrate inmates of institutions into the community.\textsuperscript{79} There are also cases that consider the duty of care an institution owes third parties harmed by a person currently in its care. These typically involve the question of whether injuries inflicted on another patient or resident were foreseeable.\textsuperscript{80} However, in Garrison Retirement Home Corp. v. Hancock, the Florida District Court of Appeals found an institution liable for failing to prevent a person with dementia from causing harm to an external third party by driving a car.\textsuperscript{81} This was based on general principles underlying the articulation of the “duty to control conduct of third persons” in section 315 of the Restatement (Second) of Torts,\textsuperscript{82} as interpreted by the Court:

\begin{quote}
[T]here is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.\textsuperscript{83}
\end{quote}

Consistent with the subsequent re-articulation of this principle in section 41 of the Restatement (Third) of Torts,\textsuperscript{84} the Court held that the assumption of control by the institution over the patient constituted a special relation with the patient and found the institution liable.\textsuperscript{85} The control in this case was assumed through the presence of locked gates designed to prevent wandering, but also strategies that had attempted to prevent the person with dementia from driving, whether these were strictly authorized by law or not.\textsuperscript{86} The corollary is that where there was no such assumption of control, there would be no liability. Professor Richards supports this view, arguing that from a public policy perspective the duty to the public and the duty to the

\textsuperscript{78} Id.
\textsuperscript{80} Vaughn E. James, No Help for the Helpless: How the Law has Failed to Serve and Protect Persons Suffering from Alzheimer’s Disease, 7 J. HEALTH & BIOMEDICAL L. 407, 434–35 (2012).
\textsuperscript{81} Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257, 1262 (Fla. Dist. Ct. App. 1985).
\textsuperscript{82} RESTATEMENT (SECOND) OF TORTS, supra note 55, at § 315.
\textsuperscript{83} Garrison Retirement Home, 484 So.2d at 1261.
\textsuperscript{84} RESTATEMENT (THIRD) OF TORTS, supra note 69, at § 41.
\textsuperscript{85} Garrison Retirement Home, 484 So. 2d at 1259.
\textsuperscript{86} Id. at 1262.
patient are “mutually reinforcing” and should indeed be merged, a notion this Article returns to below.\(^\text{87}\)

Despite the public policy context reinforcing a distinction between professional and family care in the United States, the logic behind the rationale for imposing liability upon persons with mental impairments is equally applicable to informal caregivers. That is, a concern over personal liability and future inheritance creates an incentive for family members to restrain and control a potentially dangerous individual.\(^\text{88}\) However, as Richards observes, United States courts have been reluctant in a family context to endorse this “norm of confinement” as formulated by Light.\(^\text{89}\) In *Emery v. Littlejohn*, the Washington Supreme Court found the defendants not liable after the plaintiff was shot by the defendant’s adult son while he was under the defendant’s care, having been released from a mental institution.\(^\text{90}\) The Court allowed room for a general duty to the public on the part of a “private person having the legal custody and control of a violently insane person with homicidal tendencies” grounding liability for “want of care and restraint” where there is clear evidence that dangerous behavior was foreseeable.\(^\text{91}\) However, the Court was reluctant to articulate even this very high threshold due to the lack of an exact precedent.\(^\text{92}\)

The possibility of informal caregiver liability was present in the (now-superseded) Restatement (Second) of Torts section 319 (1965) relating to persons with “dangerous propensities”:

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.\(^\text{93}\)

Despite this, United States case law has affirmed the very high threshold in *Emery* for liability that arises from the care and control of family members with a mental impairment. To begin with, a duty has been held to

---

\(^{87}\) Richards, *supra* note 76, at 652.

\(^{88}\) *Id.* at 653.

\(^{89}\) *Id.*

\(^{90}\) *Emery v. Littlejohn*, 145 P. 423, 428 (Wash. 1915).

\(^{91}\) *Id.* at 350.

\(^{92}\) *Id.*

arise only where control over the person is assumed voluntarily.\textsuperscript{94} To flesh out what “voluntary” assumption of control might mean in such cases, Richards uses examples from cases that consider whether defendants have voluntarily taken responsibility for a child’s care.\textsuperscript{95} These cases in turn consider the liability of volunteers in employment contexts: the undertaking to brace a wall, say, even where to do so was not itself a duty, brings with it liability to use “reasonable skill and care” in the performance of the work.\textsuperscript{96} A comparable duty also attaches to an undertaking to control and supervise a child beyond a mere invitation to a “social guest.”\textsuperscript{97} The assumption of the duty must also be specific: for example, simply providing one’s home to be used as a residence in a general sense may be insufficient to constitute assumption of the duty.\textsuperscript{98} Furthermore, liability will only proceed from an actual ability to control.\textsuperscript{99} The threshold of liability is then determined largely by whether the caregiver had notice with regard to the threat, which was therefore foreseeable.\textsuperscript{100}

For example, in \textit{Alva v. Cook}, the California Court of Appeals found two sisters not liable when their mentally ill adult brother shot and killed the plaintiff, stating that:

\begin{quote}
In the absence of ultimate facts that [the brother] was dangerous to himself and others at least sufficient to warrant a reasonable assumption that a petition for evaluation or commitment . . . would be granted, we are not ready to equate respondents’ assumption of a moral obligation to a guarantee and indemnification agreement in respect of [the brother’s] conduct on or off respondents’ premises as if he were a dog and to hold that respondents are their brother’s keeper but at their risk.\textsuperscript{101}
\end{quote}

