

SUBJECTIVIZING THE NEGLIGENCE REASONABLE PERSON STANDARD FOR PERSONS WITH MENTAL DISABILITIES

ABSTRACT

Hiding under the guise of the fundamental purposes of tort law, the theory of negligence in the United States holds defendants with mental disabilities liable for their actions despite the real possibility that they may be incapable of exercising the required level of care. While individuals with mental disabilities are required to exercise the same level of care as the reasonable, prudent person under the circumstances, the law allows concessions for children and individuals with physical disabilities. For these exceptions, the age and intelligence or physical disability of the defendant are considered part of the circumstances under which the defendant must exercise care. Courts and commentators provide many public policy arguments for why the subjective standard is necessary for children and those with physical disabilities; however, many of the arguments supporting the exceptions are applicable to defendants with mental disabilities.

Though the law is intended to provide compensation to injured parties, it strongly disfavors holding someone liable for actions they cannot control. Accordingly, this Comment proposes subjectivizing the reasonable person standard for defendants with mental disabilities to consider how their mental disabilities affect their capacity to act reasonably. As support for a subjective standard, this Comment draws parallels to contributory negligence and tort liability in other countries where individuals are not expected to exercise a level of care that they are incapable of. Additionally, this Comment urges that the societal and scientific understanding of mental disabilities no longer supports the traditional policy reasons for holding individuals with mental disabilities liable for torts without consideration of their ability to exercise the required level of care.

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INTRODUCTION

The reasonable person standard in negligence law does not provide any concessions for individuals with mental disabilities.¹ A defendant with a mental disability is required to exercise the same standard of care as the reasonable person of average intelligence and prudence under the circumstances;² this standard fails to consider that an individual with a mental disability may not have the mental capacity to conform their actions to that level of care.³ Consider a situation where a defendant used a machine and caused injuries to a plaintiff that could have been avoided if the defendant had been able to comprehend a warning sign on the machinery. However, the defendant has a mental disability that rendered it impossible to comprehend the warning and take mitigating actions to avoid causing injuries. Under the current standard, the defendant would be held liable despite their innocence with regard to intent to cause harm or ability to understand the possible repercussions of their actions.⁴ Given this possible situation where a defendant may not have the capacity to conform to the required standard of care but is nevertheless expected to, the objective reasonable person standard should be subjectivized to consider individuals' mental disabilities and how those particular mental disabilities impact their ability to meet the expected standard of care.

1. William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 52-53 (1960).

2. *Id.*

3. See Kristin Harlow, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO STATE L.J. 1733, 1746 (2007).

4. *Id.* at 1745-46.

Prior to the twentieth century, the United States had a longstanding history of treating those with mental disabilities as “unhealthy, defective and deviant,” and society neither respected these individuals nor treated them as human.⁵ The “fear” around persons with mental disabilities was so severe that, in the late 1800s, many considered people with mental disabilities a threat to society and believed the only way to “protect society” was to segregate them or sterilize them to prevent reproduction.⁶ Despite the historical misunderstanding and biases against individuals with mental disabilities, society’s perception began to shift in the early 1900s.⁷ However, a corresponding shift in the law did not follow until nearly a century later with two of the biggest and most prominent pushes in the Disability rights movement, the 1990 Americans with Disabilities Act (ADA)⁸ and the ADA Amendments Act of 2008.⁹

This transition to a more positive societal attitude toward those with mental disabilities is driven in part by scientific advancements and the substantial number of Americans that have some form of disabling condition.¹⁰ Given the recent push for disability rights and a better societal understanding around mental disability,¹¹ questioning why there is not a stronger push toward advocating for a subjective standard in tort liability for those with mental disabilities is appropriate.

In determining tort negligence, the current rule in the United States is that individuals with mental disabilities are held to the same standard of care as a reasonably prudent or ordinary person.¹² This Comment proposes subjectivizing the reasonable person standard for individuals with mental disabilities to allow consideration of their mental disability and the impact that disability has on their capacity to act reasonably under the circumstances. In advocating for this shift, this Comment uses autism spectrum

5. *Society’s Attitude Toward People with Disabilities*, UNIV. FLA. HEALTH, <https://paul-burner.dental.ufl.edu/oral-health-care-for-persons-with-disabilities/societys-attitude-toward-people-with-disabilities/> (last visited Oct. 13, 2022).

6. James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, AM. BAR FOUNDATIONAL RSCH. J. 1079, 1085 (1981).

7. Perri Meldon, *Disability History: The Disability Rights Movement*, NAT’L PARK SERV. (Dec. 13, 2019), <https://www.nps.gov/articles/disabilityhistoryrightsmovement.htm>.

8. *See id.*; *see generally* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

9. *See* Meldon, *supra* note 7; *see generally* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

10. *See Society’s Attitude Toward People with Disabilities*, *supra* note 5 (noting approximately fifty-two million Americans have some form of disability such as cognitive or mental impairment, cerebral palsy, or visual impairment); *Mental Health Disorder Statistics*, JOHN HOPKINS MED., <https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics> (last visited Oct. 13, 2022) (stating every year, 26% of adult Americans over the age of eighteen suffer a diagnosable mental disorder); Ellis, *supra* note 6, at 1086; Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 864 (1990) (explaining that the transition toward a greater societal understanding of mental disabilities was also influenced by advocates for the gender movement who acknowledged the similar biases and stigmas directed toward both women and women with disabilities).

11. *See Society’s Attitude Toward People with Disabilities*, *supra* note 5.

12. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B (AM. L. INST. 1965); Curran, *supra* note 1, at 52–53.

disorder (ASD) to exemplify the importance and necessity of taking mental disability into consideration when determining negligence. This Comment will: (I) discuss the basics of the tort negligence standard in the United States; (II) discuss the current exceptions to the reasonable person standard of tort negligence; (III) discuss the current reasonable person standard applied to those with mental disabilities; (IV) depict the inequities of applying the objective reasonable person standard to a defendant with ASD; (V) argue for a subjectivized reasonableness standard for those with mental disabilities; and (VI) analyze the arguments for and against this newly proposed standard.