Professor Richards also argues that this high threshold creates no incentive for informal caregivers to voluntarily assume control where there is foreseeable harm, and therefore the greatest risk to the public.\textsuperscript{102} Richards

\begin{footnotesize}
\textsuperscript{94} Richards, \textit{supra} note 76, at 655.
\textsuperscript{95} \textit{Id.} at 655, n.114.
\textsuperscript{96} City of Covington v. Geylor, 19 S.W. 741, 741 (Ky. 1892).
\textsuperscript{97} Zalak v. Carroll, 205 N.E.2d 313, 313 (N.Y. 1965).
\textsuperscript{98} Kaminski v. Town of Fairfield, 578 A.2d 1048, 1052 (Conn. 1990).
\textsuperscript{100} Richards, \textit{supra} note 76, at 655. \textit{See also} Bollinger v. Rader, 69 S.E. 497 (N.C. 1910); Fisher v. Mutimer, 12 N.E.2d 315 (Ill. App. 1938).
\textsuperscript{102} Richards, \textit{supra} note 76, at 658.
\end{footnotesize}
concludes that the right balance of incentives will only exist if caregiver immunity from liability is premised on reasonable measures to protect the public. 103 This also appears to rest on foreseeability, but the onus shifts to the defendant and the threshold for liability would be lower than Emery. Richards cites Irons v. Cole, 104 in which a caregiver was found liable for harm to a third party when a mentally impaired adult family member accessed a gun on the caregiver’s premises. For Richards, the logic of the case should be extended to more commonplace situations, such as where the implement of harm is a vehicle rather than a weapon (readily conceivable in an aging society). 105 The argument is that a caregiver, no matter his or her altruistic motives, only deserves immunity if it can be established that he or she in no way contributed to the harmful act occurring. This logic is evident in section 37 of the Restatement (Third) of Torts: while reaffirming the basic principle that a plaintiff does not have an affirmative duty to prevent harms from a risk not of his or her creation, section 37 clarifies that this is “conditioned on the actor having played no role in facilitating the third party’s conduct, such as by providing a dangerous weapon to an insane individual.” 106

B. The United Kingdom and Australia

While caregiver liability has not been explored in non-United States common law jurisdictions to the same extent, the case law in other jurisdictions contains clues as to how to overcome the doctrinal obstacles to such liability. The allusion in Alva v. Cook above to “my brother’s keeper” refers (through the biblical usage) to a line of cases in the common law, culminating in United Kingdom House of Lords decisions in Home Office v. Dorset Yacht Co. Ltd. 107 and Smith v. Littlewoods Organization Ltd., 108 where a special or proximate relationship, such as control of prisoners or minors, was required before a defendant would, by omission, be liable for the wrongdoing of others. In Smith, Lord Justice Goff held that there is also a general liability where “the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer.” 109

103 Id. at 659.
105 Richards, supra note 76, at 657–58.
106 AM. LAW. INST., supra note 69, at § 37.
109 Id.
The question, therefore, becomes one of whether a care relationship involving dementia falls within one of these special or general exceptions. R v. Stone and R v. Dobinson explored the notion that a defendant may have “assumed” responsibility for the provision of care to the person, which can be contrasted with a mere omission.¹¹⁰ In that case, the Court found two defendants guilty of criminal neglect after failing to provide the “necessaries of life” to a family member over whom they had assumed care. This was a criminal case and the person under care was the victim rather than the agent of harm. Yet this line of jurisprudence provides an analogous basis for tortious liability for the acts of people with dementia to be directed back towards a care provider who has failed to acquire a positive, assumed duty of care.¹¹¹

With regard to the second difference, namely a victim who is a third party, a person who has assumed care could still be culpable on the following basis. Under apportionment of liability principles operating in many common law jurisdictions, if a person with dementia causes harm to another and they are sued, they (or more likely, their legal guardian) could seek to join care providers as defendants to the litigation. In this case, damages typically would be apportioned according to comparative culpability of the person and the caregiver. In the case of harm resulting from the negligence of a person with dementia, the chain of causation linking the negligence of a caregiver in failing to provide adequate care, including taking steps to prevent wandering, for example, would potentially encompass personal liability to third parties. However, the court must be satisfied that the actions of the person with dementia did not constitute novus actus interveniens, i.e. a new intervening act which breaks the chain of causation, and hence disrupts the flow of liability.

There is, therefore, some room in these jurisdictions to develop principles of caregiver liability beyond the high threshold of United States law. Nevertheless, we can summarize that the basic approach in the United States, the United Kingdom, and Australia remains one of imposing liability for accidents upon the immediate actor regardless of mental impairment. Immediate actors are allocated liability largely based on public policy, rather than principle, although these reasons can overlap. Such an assignment of

¹¹¹ Note that the legal elements of criminal negligence are broadly similar to those of civil negligence, namely, existence of a duty of care, a breach of that duty, tested against the standard of the reasonable person’s conduct in the position of the caregiver; and harm caused as a consequence of that breach of duty.
liability regardless of mental impairment is problematic for a number of reasons. First, imposing liability upon persons who may not be able to meet the common “reasonable person” standard is unjust and logically flawed. Second, the policy concerns underpinning many of the judgments adopting this approach convey a “norm of confinement” inconsistent with modern human rights norms. Third, the goal of protecting the public is also neglected because the narrow exceptions to caregiver immunity that do exist are easily avoided by caregivers, especially in those cases where the caregiver is best placed to foresee and prevent the harm. Observers of this system do, however, see potential for improvements given two conditions: first, if caregiving behavior and concern for public safety are conceived of as mutually reinforcing; and second, if greater responsibility is placed on caregivers to justify their immunity from liability by being more mindful to ways in which the environment they create can contribute to accidents occurring.

C. Caregiver Liability in Civil Law Jurisdictions

Unlike the common law, civil law jurisdictions tend to premise responsibility for torts on mental capacity. The origin for many jurisdictions is section 827 of the German BGB: “A person who, in a state of unconsciousness or in a state of pathological mental disturbance precluding free exercise of will, inflicts damage on another person is not responsible for such damage” unless the person “has temporarily induced such a state . . . .” Liability may arise nonetheless under section 829, at least as far as equity between the parties allows, unless liability can be borne under section 832 by a person with a legal “duty to supervise.”

---

112 BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 827, as amended by Article 2 (16) of the statute of 19 February 2007, translation at http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Alemao-BGB-German-Civil-Code-BGB-english-version.pdf (“Exclusion and reduction of responsibility: A person who, in a state of unconsciousness or in a state of pathological mental disturbance precluding free exercise of will, inflicts damage on another person is not responsible for such damage. If he has temporarily induced such a state in himself with alcoholic beverages or similar means, he is then responsible for damage that he unlawfully causes in this state as if he were responsible because of negligence; responsibility does not ensue if he came into this state without fault.”).