I. THE BASICS OF TORT NEGLIGENCE

Negligence is the failure to act with the level of care that someone of ordinary prudence or intelligence would exercise under the same circumstances.¹³ To find an actor negligent, the actor must have “fail[ed] to observe, for the protection of the interests of another, th[e] degree of care [or standard of care], precaution, and vigilance which the circumstances justly demanded.”¹⁴ The standard of care is the degree of care (watchfulness, attention, caution, and prudence) that an average person should exercise under the circumstances.¹⁵ If a person fails to exercise that standard of care, they may be found negligent and held liable to a third party for damages.¹⁶ The three fundamental purposes of determining negligence and fault under tort law are: (1) to provide compensation to injured parties, (2) to shift the loss and impose liability to the parties responsible for the harm, and (3) to deter others from committing future harmful acts.¹⁷ While there are many different standards to determine whether an actor was negligent under tort law,¹⁸ one of the most common is the reasonable person standard.¹⁹ The reasonable person standard is an objective test that determines negligence by asking whether the allegedly negligent actor’s actions were consistent

13. Harlow, *supra* note 3, at 1738.

14. William Benjamin Hale, HANDBOOK ON THE LAW OF TORTS § 226, at 449 (1896).

15. See *Standard of Care*, LEGAL INFO. INST. (Sept. 2021), https://www.law.cornell.edu/wex/standard_of_care; *WEX Definitions*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/category/wex_definitions?page=396 (last visited Oct. 14, 2022).

16. See *Standard of Care*, *supra* note 15.

17. STUART M. SPEISER, CHARLES F. KRAUSE, & ALFRED W. GANS, 1 AMERICAN LAW OF TORTS: PURPOSE AND AIMS OF TORT LAW § 1:3 (2022).

18. See MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD, & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 50–51, 55, 77–80 (11th ed. 2021) (explaining: the *Carroll Towing* (Hand) Formula finds liability for negligence if the burden on the actor is less than the probability of the harm multiplied by the injury ($B < PL$); the reasonable person standard determines negligence by asking whether the actor failed to exercise reasonable care, which is determined by what a reasonable person would have done under the circumstances; custom does not set the standard of care but aids in the determination of whether the actor acted reasonably under the circumstances; statutes can be used to find negligence because the willful omission of statutory signals is negligent on behalf of the actor).

19. See *Negligence*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/negligence> (last visited Oct. 14, 2022); *Reasonable Person*, LEGAL INFO. INST. (AUG. 2021), https://www.law.cornell.edu/wex/reasonable_person.

with a reasonable person's under the circumstances.²⁰ Under the objective reasonable person standard, the court judges an actor against the objectively reasonable human that is ordinarily prudent, careful, diligent, and of ordinary physical and mental capacity.²¹ This reasonable person to which the actor must conform their actions is not perfect or without fault; the person is "capable of making mistakes and errors of judgment . . . but only to the extent that any such shortcoming embodies the normal standard of community behavior."²² Proponents have argued that the reasonable person standard must be objective because considering defendants' individual characteristics and traits when determining tort liability would open the door to endless defenses based on individuals' shortcomings.²³ Accordingly, the actor's own personal attributes and capacities—such as thought process, intelligence, or strength—are not taken into consideration²⁴ except under certain circumstances where exceptions to the reasonable person standard apply.²⁵

II. EXCEPTIONS TO THE REASONABLE PERSON STANDARD

Today, two of the most notable exceptions to the reasonable person standard are the exception for children and the exception for those with physical disabilities.²⁶

A. Children

Though there is a subjectivized reasonable person standard for children today,²⁷ historically, this exception to tort liability did not always apply, and children were considered responsible for their torts without considering their age and intelligence.²⁸ Dating back to early Roman law, when a tort or wrongdoing was committed by a child and the child was responsible for the damages, the father could either pay for the damages or surrender the child.²⁹ The trend of holding children liable for their wrongdoings continued in American common law courts,³⁰ but in 1934 the

20. See FRANKLIN ET AL., *supra* note 18, at 55.

21. STUART M. SPEISER, CHARLES F. KRAUSE, & ALFRED W. GANS, AMERICAN LAW OF TORTS: STANDARD; RISK FACTORS; CUSTOM—THE "REASONABLE PERSON" § 9:5 (2022).

22. Franklin et al., *supra* note 18, at 58.

23. Harlow, *supra* note 3, at 1738.

24. Aaida Peerani, *The Reasonable Person*, LAWNOW MAG. (July 5, 2017), <https://www.lawnow.org/the-reasonable-person/>.

25. See *Reasonable Person*, *supra* note 19 (providing examples of cases where a child's age and a person's physical disability were taken into account for the determination of negligence as exceptions to the reasonable person standard).

26. See RESTATEMENT (SECOND) OF TORTS: CHILDREN § 283A (AM. L. INST. 1965); RESTATEMENT (SECOND) OF TORTS: PHYSICAL DISABILITY § 283C (AM. L. INST. 1965).

27. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM: CHILD. § 10 (AM. L. INST. 2010); RESTATEMENT (SECOND) OF TORTS: CHILDREN § 283A (AM. L. INST. 1965).

28. See Patrick Kelley, *Infancy, Insanity, and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179, 183–84 (2003).

29. Frank H. Ferris, *Infants and Their Torts* 1, 4 (1893) (thesis) (on file with the Cornell Law School).

30. Kelley, *supra* note 28, at 183–84.

standard began to shift when the courts found an exception for both children and “insane persons.”³¹ However, in 1965, the standard changed to exclude “insane tortfeasors” from the exception, yet retained the exception for children.³² Today, the standard for determining the negligence of children is subjectivized, and children must exercise the care that a reasonable child of their actual age, intelligence, and experience would exercise under the circumstances.³³

There were many policy reasons behind the shift from holding children liable for their torts to the subjectivized standard that children are held to today.³⁴ The primary reason for subjectivizing the standard was that children are unable to understand and be attentive toward their conduct.³⁵ Additionally, children, unlike adults, are “less able . . . to understand risks, to appreciate alternative courses of conduct with respect to risks, and to make appropriate choices from among those alternatives.”³⁶ Society deems this exception to tort liability necessary for children because there is a strong public interest in protecting the welfare of children, and the community knows children cannot meet the reasonable person standard for adults that would otherwise be expected of them.³⁷

Applying this exception to a minor defendant demonstrates why public policy disfavors holding children to the same standard as adults. In *Hoyt v. Rosenberg*,³⁸ the defendant, a twelve-year-old boy, was playing a game with other children that involved kicking a coffee canister.³⁹ During the game, the minor defendant kicked the coffee canister and struck the plaintiff (another minor) in the face, causing injury to her eye.⁴⁰ The court held that the defendant’s actions aligned with the ordinary and reasonable actions of a child of his same age and intelligence and that the minor defendant could not have fully understood, based on his age and intelligence, that he could have seriously injured someone by kicking the can.⁴¹ Because the minor acted like an ordinary child of his age and intelligence under the

31. RESTATEMENT (FIRST) OF TORTS: CONDUCT OF A REASONABLE MAN; THE STANDARD § 283 (AM. L. INST. 1934) (“Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”).

32. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B (AM. L. INST. 1965) (“Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.”).

33. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM: CHILDREN § 10 (AM. L. INST. 2010); RESTATEMENT (SECOND) OF TORTS: CHILDREN § 283A (AM. L. INST. 1965).

34. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM: CHILDREN § 10 cmt.b (AM. L. INST. 2010).

35. *Id.*

36. *Id.*

37. RESTATEMENT (SECOND) OF TORTS: CHILDREN § 283A cmt.b (AM. L. INST. 1965).

38. *Hoyt v. Rosenberg*, 182 P.2d 234 (Cal. Ct. App. 1947).

39. *Id.* at 235.

40. *Id.*

41. *Id.* at 237–39.

circumstances, the court found that he met the requisite standard of care and held that the minor defendant was not liable.⁴²

This case demonstrates the importance of having the reasonable person exception for children. Even if an adult understands that kicking a metal can in the direction of a child could cause serious injury, an ordinary child of like age and intelligence would not understand the risk, which demonstrates that courts cannot expect children to exercise the same degree of care as adults given their inability to fully understand and appreciate the consequences of their actions.⁴³

Though the standard of care for children is generally lower than the standard of care for the average adult, a child is not immune from liability, and courts may still hold children liable for their actions if they fall below the standard.⁴⁴ If a court deems a child's actions unreasonable compared to what is reasonable to expect from a child of like age, intelligence, and experience, the child may still be found negligent.⁴⁵ Additionally, if a child is engaged in an adult activity, such as driving a car or operating a boat, they are held to the same standard of care as the reasonable adult, and the subjectivized standard for children does not apply.⁴⁶ This exception to the subjectivized standard for children recognizes that it would be unfair to the public to hold children to a lower standard when potentially hazardous activities are involved.⁴⁷

B. Physical Disabilities

There is also a subjective reasonable person standard for defendants with physical disabilities.⁴⁸ Those with physical disabilities must exercise the care that a reasonable person with the same or a similar physical disability would exercise under the circumstances.⁴⁹ The particular physical disability of the defendant, such as blindness, deafness, or a clubfoot, is considered “part of the ‘circumstances’ under which [the] reasonable [person] must act.”⁵⁰ This standard means that a person with a physical disability, such as blindness or paraplegia, would “not be held to the same abilities as [the] able-bodied person” but would be required to exercise the

42. *Id.* at 238–39.

43. See RESTATEMENT (SECOND) OF TORTS: CHILDREN § 283A cmt.b (AM. L. INST. 1965); but see *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955) (explaining that a child may be liable for their intentional actions in committing a battery if the child knew their action would cause offensive contact).

44. Kelley, *supra* note 28, at 200.

45. *Id.*

46. Connor Bildfell, *The Standard of Care for Children Engaged in Adult Activities: Not Ex-actly Child's Play*, 53 UNIV. B.C. L. REV. 299, 321–22 (2020).

47. *Id.* at 322.

48. Ellis, *supra* note 6, at 1098.

49. 57A AM. JUR. 2D *Negligence* § 181, Westlaw (database updated Nov. 2022).

50. RESTATEMENT (SECOND) OF TORTS: PHYSICAL DISABILITY § 283C cmt.a (AM. L. INST. 1965).

same standard of care that a reasonable person with the same physical disability would exercise under the circumstances.⁵¹ This subjectivized standard recognizes that there are certain precautions that are impossible for those with physical disabilities to take and that holding these individuals to the objective reasonable person standard would essentially hold them strictly liable.⁵² Therefore, the standard requires that a person with a physical disability take only the precautions that a reasonable person with the same or similar disability would exercise.⁵³

Many policy reasons support the subjectivized standard for those with physical disabilities. First, taking a person's physical disability into account when determining negligence does not impact the efficiency of court adjudications.⁵⁴ Physical disabilities are typically visible and easy to diagnose, so it is neither time-consuming nor inefficient for a court to determine their nature and extent.⁵⁵ Second, given the ease of observing physical disabilities from the exterior, it is difficult to falsify such disabilities.⁵⁶ Additionally, many argue that the reason the standard is subjectivized for physical disabilities but not mental disabilities is because society is more familiar with physical disabilities.⁵⁷

The policy reasons that support the subjectivized standard for defendants with physical disabilities are highlighted in the relevant case law. In *Roberts v. State*,⁵⁸ a blind operator of a concession stand collided with the plaintiff while walking to the bathroom, and the plaintiff sustained injuries.⁵⁹ At the time of the accident, the blind man was not using his cane or walking with his arms extended to guide him.⁶⁰ The court, in determining the negligence of the blind man, reasoned that "[a] man who is blind . . . is entitled to live in the world and to have allowance made by others for his disability, and he cannot be required to do the impossible by conforming to physical standards which he cannot meet."⁶¹ Accordingly, the blind man must have conformed his actions and taken the same precautions that a reasonable blind person would have under the circumstances.⁶² Accounting for the blind man's specific disability and circumstances, the court considered the evidence that the blind man had worked in the same environment for over three years, was very familiar with his surroundings, and had special mobility training.⁶³ The court concluded that the blind man

51. Ellis, *supra* note 6, at 1098.

52. Jacob E. McKnite, *When Reasonable Care Is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation*, 38 WM. MITCHELL L. REV. 1375, 1380 (2012).

53. Ellis, *supra* note 6, at 1098.

54. See McKnite, *supra* note 52, at 1382.

55. *Id.*

56. *Id.*

57. RESTATEMENT (SECOND) OF TORTS: PHYSICAL DISABILITY § 283C cmt.b (AM. L. INST. 1965).

58. *Roberts v. State*, 396 So. 2d 566 (La. Ct. App. 1981).

59. *Id.* at 566.

60. *Id.* at 567.

61. *Id.*

62. *Id.*

63. *Id.* at 569.

was not negligent because his action of walking to the bathroom without his cane conformed to what a reasonable blind person would have done under the same circumstances.⁶⁴

Application of the subjective reasonable person standard to defendants with physical disabilities and the policy reasons provided by courts in support of this standard demonstrate the consensus among society regarding the importance of this exception for defendants with physical disabilities.

III. CURRENT STANDARD FOR INDIVIDUALS WITH MENTAL DISABILITIES

Though tort law recognizes exceptions to the reasonable person standard for children and those with physical disabilities, there is no exception for persons with mental disabilities.⁶⁵ The general rule for determining negligence for those with mental disabilities is that they should be responsible for the torts they commit.⁶⁶ Individuals with mental disabilities are held to an objective reasonable person standard and must exercise the same standard of care as a reasonably prudent person of average intelligence would under the circumstances.⁶⁷ For example, in *Johnson v. Lambotte*,⁶⁸ a woman with chronic schizophrenia who commonly experienced paranoia escaped from the hospital, entered a car whose keys were left in the ignition, drove away from the hospital with little or no control, and collided with the plaintiff's vehicle, causing the plaintiff's injuries.⁶⁹ The Colorado Supreme Court held that the defendant, regardless of her mental disability, was liable for her tortious conduct.⁷⁰ In doing so, the Court held her "to the same degree of care and diligence as a person of sound mind."⁷¹ In holding the defendant to the same degree of care as a person of "sound mind" or ordinary intelligence,⁷² the court clearly acknowledged the defendant's inability to conform to the required standard of care but nevertheless held the defendant liable for her actions.

The current rule specifically excludes individuals with mental disabilities from any exception and states that "[u]nless the actor is a child, [their] insanity or other mental deficiency does not relieve the actor from

64. *Id.*

65. See RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B (AM. L. INST. 1965) (explaining that those with mental disabilities must exercise the same standard of care as a reasonable person under the circumstances).

66. Ellis, *supra* note 6, at 1081.

67. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B (AM. L. INST. 1965).

68. *Johnson v. Lambotte*, 363 P.2d 165 (Colo. 1961).

69. *Id.* at 165–66.

70. *Id.* at 166.

71. *Id.*

72. *Id.*

liability for conduct which does not conform to the standard of a reasonable [person] under like circumstances.”⁷³ The comments to the *Restatement of Torts* provide some explanation for this standard:

The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites; and yet allowance must be made for some of the differences between individuals, the risk apparent to the actor, his capacity to meet it, and the circumstances under which he must act.⁷⁴

This comment specifically recognizes that some exceptions must be made given the differences between individuals, notably as discussed for children and those with physical disabilities; however, it refuses to recognize an exception for people with mental disabilities.⁷⁵ Further, an individual’s attributes that do not conform to that of the “reasonable person” are considered an unacceptable excuse for the failure to act reasonably unless the actor is a child or has a physical disability,⁷⁶ making it clear that even defendants’ severe mental disabilities that impact their capacity to conform to the reasonable person standard will not be considered when determining negligence and liability.⁷⁷

Courts and commentators have given many policy arguments in support of applying the objective reasonable person standard to people with mental disabilities.⁷⁸ Four of the most commonly cited rationales are: (1) the difficulty of drawing a clear line between true mental disability and immaterial variations of temperament and intellect; (2) the insufficient evidence for proving mental disabilities and the ease of feigning mental disabilities; (3) the argument that individuals with mental disabilities should use their wealth to pay for the damage they cause and compensate victims; and (4) the belief that holding individuals with mental disabilities liable for their actions will cause their caretakers to assure these individuals

73. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B (AM. L. INST. 1965).

74. *Id.* cmt.c.

75. *See id.* cmt.a–b.

76. RESTATEMENT (SECOND) OF TORTS: RECOGNIZING EXISTENCE OF RISK § 289 cmt.n (AM. L. INST. 1965). As described in the *Restatement*:

Except in such cases [of children or the physically disabled], the actor is held to the standard of a reasonable man as to his attention, perception, memory, knowledge of other pertinent matters, intelligence, and judgment, even though he does not in fact have the qualities of a reasonable man. The individual who is habitually wool-gathering and inattentive, absent-minded, forgetful, ignorant or inexperienced, slow-witted, stupid, or a fool, must conform to the standards of the society in which he lives, or if he cannot conform to them must still make good the damage he does.

Id.

77. *Id.*

78. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B cmt.b (AM. L. INST. 1965); *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 640–41 (Cal. Ct. App. 1996).

cause no harm.⁷⁹ Another common rationale used to apply an objective standard to defendants with mental disabilities is that society is unfamiliar with mental disabilities, as opposed to physical disabilities, so the court is less willing to subjectivize the standard for an unfamiliar set of disabilities.⁸⁰ Additionally, commentators have argued that the justice system is meant to reflect the opinions of society as to what is fair and equitable.⁸¹ Accordingly, because the general public is not understanding and supportive of those with mental disabilities, the public would not support a system that denies recovery to plaintiffs for injuries caused by defendants with mental disabilities who are unable to meet the lofty reasonable person standard.⁸²

While all of the commonly cited policy reasons for holding people with mental disabilities to an objective standard might have had force in the past, the societal understanding and support of the Mentally Disabled community no longer align with those rationales.⁸³ Today, there are numerous local and federal programs aimed at bettering the understanding of mental disabilities and supporting the Mentally Disabled community, which demonstrates society's shift in embracing, rather than fearing, the Mentally Disabled community.⁸⁴

The current subjective standard of tort negligence for people with mental disabilities falls short and should be discontinued for many reasons. Most importantly, the current standard ignores the reality that many people

79. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B cmt.b (AM. L. INST. 1965) (“1. The difficulty of drawing any satisfactory line between mental deficiency and those variations of temperament, intellect, and emotional balance which cannot, as a practical matter, be taken into account in imposing liability for damage done. 2. The unsatisfactory character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned, the difficulties which the triers of fact must encounter in determining its existence, nature, degree, and effect; and some fear of introducing into the law of torts the confusion which has surrounded such a defense in the criminal law. Although this factor may be of decreasing importance with the continued development of medical and psychiatric science, it remains at the present time a major obstacle to any allowance for mental deficiency. 3. The feeling that if mental defectives are to live in the world they should pay for the damage they do, and that it is better that their wealth, if any, should be used to compensate innocent victims than that it should remain in their hands. 4. The belief that their liability will mean that those who have charge of them or their estates will be stimulated to look after them, keep them in order, and see that they do not do harm.”).

80. Ellis, *supra* note 6, at 1100.

81. *Id.*

82. *Id.*

83. See Meldon, *supra* note 7 (explaining the Americans with Disabilities Act and how the Disabilities Rights Movement has impacted society's perceptions of people with mental disability); see also *Society's Attitude Toward People with Disabilities*, *supra* note 5.