113 Id. at § 829 (“A person who, for reasons cited in sections 827 and 828, is not responsible for damage he caused in the instances specified in sections 823 to 826 must nonetheless make compensation for the damage, unless damage compensation can be obtained from a third party with a duty of supervision, to the extent that in the circumstances, including without limitation the circumstances of the parties involved, equity requires indemnification and he is not deprived of the resources needed for reasonable maintenance and to discharge his statutory maintenance duties. . . . Section 832 Liability of a person with a duty of supervision (1) A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. Liability in damages does not apply if he fulfils the
exemption from liability if the supervisor “fulfils the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision.” The policy behind these provisions is one of caregiver liability in principle, with some flexibility to safeguard equity for each of the parties.

Japan adopted and adapted the provisions of the German BGB in the late nineteenth century. The key provision is section 713 of the Civil Code, which states:

A person who has inflicted damages on others while he/she lacks the capacity to appreciate his/her liability for his/her own act due to mental disability shall not be liable to compensate for the same; provided, however, that this shall not apply if he/she has temporarily invited that condition, intentionally or negligently.\(^{114}\)

Like Germany’s BGB, Japan’s section 714(1) imposes liability for third-party harm upon a person with a “legal obligation to supervise” a person without mental capacity. The Japanese sections depart from their German origins in two respects. First, a person without mental capacity is immune from both responsibility and liability. Second, the scope of caregiver liability is apparently broader: section 714(2) also imposes liability upon a person who has assumed supervision on behalf of a person who has the legal obligation to supervise.\(^ {115}\)

Before 2000, case law on the Japanese provisions was relatively settled. A “person with the legal obligation to supervise” included a person with parental authority, an adult guardian, or a spouse.\(^ {116}\) Judicial interpretation of the term had been informed by the pre-1999 Mental Health Act, which

\(^{114}\) 公法 [公法] [Civ. C.] art. 713, translated in (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp (Japan).

\(^ {115}\) Id. art. 714, para. 1 (“In cases where a person without capacity to assume liability is not liable in accordance with the provisions of the preceding two Articles, the person with the legal obligation to supervise the person without capacity to assume liability shall be liable to compensate for damages that the person without capacity to assume liability has inflicted on a third party; provided, however, that this shall not apply if the person who has the obligation to supervise did not fail to perform his/her obligation or if the damages could not have been avoided even if he/she had not failed to perform his/her obligation.”); id. at para. 2 (“A person who supervises a person without capacity to assume liability, on behalf of a person who has the obligation to supervise, shall also assume the liability under the preceding paragraph.”).

imposed certain obligations upon guardians and spouses toward persons with a mental disability, for example to ensure that appropriate treatment was sought. A spouse’s obligation to supervise was also drawn from elsewhere in the Civil Code: “a husband and wife shall live together and provide mutual cooperation and assistance.” This provision implied for cohabiting spouses a mutual duty of “personal supervision,” including a duty to take action when the other spouse loses independence through physical or mental disability, and thus, a duty to supervise. Doctrine also developed with regard to other issues. For example, liability for third-party harm could arise even in the absence of a professional diagnosis of mental impairment where there was a clear and present danger, the person was clearly experiencing a significantly abnormal condition, and in the past had experienced bouts of a similar nature.

Over the past decade, the trajectory of this doctrinal development and the fundamental principles underpinning supervisor liability faced challenges from the advent of the CRPD and reformed guardianship laws, greater prevalence of dementia, continued urbanization and fragmentation of communities, and evolving social values around care responsibilities. An opportunity to revisit these principles arose in a recent landmark case exploring supervisor liability for a train accident. The following Part examines this case in detail.

IV. THE NAGOYA TRAIN ACCIDENT CASE

In December 2007, a ninety-one-year-old man who suffered advanced dementia left his residence in Aichi Prefecture unnoticed by his daughter-in-

117 Seishin hoken oyobi seishin shōgaisha fukushi ni kansuru hōritsu [Act on Mental Health and Welfare for the Mentally Disabled], Law No. 123 of 1950, art. 20, amended by Law No. 615 of 2016. As discussed below, while this provision was deleted in 2011 to recognize the untenable nature of this duty in an ageing society, it was current law at the time of the incident in this case. See Memorandum, Hogosha seido, nyūin seido ni kansuru sagyō chīmu [Work Team on the Caregiver and Hospital Admission Systems], Kōsei Rōdōshō [Ministry of Health, Labour and Welfare], Hogosha seido no minaoshi ni tsuite (kakuron goto no kentō) [On the Reforms to the Caregiver System (Discussion of Each Argument)] (Jan. 7, 2011), http://www.mhlw.go.jp/stf/shingi/2r985200000101rg-att/2r985200000101z5.pdf.
118 See Act on Mental Health and Welfare for the Mentally Disabled, art. 22, para. 1 (imposing a duty to protect property interests and ensure medical treatment is given with regard to a person with mental disability), amended by Law No. 615 of 2016; id. para. 2 (requiring cooperation with doctors to ensure appropriate examination and diagnosis), amended by Law No. 615 of 2016.
119 MNPÖ art. 752, translated in (JLT DS), http://www.japaneselawtranslation.go.jp.
120 As well as notions of “good faith” and “common reason” (jōri) as applied to the marriage relationship.
121 See Hei 25 (ね 25) no. 752, SAIBANSHO WEB at 20–21.
122 Memorandum, Work Team on the Caregiver and Hospital Admission Systems, supra note 117, at 5.
law, who was engaged in housework, and his wife, who had momentarily dozed off. An hour later, having managed to board a train at a nearby station, he entered the grounds of another railway station and made his way through an unlocked gate to the tracks, where he collided with a passing train and was killed. In 2013, a single judge of the Nagoya District Court held that the man’s eighty-five-year-old wife and his adult son were liable for economic harm (¥7.1 million) caused to the railway, mainly the costs associated with arranging alternate routes with different train companies for affected passengers.\(^{123}\)

In 2014, a three-member panel of the Nagoya High Court upheld the earlier ruling, albeit only with regard to the appellant wife’s liability, which was reduced by fifty percent due to contributory negligence on the part of the respondent rail company.\(^{124}\) In 2016, the five-member 3rd Petty Bench of the Supreme Court of Japan overruled these judgments, finding neither the wife nor son liable.\(^{125}\) The following section outlines the reasoning adopted in the first and final appeal decisions.

\[\textit{A. High Court Decision}\]

To begin with, the Nagoya High Court found that the fatal collision was not specifically foreseeable, which precluded a finding of personal liability for either the wife or son under section 709. Wandering itself was foreseeable due to past behavior: the man had gone missing on two occasions in the two years prior and had once required assistance from the police to return home. At other times, he expressed a desire to go to work, despite having retired many years earlier. The accident itself was nonetheless not specifically foreseeable because the man had never attempted to board a train, enter a dangerous area such as train tracks, or even enter somebody else’s property without permission during a wandering incident.