84. See *Disability and Health State Programs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/programs.html> (last visited Oct. 15, 2022) (explaining the Centers for Disease Control and Prevention's Disability and Health Promotion Branch that has the purpose of improving the health of those with intellectual/developmental disabilities); *Disability Rights Organizations*, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH, <http://www.bazelon.org/resource-library/disability-rights-organizations/> (last visited Oct. 15, 2022) (listing numerous programs and resources around the country that provide services and are dedicated to bettering the lives of the mentally and physically disabled).

with mental disabilities do not have the capacity to meet the objective reasonable person standard.⁸⁵

IV. THE INEQUITIES OF THE REASONABLE PERSON STANDARD AS APPLIED TO DEFENDANTS WITH MENTAL DISABILITIES: AUTISM SPECTRUM DISORDER

Though there are still concerns and questions that surround subjectivizing the reasonable person standard for mental disabilities,⁸⁶ the inequities of the current objective standard as applied to defendants with mental disabilities makes it clear that a change must occur to avoid the continued inequitable outcomes that fall on defendants with mental disabilities. The shortcomings of the current objective standard are apparent when considering its potentially negative impacts on a defendant with ASD. The objective standard does not account for the specific mental disability of defendants with ASD and requires them to exercise the same level of care as the ordinary person, ignoring the fact that many individuals with ASD are incapable of exercising that standard of care because of ASD's impact on cognitive function, behavior, and interaction.⁸⁷

ASD is a mental disability that impacts the development of individuals and can cause communication, social, and behavioral challenges.⁸⁸ The social and behavioral difficulties that accompany ASD cause people with ASD to “behave, communicate, interact, and learn in ways that are different from most other people.”⁸⁹ Many adults with ASD have deficits and impairments in cognitive function in four areas of both social and nonsocial functioning: theory of mind, emotion perception and processing, processing speed, and verbal learning and memory.⁹⁰ These deficits and impairments impact the everyday life and functioning of adults with ASD by affecting their ability to both understand and process their own actions.⁹¹

85. See Harlow, *supra* note 3, at 1746.

86. See Ellis, *supra* note 6, at 1088–89 (explaining concerns regarding increased litigation costs resulting from the subjectivized reasonable person standard and the concern of the rule being subjectivized for defendants that have the ability to meet the objective reasonable person standard); RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B cmt.b.2 (AM. L. INST. 1965) (explaining the concern that mental disabilities can be easily feigned).

87. See Georg Peter Zwick, *Neuropsychological Assessment in Autism Spectrum Disorder and Related Conditions*, 19 *DIALOGUES CLINICAL NEUROSCIENCE* 373, 374–75 (2017); *What Is Autism Spectrum Disorder?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> (last visited Oct. 15, 2022).

88. *What Is Autism Spectrum Disorder?*, *supra* note 87.

89. *Id.*

90. Tjasa Velikonja, Anne-Kathrin Fett, & Eva Velthorst, *Patterns of Nonsocial and Social Cognitive Functioning in Adults with Autism Spectrum Disorder: A Systematic Review and Meta-Analysis*, 76 *JAMA PSYCHIATRY* 135, 147–48 (2019).

91. *Id.* at 136.

As science has progressed, there has been a greater understanding of how ASD impacts cognitive function.⁹² Specifically, functional neuroimaging has shown that individuals with ASD commonly have decreased brain activity in areas normally associated with high cognitive processing in the neurotypical individual without ASD.⁹³ Given the scientific evidence of how ASD impacts cognitive function,⁹⁴ some individuals with ASD are often incapable of adhering to the objective reasonable person standard.⁹⁵

Because of how ASD impacts cognitive function, there is an incongruity between the mental age and actual age of individuals with ASD.⁹⁶ Mental age matches the intelligence quotient (IQ) score of an individual experiencing a mental disability with the age at which a neurotypical child would obtain that same score, which means that an individual over the age of eighteen could have the mental capacity of a three year old.⁹⁷ Because individuals with ASD typically have a low mental age,⁹⁸ an individual with ASD may be an adult over the age of twenty-one but have the mental capacity and functional abilities of a much younger age.

Under the current objective standard, courts would require an adult tortfeasor with ASD to exercise the same standard of care as a reasonable *neurotypical* person under the circumstances without considering the real possibility that the defendant with ASD may not have the mental age or capacity of an adult.⁹⁹ A defendant with ASD may be unable to understand the risks of certain actions because of ASD's impact on their cognitive function and mental age,¹⁰⁰ and public policy disfavors holding a defendant liable for failure to meet a standard that they are incapable of meeting.¹⁰¹ Accordingly, the current reasonable person standard is untenable and should be subjectivized for individuals with mental disabilities.

92. See Zwick, *supra* note 87, at 375–76.

93. Simon Baron-Cohen, *The Cognitive Neuroscience of Autism*, 75 J. NEUROLOGY, NEUROSURGERY & PSYCHIATRY 945, 946 (2004).

94. See Zwick, *supra* note 87, at 375–76; Baron-Cohen, *supra* note 93, at 945–46.

95. See *What Is Autism Spectrum Disorder?*, *supra* note 87 (explaining that individuals with Autism Spectrum Disorder (ASD) often interact and learn in ways that are different than neurotypical individuals, which may impact their understanding on what behaviors are expected in certain situations).

96. Alexander J. Hinnebusch, Lauren E. Miller, & Deborah A. Fein, *Autism Spectrum Disorders and Low Mental Age: Diagnostic Stability and Developmental Outcomes in Early Childhood*, 47 AUTISM & DEV. DISORDERS 3967, 3967–68 (2017).

97. Ellis, *supra* note 6, at 1105.

98. Hinnebusch et al., *supra* note 96, at 3967–68.

99. See RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B (AM. L. INST. 1965) (explaining that the objective reasonable person standard is applied to those with mental disabilities); Hinnebusch et al., *supra* note 96, at 3967–68 (explaining that individuals with ASD typically have a low mental age as compared to their actual age).

100. See Zwick, *supra* note 87, at 377; Baron-Cohen, *supra* note 93, at 945–46; Hinnebusch et al., *supra* note 96, at 3967–68 (explaining that individuals with ASD typically have a low mental age as compared to their actual age).