Second, the Court explored the possibility of “supervisor liability” under section 714, which is capable of broader application by the courts due to the apparent absence of the criterion of foreseeability. This is because, according to the Court, this form of liability is not conceived upon direct fault for the harm, but is instead something akin to vicarious liability. The “fault” in supervisor liability is instead that of being remiss in performing the duty of


\(^{124}\) Hei 25 (ね 悪) no. 752, SAIBANSHO WEB at 1.

supervision. Moreover, being remiss is presumed by virtue of harm having occurred; the burden of proof to displace the presumption therefore lies with the supervisor.\textsuperscript{126} At the same time, the Court noted countervailing policy factors underpinning the Civil Code, including fair allocation of loss and liability in tort that is, in principle, fault-based. These factors appear to have influenced the Court to nevertheless apply the criterion of foreseeability, at least to the question of whether the presumption of failed supervision could be rebutted in this case.

As a preliminary issue, the High Court affirmed a spouse’s legal duty to supervise and rejected that the wife was excused through her own care needs (she received an official assessment of need for low-level care in early 2006 for physical disabilities). The Court held that supervision is qualitatively different than actual care and, according to the Court, she was capable of undertaking the role of supervisor of her husband’s care due to the support afforded her. This included the assistance of the couple’s daughter-in-law, who had been the primary daytime caregiver since 2006. It also included intermittent professional in-home care and institutional day care six days a week funded by national nursing-care insurance. In contrast, the Court found that the couple’s adult son had no legal duty to supervise. This was because, unlike a spouse, the duty in the Civil Code to support a “lineal relative by blood”\textsuperscript{127} was of an economic nature only. Further, the son commuted from another city and did not live close enough to assume supervision on behalf of his mother.

The central issue was, therefore, whether the wife could, as required by section 714, rebut the presumption of liability by demonstrating either that she was not remiss in fulfilling her supervisory duty or that the harm was unavoidable. The Court held that the wife was remiss in her duty and was thus liable. This was because there was sufficient unpredictability in the man’s behavior to create a general, foreseeable, and preventable risk that he would depart from his established patterns of behavior and meet with or cause harm as a result of wandering. Furthermore, while the family had installed a sensor at the front door to monitor the man’s movements, the man left by a different door on the day of the accident. This door could have been monitored readily (according to the Court) by replacing the battery in another

\textsuperscript{126} This presumption can only be overturned if the supervisor can establish that he or she was not remiss in performing the caregiver’s duty or that the harm would have occurred in any case. See MINPÔ art. 714, para. 1.

\textsuperscript{127} Id. art. 877, para. 1. The provision also includes a duty to siblings.
sensor that had once been used as a shopfront bell and had been disconnected as a disturbance.

Precisely because of the strict aspect of caregiver liability in Japan, there was no legal mechanism in the Civil Code for claiming contributory liability.\textsuperscript{128} Nevertheless, the Court fashioned a remedy that divided the loss equally between the rail company and the wife. It invoked the spirit of fair distribution of loss that the Court saw as underpinning tort law. This spirit is manifested in provisions of the Civil Code that were not directly applicable, specifically section 722(2), which provides for reduced liability for contributory negligence in standard (i.e. foreseeable) negligence cases. Furthermore, the Court engaged in a contextual assessment of fairness. This included weighing the wife’s reasonable economic situation,\textsuperscript{129} her substantial (though ultimately inadequate) attempt to acquit her duty of supervision, the railway’s significant wealth,\textsuperscript{130} and the corporate responsibility of the railway to aspire beyond legal minimums to standards that promote the safety of vulnerable members of society such as children and those with dementia.

\textbf{B. Supreme Court Decision}

The Supreme Court delivered a joint judgment (Justices Kiuchi, Yamazaki, Ohashi) with an addendum (written by Justice Kiuchi), and separate judgments written by Justice Otani and presiding Justice Okabe. There was consensus that neither the wife nor the adult son was liable. However, there was disagreement over the question of the existence of a duty to supervise, which means the principles of caregiver liability remain unresolved in certain respects.

The joint judgment held that a spouse has no legal duty to supervise, mainly because this duty cannot be founded in a spouse’s duty to provide mutual support, which is not directed at third parties. Justice Kiuchi held that the legal framework attributing a legal duty to supervise to a spouse (or for that matter an adult guardian) has changed, which justifies a departure from precedent on this point. Prior to reforms in 1999, a person automatically became a guardian upon a declaration of “mental incompetence” over his or

\begin{itemize}
\item[128] The existence of a fence, albeit unlocked, did constitute sufficient measures for the rail company to satisfy its duty of safety, thus preventing any counterclaim. See Hei 26 (ju) no. 1434, 70 MINSHŪ.
\item[129] This included several properties and ¥50 million in savings belonging to her deceased husband. See Hei 25 (ね コ) no. 752, SAIBANSHO WEB at 41.
\item[130] JR East is Japan’s leading rail company with capital stock of over ¥100 billion at the time. Id. at 42.
\end{itemize}
her spouse.\textsuperscript{131} As guardian, the spouse had a duty to ensure appropriate treatment and was the primary person responsible under the Mental Health Act to undertake the duties of a “protector” (hogosha), including supervision to prevent harm to self and others.\textsuperscript{132} Since several anti-paternalistic amendments to the Mental Health Act in 1999, a “protector” must still ensure that a person with a mental illness or disability receives treatment, but there is no longer an obligation to prevent harm to self or others. Furthermore, a spouse is no longer automatically appointed guardian. Indeed, alongside the new guardianship regime and demographic changes, the percentage of non-family members such as legal professionals appointed guardian has increased from 16% in 2003 to approximately 66% in 2014.\textsuperscript{133}