101. See Ellis, *supra* note 6, at 1087–90.

V. THE NEW, SUBJECTIVIZED STANDARD

The standard of care for those with mental disabilities should be the same standard used for those with physical disabilities. The court should judge people with mental disabilities against someone with the same or similar mental disability to determine whether their actions were reasonable under the circumstances. This standard would require the court to consider the specific mental disability and the mental capacity of the actor, not just the objective age of the actor. Taking the mental capacity of the actor into account is necessary for fairness because age is not determinative of cognitive function or one's ability to act reasonably.¹⁰²

VI. ARGUMENTS FOR THE SUBJECTIVIZED STANDARD

A. Other Countries Have a Subjective Standard for Determining Tort Negligence in Cases Involving Defendants with Mental Disabilities

Though courts do not find an exception to the reasonable person standard for individuals with mental disabilities in the United States, other countries have subjectivized the standard for determining tort negligence in cases involving defendants with mental disabilities.¹⁰³ The Japanese Civil Code provides that “[a] person who has inflicted damages on others while [they] lack[] the capacity to appreciate [their] liability for [their] own act[s] due to mental disability shall not be liable to compensate for the same.”¹⁰⁴ Additionally, the Swiss Civil Code provides that:

A person who has the capacity to act has the capacity to create rights and obligations through his actions. . . . A person is capable of judgement within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication or similar circumstances. . . . A person who is incapable of judgement cannot create legal effect by his or her actions, unless the law provides otherwise.¹⁰⁵

Though neither the Japanese Civil Code nor the Swiss Civil Code expressly mention any objective reasonable person standard that is typically applied in tort negligence in the United States, it is clear from the text of the respective codes that an individual will not be held liable for their actions if they lack the capacity to appreciate the consequences of

102. See Harlow, *supra* note 3, at 1746 (stating that an individual with the mental capacity of a seventeen year old could have the cognitive function of a six year old); Ellis, *supra* note 6, at 1105 (explaining that an adult could have the mental capacity of a three year old based on their mental age calculation).

103. See Johnny Chriscoe & Lisa Lukasik, *Re-Examining Reasonableness: Negligence Liability in Adult Defendants with Cognitive Disabilities*, 6 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 1, 5 n.10 (2015) (explaining that Japan and Switzerland have subjectivized the standard for determining negligence for defendants with mental disabilities).

104. *Id.* (quoting MINPŌ [MINPŌ] [CIV. C.] art. 713, ¶ 1 (Japan)).

105. Schweizerisches Zivilgesetzbuch [ZGB], Code civil [CC], Codice civile [CC] [Civil Code] Dec. 10, 1907, SR 210, RS 210 arts. 12, 16, 18 (Switz.).

their actions because of a mental disability. This demonstrates that other countries have found it inequitable to hold those with mental disabilities liable for their torts when they do not have the capacity to appreciate their actions and that it is possible to implement a subjective standard for defendants with mental disabilities without too much difficulty.

B. The Standard of Care for Plaintiffs with Mental Disabilities Is Subjectivized for the Determination of Contributory Negligence

There is strong evidence that subjectivizing the standard is possible without being too detrimental to courts by paralleling contributory negligence. Contributory negligence is “conduct on the part of the plaintiff which falls below the standard to which [the plaintiff] should conform for [their] own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff’s harm.”¹⁰⁶ In determining contributory negligence for those with mental disabilities, the court subjectivizes the standard, showing that it is possible to consider mental capacity without much burden.¹⁰⁷

In *Worthington v. Mencer*,¹⁰⁸ an injured worker claimed mental disability as a defense to contributory negligence, and the Alabama Supreme Court held that his mental capacity should have been considered because “the plaintiff is to be held to the exercise of the degree of care of which he was capable.”¹⁰⁹ The court further explained that the plaintiff should not have been held liable for failing to meet a standard of care that he was incapable of meeting because of his level of intelligence, meaning that the court subjectivized the standard of care for contributory negligence in a case involving a plaintiff with a mental disability.¹¹⁰

*Cowan v. Doering*¹¹¹ further expressed that individuals should not be held contributorily negligent for failing to meet a standard of care that they are incapable of meeting.¹¹² The New Jersey Supreme Court stated that a standard that failed to take mental capacity into account would recognize “that a mentally [disabled] plaintiff is not capable of adhering to a reasonable person’s standard of self-care, but at the same time hold[] that plaintiff responsible for the consequences of conduct that is unreasonable in light

106. RESTATEMENT (SECOND) OF TORTS: CONTRIBUTORY NEGLIGENCE DEFINED § 463 (AM. L. INST. 1965).

107. See Harlow, *supra* note 3, at 1745.

108. 11 So. 72 (Ala. 1982).

109. *Id.* at 73.

110. *Id.* at 73–74 (“The plaintiff is to be held to the exercise of the degree of care of which he was capable. If he was merely a person of dull mind, who could labor for his own livelihood, and there was no apparent necessity of putting him under the protection of a guardian to keep him out of harm’s way, he is chargeable with the same degree of care for his personal safety as one of brighter intellect, as any attempt to frame and adapt varying rules of responsibility to varying degrees of intelligence would necessarily involve confusion and uncertainty in the law. If, on the other hand, he was so absolutely devoid of intelligence as to be unable to apprehend apparent danger, and to avoid exposure to it, he cannot be said to have been guilty of negligence, because he was incapable of exercising care.”).

111. 545 A.2d 159 (N.J. 1988).

112. *Id.* at 162.

of the plaintiff's capacity."¹¹³ Additionally, in *Noel v. McCraig*,¹¹⁴ the Kansas Supreme Court found that a plaintiff should not be held to the "objective reasonableness" standard typically required of plaintiffs acting in protection of themselves when the plaintiff "is so absolutely devoid of intelligence as to be unable to apprehend danger and to avoid exposure to it"¹¹⁵ The court expanded on its holding and explained that "[s]ince knowledge and appreciation of the peril are essential elements of contributory negligence, it is obvious that an inquiry into the age, experience, and mental capacity of the plaintiff is material where contributory negligence is invoked as a defense."¹¹⁶ Each of these holdings express the same sentiment—it is against public policy and inequitable to require a plaintiff to exercise a standard of care that they are incapable of meeting.

The courts' recognition of a plaintiff's inability to meet the objective reasonable person standard for contributory negligence is easily transferable to standard negligence, where it is equally inequitable to hold a defendant liable for failure to meet a standard of care that the defendant is incapable of meeting because of a mental disability.