The judgment had implications for adult guardians as well as spouses. An adult guardian, according to Justice Kiuchi, bears merely an aspirational duty to ensure appropriate medical treatment and nursing care. Although the guardianship reforms in 2000 created new duties to consider the views, lifestyle, and physical or mental situation of the protected person,\textsuperscript{134} these are guidelines for making decisions rather than a requirement to supervise. In contrast, supervision—including that aimed at preventing harm to third parties—is an activity of a non-legal nature that falls beyond the scope of a guardian’s duties and authority. Justice Otani disagreed on this point. How, he asked, can a person assume a legal duty on behalf of another if there is no party (i.e. a guardian) that can be designated by law to bear that duty? Justice Otani conceded that the actual labor of supervision has, since the 1999 reforms, been expressly excluded from the scope of adult guardianship. Yet there remains some scope for decision-making of a legal nature—such as contracting with public and private nursing service providers—to constitute a duty of supervision. It is through this creation of a care plan and environment that a framework for preventing harm to third parties emerges. Furthermore, for Justice Otani, the duty of supervision is given its contours by factors such as the duty of good management imposed upon guardians in the Civil Code.\textsuperscript{135} This in turn explains how the concept of fault can be reintroduced into caregiver liability, where the precedents had been moving effectively towards no-fault liability.

\textsuperscript{131} MNPÔ arts. 840, 843, amended by Law No. 94 of 2013.
\textsuperscript{132} See generally Act on Mental Health and Welfare for the Mentally Disabled, Law No. 123 of 1950 (Japan).
\textsuperscript{134} MNPÔ art. 858.
\textsuperscript{135} See id. arts. 644, 852.
Justice Kiuchi, however, proposed an alternative argument to counter the issues raised by Justice Otani. Specifically, Justice Kiuchi asserted that managers of care institutions have a legal duty to supervise due to their limited authority to restrain, which is granted under the Mental Health Act. Indeed, he noted that the potential incentives to restrain are an additional reason to not regard family members and guardians as bearing a legal duty to supervise. If the law imposed on guardians a duty to protect third parties, not only would the law create an excessive burden on protectors by requiring constant attention, it would also be inimical to the best interest of the protected.

Having established that a spouse does not by law bear a duty to supervise, the joint judgment laid out the principles defining an assumed duty to supervise. It held that the liability in section 714 could arise if, in the context of the relationship and involvement with the person without mental capacity, there were special circumstances where the supervisor’s duty had been assumed in a manner that exceeded simple supervisory activity and was directed at preventing harm to third parties. This question is to be resolved objectively by:

[T]ak[ing] into comprehensive consideration various circumstances . . . including whether said person has a relationship of being a relative of the mentally disabled person and how close their relationship is, whether they live together and how frequently they have daily contact, how said person is involved in the administration of the property of the mentally disabled person and other circumstances concerning said person’s involvement in the affairs related to the mentally disabled person, the physical and mental conditions of the mentally disabled person and whether and how the mentally disabled person shows problematic behavior in everyday life, and the actual care given by said person to the mentally disabled person depending on these factors.136

These criteria are to be weighed “from the viewpoint of equity” while considering whether “it is possible and easy for said person to conduct supervision.”137 To counteract the incentives to restrain that would otherwise exist, Justice Kiuchi emphasized that the degree of difficulty entailed in the

137 Id.
supervision is a crucial factor. Applying these criteria to the wife and adult son, the joint judgment found that there were no such special circumstances because the wife could not be expected to prevent harm to third parties due to her own physical disability and the son was not physically proximate.

Justices Okabe and Otani in separate judgments disagreed with the joint judgment as to whether the adult son had assumed the duty to supervise, but found that this duty had been met anyway. For Justice Okabe, supervision could be assumed by creating a care plan and environment whereby harm to third parties is avoided and the day-to-day restraint which is necessarily part of supervision is delegated to others. The care plan in this case provided supervised outlets for the desire to wander through daily outings to either institutional care or surrounding streets accompanied by the wife or daughter-in-law. Rooted in a perceived sense of responsibility as eldest son, the adult son was centrally involved in this care plan. Moreover, it was apparent that, by trialing restraints in the form of locking outer doors and installing sensors, the adult son had made efforts to prevent harm to others. Applying the criteria of the joint judgment, these factors amounted to special circumstances to the effect that the adult son had assumed the duty of supervision. Nevertheless, Justice Okabe held that this duty was acquitted. The criteria to be used in determining this includes a variety of factors, such as foreseeability and the scope of the ability to prevent the harm. As a non-professional, the standard of care for the adult son was that of an ordinary reasonable person. While the wandering was foreseeable, it was an unreasonable demand to require that he install functioning sensors at the exits to the house. The adult son did not therefore neglect his duty to supervise.

Justice Otani, who regarded an adult guardian as having a duty to supervise, agreed with Justice Okabe’s conclusion. Considering the criteria typically used by family courts upon appointing an adult guardian (which were influenced by Civil Code obligations of mutual care within the family), the adult son was a prime candidate. The son was in the position to arrange a care plan and that the son did indeed play a central role in this respect regardless of his lack of proximity. The son could therefore be said to have assumed the duty of supervision. The content of this duty aligns with the supervisory duty of an adult guardian. That the scope of this duty is narrower than the pre-2000 position will, Justice Otani added, go some way to reconciling the principles to be applied here with contemporary social expectations. On this standard, the son could be said to have been exempted from the presumption. Not maintaining a sensor, which was originally
intended for customers anyway, did not detract from what was a praiseworthy care plan and environment.

Ultimately, the Nagoya Train Accident Case held that the caregivers in the case were not liable. However, the path taken to reach this conclusion differed in a number of respects among the judges. While in the domestic context, this leaves several points of law unsettled, the diversity of opinion provides greater depth for comparison with current and potential common law approaches to the issue.

V. A COMPARATIVE ANALYSIS OF CAREGIVER LIABILITY

The juxtaposition of common law and civil law approaches to the liability in tort of persons with mental impairment and their caregivers highlights difficult and unresolved questions of principle, policy, and doctrine. The imposition of civil liability on a person who is mentally impaired is problematic, but equally so is immunity from liability given presumptions of capacity under the CRPD. However that question is resolved, the key follow-up question for any jurisdiction is the justification, if any, of attributing sole or joint liability to a caregiver. This liability can be personal or derivative, flowing from either a legal or assumed duty of supervision. The content of this duty is also contestable in its scope toward the mentally impaired person and, most controversially, toward third parties.

A. Legal or Assumed Duty?

The location of these principles within a code seems to place a considerable restraint on doctrinal development of the issue in civil law jurisdictions. However, this difference should not be overstated. Case law can develop codes in unexpected and contested directions. The reasoning of the different judges in the Japanese judicial system above is reminiscent of the common law uncertainty evident in Emery, for example, where the Court was undecided on whether parents of an adult child were liable for third-party harm based on their parental status or because they assumed supervision of the adult child upon his release from an institution.138 It would seem that in both the United States and the United Kingdom, there is potential for liability in either situation. In Japan, the wording of the provisions requires that analysis begins with identifying the person with a legal duty to supervise and

then, if this duty cannot be acquitted, a person who has assumed the duty. Yet opinions within the Japanese Supreme Court diverge as to who, if anybody, bears this legal duty.

The justifications for making no assumption that a spouse or other family member (other than a parent of a minor) bears a supervisory or caregiver’s duty are consistent with contemporary values shared across jurisdictions. Justice Kiuchi’s reasoning for regarding care institutions authorized to restrain as having this duty are compelling, in that informal caregivers and guardians should not be regarded as wielding this authority (though institutional authority too is increasingly subject to scrutiny). In an age where volunteers and professionals are filling vacuums in families caused by demographic change, the view that an adult guardian should bear a legal supervisory duty, albeit in a narrower sense than in the past, also holds some merit. Ultimately, however, there may not be a care institution or guardian available. In many cases, therefore, the analysis will automatically begin with whether there is a party who can be said to have assumed a duty of supervision.

B. Duty to Third Parties?

If the assumption of a duty of supervision is the primary basis for third-party liability, another unresolved question is how precisely a duty to supervise generates a protective role toward third parties. It may be fruitful to draw an analogy with the liability of parents for the acts of minors, and indeed this is regulated by the same provision in Japan (section 714) because, depending on the child’s maturity, a minor may not have the mental capacity required for tortious liability. The Supreme Court of Japan held in 2015 that a parent’s duty of supervision includes a duty to direct the child to take care not to cause harm to others when beyond the parent’s direct supervision. The parent meets this duty, and therefore avoids parental liability, if the act that causes harm is not generally considered dangerous (in that case, kicking a soccer ball in an enclosed area) unless there are special circumstances that give rise to a specific foreseeable danger. Yet the analogy between parents of minors and caregivers of mentally impaired adults breaks down due to the differences between a developing child, who becomes a full citizen under the
tutelage of his or her parents, and a person with mental impairment, who is not clearly under any tutelage at all and is certainly not an “ex-citizen.”

As highlighted from the analysis of the common law position in Part I, one argument for how a non-paternalistic supervisory duty could generate a protective duty to third parties is that the two duties are inextricably connected. At the very least, the duties overlap: where there is an apparent danger posed by a person with a mental impairment, taking protective action such as notifying authorities or taking the mentally impaired person to a doctor may meet both duties simultaneously. This position is reflected in the Nagoya High Court’s rejection of a stand-alone duty to third parties. Rather, preventing trespass and other third-party property violations was related to the duty to prevent harm to the mentally impaired person in cases where that person has little spatial awareness and expresses a desire to wander. Not causing harm to another can also be considered one of the mentally impaired person’s interests in both of Ronald Dworkin’s senses: experiential, that is in the present moment, and critical, namely authoring one’s own life.

The theoretical interdependence of these duties is also supported in the adult guardianship literature. Associate Professor Bruce Jennings provides a choice of models to conceptualize restrictions on the autonomy of sufferers of dementia. The first is the Public Health Model, “a regulatory basis in which the interests of others in not being harmed override the liberty interest of the individual.” This model is consistent with Mill’s ‘harm principle’ that only harm to others justifies state interference with individual liberty and involves the concomitant difficulties in defining harm. More concerning for Jennings, given the fluctuating nature of an individual’s dementia, is the tendency of this model to view persons “categorically rather than situationally” due to the “large populations, statistical risks, and impersonal factors” inherent in its focus.

139 For accidents in the presence of the parent, it is more likely that direct liability will arise for the parent under MinPö art. 709. This is also true for caretakers and adult guardians (in common law jurisdictions), but does not assist in matters such as the Nagoya Train Accident Case where wandering was involved.


141 Associate Professor Bruce Jennings is an adjunct professor in the Center for Biomedical Ethics and Society and the Department of Health Policy at the Vanderbilt Medical Center.

142 Jennings, supra note 31, at 599.

143 Id. at 598.

144 Id. at 602.
The second model is the Guardianship Model. Traditionally, this legal tool for substituted decision making has come into effect upon the loss of an individual’s capacity. While it has traditionally been justified by paternalism towards the individual rather than concern for public welfare, it can have an indirect effect on public safety. Yet Jennings is skeptical of this model as a means of locating appropriate interventions in the lives of persons with dementia in the name of public safety because this model tends to view capacity as an all or nothing concept. In addition to the danger of overriding autonomy excessively in the name of “best interests,” Jennings argues that the model is less useful for problematic behaviors at early stages of dementia.

In many respects, the Japanese position embodies the Guardianship Model. Yet one might think that it was instead informed by a Public Health Model if one were to go by the reaction of the mass media and care professionals to the High Court decision. It was widely argued that the ruling would push dementia sufferers back into institutional care or create incentives for excessive physical restraints at home, and further isolation of families already suffering the stigma of dementia. Of the estimated 4.4 million dementia sufferers in Japan, 2.8 million use services under the new Long-Term Care Insurance, and half of these users reside outside of institutional care in the community—a rapidly growing proportion.

145 Id. at 605.
146 Id.
147 Id. at 607.
148 Id. at 608.
150 Press Release, Japense Soc’y of Neurology et al., supra note 149.
152 Press Release, Japanese Soc’y of Neurology et al., supra note 149.
is not always a matter of choice. The waiting list for “special” aged care nursing homes, entry to which has strict means and merits tests, has reportedly reached 500,000 people. In this context, sections of the media criticized the High Court for failing to demonstrate an understanding of the complexity of caring for sufferers of dementia—which includes fluctuating capacity, challenging behaviors such as wandering, and the resulting strain—and was therefore unrealistic in expecting 24-hour supervision on the part of a caregiver for the sake of public safety.