C. Courts Have Started to Find Specific Exceptions to the Reasonable Person Standard for Individuals with Mental Disabilities

Though courts apply the objective reasonable person standard to determine negligence for defendants with mental disabilities, certain jurisdictions have stated exceptions to the standard and have cited many public policy reasons in support of these exceptions.¹¹⁷ In *Gould v. American Family Mutual Insurance Company*,¹¹⁸ the Wisconsin Supreme Court held that courts should subjectivize the reasonable person standard when the defendant is an institutionalized individual with a mental disability.¹¹⁹ The court concluded that, although people with mental disabilities are ordinarily responsible for their torts, the rule should not apply to those individuals who are also institutionalized because institutionalized individuals "do[] not have the capacity to control or appreciate [their] conduct" or be aware of the possible injuries that could arise from the conduct.¹²⁰

The court further reasoned that when an institutionalized individual with a mental disability injures an employed caretaker, "the injured party can reasonably foresee the danger and is not 'innocent' of the risk involved."¹²¹ Though the court reasoned that the caretakers of institutionalized defendants with mental disabilities have put themselves in a setting

113. *Id.* at 163.

114. 258 P.2d 234 (Kan. 1953).

115. *Id.* at 241 (quoting 38 AM. JUR. NEGLIGENCE § 201 (1st ed. 1952)).

116. *Id.*

117. See *Gould v. Am. Fam. Mut. Ins. Co.*, 543 N.W.2d 282, 286–87 (Wis. 1996); *Breunig v. Am. Fam. Ins. Co.*, 173 N.W.2d 619, 624–25 (Wis. 1970).

118. 543 N.W.2d 282 (Wis. 1996).

119. *Id.* at 283, 287.

120. *Id.* at 287.

121. *Id.*

that exposes them to the risk, both institutionalized defendants and non-institutionalized defendants with mental disabilities lack the capacity to control and be aware of the potential repercussions of their conduct.¹²² The court's argument in favor of subjectivizing the standard because institutionalized defendants with mental disabilities cannot control or appreciate the repercussions of their conduct signals an understanding that public policy cannot support holding someone liable for failure to conform to a standard of care that they are incapable of meeting.¹²³ Public policy equally disfavors holding defendants with mental disabilities liable for failure to meet a standard that they are incapable of meeting.

In *Breunig v. American Family Insurance Company*,¹²⁴ the Wisconsin Supreme Court found another exception to the objective reasonable person standard in cases involving the sudden onset of insanity.¹²⁵ There, the defendant experienced a cognitive delusion that impacted her ability to properly operate and drive her car, which led to the accident that caused the plaintiff's injuries.¹²⁶ The court held that for an exception to tort liability to apply, the effect of the mental disability "must be such as to affect the person's ability to understand and appreciate the duty which rests upon [them] to drive [their] car with ordinary care, or . . . must affect [their] ability to control [their] car in an ordinarily prudent manner," and that "there must be an absence of notice of forewarning to the person that [they] may be suddenly subject to such a type of insanity or mental illness."¹²⁷

The court compared the sudden onset of insanity to cases where defendants were unable to conform their conduct through no fault of their own because of the "exceptional cases of loss of consciousness resulting from injury inflicted by an outside force, or fainting, or heart attack . . . when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen."¹²⁸ In each of these circumstances, where the disability had no warning of its likelihood of occurrence, the court absolved defendants of liability because they could not have avoided the onset disability and could not have controlled their actions.¹²⁹ Given that the policy reason behind this exception is that the defendants cannot control their actions and conform to the standard of care,¹³⁰ courts should extend the subjectivized standard to mental disabil-

122. See *id.* (explaining that an institutionalized defendant with a mental disability is unable control their conduct or appreciate the consequences of their actions); Harlow, *supra* note 3, at 1746 (explaining that many individuals with mental disabilities do not have the capacity to conform their conduct to the reasonable person standard, meaning that they cannot appreciate the consequences of their conduct).

123. *Gould*, 543 N.W.2d at 287.

124. 173 N.W.2d 619 (Wis. 1970).

125. See Ellis, *supra* note 6, at 1101.

126. *Breunig*, 173 N.W.2d at 622.

127. *Id.* at 623.

128. *Id.*

129. See Ellis, *supra* note 6, at 1101.

130. See *id.*; *Breunig*, 173 N.W.2d at 624.

ities because the same policy reason applies—individuals with mental disabilities do not have the capacity to conform their actions to the objective reasonable person standard.¹³¹

Because the Wisconsin Supreme Court is beginning to find exceptions to the objective reasonable person standard when defendants with mental disabilities are unable to conform their actions to the ordinary standard of care, other courts should extend this reasoning to subjectivize the standard for those with mental disabilities because these individuals also lack the capacity to conform their conduct to the required standard of care.

VII. ARGUMENTS AGAINST THE SUBJECTIVIZED STANDARD

Despite the arguments in favor of the subjectivized standard, there are still difficulties that courts would need to address when implementing a subjectivized reasonable person standard for defendants with mental disabilities.

A. Society's Unfamiliarity with Mental Disabilities

Many arguments based on society's unfamiliarity with mental disabilities have been averred as reasons for not subjectivizing the reasonable person standard for defendants with mental disabilities.¹³² Because society lacked a historical understanding of mental disabilities, courts and commentators argued that individuals with mental disabilities should be responsible for their torts for several policy reasons, including: the difference between mental disabilities or simple intellectual and temperament issues; the ease of feigning mental disabilities; the belief that a person with a mental disability should pay for the harms they cause if they are to live in the world; and the belief that subjecting those with mental disabilities to liability for their actions would incentivize their families and caretakers to assure that they do not harm innocent individuals.¹³³

These policy reasons were rooted in historical fears surrounding mental disability and the belief that those with mental disabilities should be isolated from society.¹³⁴ However, the policy support for holding those with mental disabilities liable for their torts based on these fears and beliefs is antiquated. Today, society has a better understanding of mental disabilities, and these individuals are no longer seen as people that society

131. See Harlow, *supra* note 3, at 1746.

132. Ellis, *supra* note 6, at 1100.

133. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B cmt.b (AM. L. INST. 1965); *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 640–41 (Cal. Ct. App. 1996).

134. Ellis, *supra* note 6, at 1085.

needs to be fearful of because of their differences, but rather are seen as a community that deserves greater protections and support in society.¹³⁵

Moreover, historically, there were two prominent reasons for not subjectivizing the reasonable person standard for those with mental disabilities based on the lack of scientific advancements to aid in the understanding of mental disabilities: (1) it was too difficult to draw the line between different variations of mental disability; and (2) there was a fear that mental disabilities could be easily falsified.¹³⁶ However, scientific advancements have made it possible to determine whether an individual has a mental disability and the extent to which the disability impacts cognitive function.¹³⁷

Mental deficiency,¹³⁸ which refers to an abnormally low intelligence as compared to the age of the actor, can be accurately measured by IQ tests.¹³⁹ IQ tests are graded as severe, moderate, or mild, and an individual with a severe mental deficiency would be considered a person who is unable to function or exercise the same level of agency in everyday life as a reasonable person.¹⁴⁰ Conversely, an individual with a mild mental deficiency may be “amenable to basic social controls and moral standards” allowing them to function in everyday life.¹⁴¹ The ability to grade mental deficiency sufficiently demonstrates that it is possible to accurately test the mental capacity of an individual, which significantly weakens the argument that the reasonable person standard should not be subjectivized for those with mental disabilities because of the difficulty in determining the existence of a mental disability.