Some of these criticisms were misdirected. The High Court’s precise words were that it is “necessary to have an awareness of the [person’s] activities to the extent that those activities do not cause physical harm were the person to disappear unnoticed.” While this seems to endorse the use of monitoring technologies such as sensors, it was tempered by a proportionality test focused on the interests of the person under care. The High Court held that the permissible extent to which the freedom of a person “without mental capacity” could be restrained by a caregiver to prevent harm is “reasonable methods to oversee [the person’s] behavior, and restrain or supervise this behavior to the extent necessary, in order to prevent physical harm to that person from unsupervised wandering.” This point was not overruled on appeal: Justice Okabe of the Supreme Court also assumed that day-to-day restraint is necessarily part of protective supervision.

The Guardianship Model is therefore consistent with the notion that third-party liability is premised on protection of the mentally impaired person. However, as is evident in the Nagoya Train Accident Case, this model can signal a norm of confinement. Furthermore, regardless of any test of proportionality, the Guardianship Model tends to employ a binary concept of capacity that is divorced from the question of individual functionality in a specific context.

---

154 Ninchishō haikai jiko, chiiki de sasaeru mimamoru shikumi o [Dementia Wandering Accidents: Towards a System of Support and Protection in the Community], KAHOKU SHINPO, June 2, 2014.


156 See Opinion Letter, Alzheimer’s Ass’n Japan, supra note 151.


158 Id.
The problem is, therefore, whether third-party liability can be generated through a caring relationship that is not premised on paternalism, a denial of capacity, and potentially confinement. Such liability might be justified under the Conservator Model, which focuses on the care relationship and the importance of creating the support for a mentally impaired person to continue to flourish. This support may entail providing alternative avenues to express individual identity to those that have become problematic behaviors (for example, driving, cooking, or wandering).159 One of the advantages of this model, according to Jennings, is that it creates opportunities for greater government, professional, and community involvement in activities that reintegrate persons with dementia into society.160 This has inherent value, may slow the onset of dementia,161 and can promote public safety through individual care and support. The Conservator Model is the model most capable of promoting public safety in a manner that is consistent with modern notions of supported decision making and the rights of persons with disabilities.

A central focus upon the care relationship and the person with a mental impairment has two implications for caregiver liability. First, caregiver duties should proceed from the fact of the relationship rather than any preconceived, anachronistic notion of who should provide that care. The duty should therefore be assumed voluntarily, independent of any statutory duty to provide care. Second, interventions should be supportive rather than motivated by mere containment. This in turn has implications for the use of psychotropic drugs and physical restraints, including new technologies such as GPS bracelets and surveillance via the Internet that, where involuntary, represent significant incursions on autonomy and may have counter-productive therapeutic outcomes.162 While an objection may be that a mentally impaired person could pose a threat to public safety, authority to restrain would lie instead in its standard repository, namely the police and like bodies, authorized (and restricted) by law for the specific purpose of preventing imminent harm to others.163 On this point, Richards predicts that greater

159 Jennings, supra note 31, at 617.
160 Id. at 618.
163 Richards, supra note 76, at 659.
incidence of accidents would likely create the political conditions for police to be resourced more adequately to perform this role.\textsuperscript{164}

In addition to adequately resourced police, the Conservator Model cannot operate without other social supports. This includes government programs providing services and education to facilitate a higher level of function in the community on the part of persons with mental impairment and greater capacity in the community for identification and management of risks, role-allocation, and decision-making processes relating to care and supervision.\textsuperscript{165} Civil society, businesses, and local governments can play important roles. For example, in December 2013, Fukuoka City established a “wandering elderly search e-mail” (haikai kōreisha sagashite mēru) system calling on citizens to assist in searching for missing persons. As of 2014, there were 2793 volunteers and 571 businesses registered.\textsuperscript{166} As of 2016, about half of Japan’s local government authorities have signed agreements with consumer co-operatives to enlist their efforts in keeping an eye on their members in the community with dementia.\textsuperscript{167} Further public support of such programs may be needed to ensure their viability and instigation where they cannot easily be expected to emerge spontaneously at a community level.\textsuperscript{168} As of 2016, about half of Japan’s local government authorities have signed agreements with consumer co-operatives to enlist their efforts in keeping an eye on their members in the community with dementia.\textsuperscript{167} Further public support of such programs may be needed to ensure their viability and instigation where they cannot easily be expected to emerge spontaneously at a community level.\textsuperscript{168} And yet these incipient programs demonstrate that, given the right environment, problematized behaviors such as wandering can be transformed into legitimate, purposeful behaviors that may obviate the need for restraints much of the time.

In a sense, the growing supportive environment provided by both public and private bodies is a partial rediscovery of traditional family and communal bonds that performed a protective function in the past, the loss of which is the heart of the problem, rather than dementia itself. This is not to suggest that the considerable social dislocation that has occurred through demographic change and urbanization in post-industrial societies can be reversed. The possibility of modern collective approaches to behaviors such as wandering

\textsuperscript{164} Id.


\textsuperscript{166} Ninchishō haikai jiko ni baishō meirei: shakai de mimamoru taisei kyuumu [Compensation Order in Dementia Wandering Accident: Urgent Need for Approach Where Society Watches Over], NISHI NIPPON SHINBUN (May 1, 2014), http://www.nishinippon.co.jp/feature/life_topics/article/85676 [hereinafter Compensation Order]. Kushiro City in Hokkaido is another example of such a network enlisting the help of taxi drivers and others. See Record 12,000 people with dementia reported missing in Japan in 2015, JAPAN TIMES (June 16, 2016).

\textsuperscript{167} Compensation Order, supra note 166.

\textsuperscript{168} Id.
does, however, have a bearing on questions of fairness and reasonableness. For example, there is a growing body of law in Japan addressing accidents suffered by the elderly and those with disabilities.\textsuperscript{169} The trend is for courts to impose reasonable standards of safety on everyday facilities, products, and residences based on the diverse level of physical and mental ability of those using the services.\textsuperscript{170} An important landmark in this respect was the Japanese Diet’s enactment in 2013 of the Act on the Elimination of Disability Discrimination.\textsuperscript{171} This evolving expectation that society should be livable for all persons, even the physically and mentally infirm, should also inform the level of restraint required to acquit a caregiver’s duty. There are echoes of this view in the Nagoya High Court’s remarks on the social responsibility of the railway company to facilitate a safe environment for all.

The Conservator Model shifts the focus to prevention rather than redress, but accidents will sometimes occur nonetheless. In such cases, tort law may be the least efficient and equitable form of dispute resolution. The arguments for retaining tort law as a mechanism for compensating negligent harm—such as emphasizing the deterrent effect or the moral aspect of fault—are weaker, just as the arguments for alternative mechanisms better equipped to provide compensation are stronger. Litigation trends in Japan reflect a growing awareness that dementia in particular creates challenges for an adversarial approach. On the one hand, JR Kyushu and Nishi Nippon Railway have stated that while they will respond to each case individually, in principle they will claim for damages for train accidents because it is impractical for the railways to determine whether a passenger has dementia or not.\textsuperscript{172} On the other hand, in 2007, Kanrin City in Gunma Prefecture decided not to claim for costs against a family amounting to 10 million yen in living costs over

\textsuperscript{169} See, e.g., Kamemoto Kazuhiko et al., Kōreika shakai ni muketa jūtaku, ijū kankyō taisaku [Housing and Living Environment Policies for an Aging Society], in Shōshika, kōreika to sono taisaku [DECLINING BIRTHRATE, AGING POPULATION AND THEIR COUNTERMEASURES] 184 (Kokuritsu Kokkai Toshokan Chōsa oyobi Rippō Kōsakyoku eds., 2005).

\textsuperscript{170} See Masuda Jun, supra note 24, at 44–63 (collecting cases). For an incisive review of broader shifts in product liability in Japan, see Luke Nottage, PRODUCT SAFETY AND LIABILITY LAW IN JAPAN: FROM MINAMATA TO MAD COWS (Routledge 2004).

\textsuperscript{171} Shōgai o riyū to suru sabetsu no kaishō no suishin ni kansuru hōritsu [Act for Eliminating Discrimination Against Persons with Disabilities], Law No. 65 of 2013.

\textsuperscript{172} Compensation Order, supra note 166. There are parallels with a policy adopted by some railways of demanding compensation from bereaved families where a person has committed suicide by moving train, presumably sharing the questionable notion that this sends incentives to individuals and families who may be able to prevent such incidents. See, e.g., Heranai tetsudō jisatsu: izoku e no songai baishō wa “yokushiryoku” ni natte iru no ka? [No Decline in Railway Suicides: Does Seeking Damages from the Bereaved Act as “Deterrence”?], J-CAST NYŪSU, (Oct. 6, 2013, 4:00 PM), http://www.j-cast.com/2013/10/06185192.html?p=all.
seven years for the institutional care of a woman with dementia while her identity remained unknown. The Mayor explained that the decision not to enforce filial duties in the Civil Code was taken from a “humanistic perspective” (jindōteki kenchi) and the view that dementia was a collective problem. Alternatively, where fairness demands compensation, some commentators have proposed the use of alternative dispute resolution mechanisms such as conciliation as a future alternative to litigation. A similar trend can be seen in criminal law, especially as prisons become populated increasingly with the elderly. For example, in a 2013 shoplifting case, the accused, who suffered dementia, was found not guilty and prosecutors opted not to appeal the District Court’s verdict.

As an alternative means of redress, socialized mechanisms for compensation like no-fault liability insurance schemes may obviate the unenviable task for courts of allocating loss among victims, mentally impaired tortfeasors, and their caregivers. A state-sponsored or cooperative insurance system would also provide redress for victims, and would be justified by the fact that dementia is a risk faced by every member of the community. In many jurisdictions it is already possible to contract for individual compensation liability insurance as part of motor vehicle and disaster insurance. However, some argue that risk-sharing regimes at a public and community level should be considered because it is not always clear whether events such as railway accidents are covered and the commercial viability of these schemes could be threatened if claimants increased proportionately to the expected increase in dementia. Cooperative insurance schemes that exist for people with intellectual disabilities in Japan could be a suitable model. Alternatively, funds could be dedicated from state welfare schemes, such as the Japanese Long-Term Nursing Insurance, just as they are for funding adult guardianship promotion activities.

---

173 Where is the Justice, supra note 149.
174 Id.
175 Id. In Japan, conciliation is presided over by a conciliation committee belonging to the family court comprising a judge and two conciliation councillors. It is a common, non-binding first step towards litigation.
177 Id. at 3.
178 Id.
180 As of March 2016, the ruling coalition parties are exploring this very possibility. State Compensation Fund Eyed for Damages Caused by People with Dementia, JAPAN TIMES (Mar. 14, 2016).
VI. CONCLUSION

As modern societies age, it is inevitable that accidents involving persons with dementia will increase and come before the courts. In many cases, the solution will lie outside the judicial system, whether through preventative strategies such as collective community support and education for caregivers, or solutions that redistribute harm collectively through means such as insurance. Without these alternatives, tort law will remain an option for resolving civil disputes where a mentally impaired person has caused harm. The Conservator Model, with its focus on the care relationship and reintegration into the community, may allow for third-party liability to be derived from a relationship of care or supervision.

The Article argues that this form of liability should be considered, but only under the following conditions. First, an assessment of liability should presume that the mentally impaired person has the capacity for responsibility, but that other parties have a role in supporting the person to exercise this capacity. Liability should flow from this supportive role, rather than a protective duty. Caregiver liability should be premised upon the notion that preventing third-party harm is integral to this supportive care relationship. Second, caregiver liability should only arise where a person has voluntarily assumed this supervisory role and is, as a result, in a unique position to assess and identify risks. Third, liability should arise not from a failure to restrain, but only from a failure to take steps to avoid potentially dangerous behaviors through support, diversions, or contacting the authorities in extreme cases. Fourth, liability should be premised on a supportive external care and living environment in the community even where this does not yet exist. Finally, the question of whether a caregiver has breached his or her duty of care could draw from the broad contextual criteria employed by the Supreme Court of Japan as applied to the particular facts. This would ensure a role for community standards to interact with legal tests of proportionality in a way that would likely place an appropriately high threshold on establishing caregiver liability. A flexible model of liability predicated on a subjective appraisal of the mentally impaired person’s capacity and the potential for some form of caregiver liability provides the best among problematic candidates for compensation of victims for the acts of persons with a mental impairment such as wandering. Caregiver liability should, however, be premised upon the central position of the rights and interests of the person under care, the voluntariness of the care relationship, and a standard of care
that anticipates collective support for caregivers in the community, obviating the need for restraints in the name of paternalism or public safety.