Additionally, a newer scientific procedure called functional magnetic resonance imaging (fMRI) permits the tracking of brain functionality and can indicate whether certain areas of the brain are functioning at normal levels.¹⁴² The notion of mental age also supports considering a person’s mental disability when determining negligence.¹⁴³ To calculate mental

135. See *Society’s Attitude Toward People with Disabilities*, *supra* note 5; Meldon, *supra* note 7 (explaining that beginning in the 1900s: society’s perceptions of the disabled community began to shift, activism showing support for the community became more prevalent with disability groups, and civil rights laws began to benefit individuals with disabilities).

136. RESTATEMENT (SECOND) OF TORTS: MENTAL DEFICIENCY § 283B cmt.b (AM. L. INST. 1965).

137. See Ellis, *supra* note 6, at 1105.

138. The term “mental deficiency” is used in the medical context to explain the impact different mental disabilities have on individuals; however, the term “mental disability” should be used in discussion as it is less antiquated.

139. Curran, *supra* note 1, at 66.

140. See *id.*

141. *Id.*

142. Ian J. Cosgrove, *The Illusive “Reasonable Person”: Can Neuroscience Help the Mentally Disabled?*, 91 NOTRE DAME L. REV. 421, 430 (2015) (“By monitoring changes in blood flow to certain areas of the brain, abnormal functionality can be pinpointed. Increases in oxygenated blood to the active region of the brain results in a high signal intensity; because the blood oxygenation level is associated with neuronal activity, the measurements provide us an indication about how a particular region of the brain is functioning.”).

143. Ellis, *supra* note 6, at 1105.

age, an individual with an IQ score that indicates mental disability is matched with the age at which a neurotypical child would obtain the same score.¹⁴⁴ This calculation of mental age demonstrates that an individual with a mental disability who is over the age of twenty-one might have the mental age of a three year old.¹⁴⁵

There are also scientific tests that assess the cognitive functionality of those with specific, diagnosable mental disabilities.¹⁴⁶ For example, neuropsychological assessments provide an analysis of cognitive function for those with ASD.¹⁴⁷ Among other determinations, these assessments can determine the alertness¹⁴⁸ and sustained attention¹⁴⁹ of individuals.¹⁵⁰ The availability of neuropsychological assessments prove that there is an effective and accurate way to determine the cognitive function of those with ASD and other similar mental disabilities. With the availability of multiple scientific tests and assessments that accurately determine cognitive function, the argument that subjectivizing the reasonable person standard for those with mental disabilities would increase the feigning of disabilities to avoid liability lacks support because these disabilities can be readily assessed and evaluated by the court.

Both scientific advancements providing more knowledge about mental disabilities and the general societal understanding of mental disabilities that has evolved over time show that individuals with disabilities are no longer seen as a community that should be feared, but rather, should be supported in society and provided greater legal protections.

B. Increased Litigation Costs for Measuring and Determining Mental Disabilities

There is a concern of increased litigation costs required for the diagnosis of mental disabilities because the subjective reasonable person standard would require the court to measure and classify the mental disability to consider whether it impacted the defendant's capacity to meet the required standard of care.¹⁵¹ Though litigation costs would increase, public policy strongly favors subjectivizing this standard because the current objective standard as applied to defendants with mental disabilities is essentially a form of strict liability.¹⁵² In tort law, strict liability holds a defendant liable for their actions in the absence of negligence (or in the absence of a breach of the standard of care) and regardless of what their mental

144. *Id.*

145. *See id.*

146. Zwick, *supra* note 87, at 373.

147. *Id.*

148. *Id.* at 375 (defining alertness as the “ability to temporarily increase and sustain the intensity of attention.” If this attention process is deficient, patients may have serious difficulties reacting to certain hazardous situations in a timely manner. . . .”).

149. *Id.* (“Sustained attention . . . involves focusing attention on a mentally demanding activity for a sustained period of time.” This is obviously a prerequisite for any kind of efficient activity. . . .”).

150. *Id.*

151. *See* Ellis, *supra* note 6, at 1089.

152. *Id.* at 1083.

state or intent was when committing the act.¹⁵³ Holding defendants with mental disabilities liable for failure to exercise a standard of care that they are incapable of meeting is liability without fault,¹⁵⁴ which is disfavored as reflected by courts' sparing application of strict liability given the harshness of holding someone liable without fault.¹⁵⁵ Moreover, the New Jersey Supreme Court has argued that "the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice."¹⁵⁶ Although the court was pushing for the extension of remedies and recovery in emotional harm cases, the same argument applies for expanding the judicial machinery and using judicial resources to provide protection for defendants with mental disabilities who cannot conform to the current objective standard of care.

Additionally, for those individuals with previously diagnosed mental disabilities, such as Down syndrome or ASD, there would be no increased litigation cost and no difficulty for the court to identify whether the individual actually has the mental disability. Further, the cost of litigation can severely affect a defendant who loses in litigation, which should mitigate the feigning of mental disabilities as a defense.¹⁵⁷

C. Extension of the Standard to Mental Disabilities that Do Not Impact an Individual's Capacity to Exercise the Reasonable Standard of Care

There are also concerns that if courts create an exception to the reasonable person standard for defendants with mental disabilities, defendants may escape liability under the subjectivized standard when the particular defendant's mental disability is not one that should be afforded the subjectivized standard.¹⁵⁸ There are many different types of mental disa-

153. *City of Neodesha v. BP Corp. N. Am., Inc.*, 287 P.3d 214, 224–25 (Kan. 2012); *Strict Liability*, CORNELL L.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_liability (last visited Oct. 15, 2022).

154. *See* Harlow, *supra* note 3, at 1746.

155. *Strict Liability*, *supra* note 153 (explaining that, in tort law, a defendant can only be held strictly liable for activities involving wild animals, abnormally dangerous activities, and products liability).

156. *Falzone v. Busch*, 214 A.2d 12, 16 (N.J. 1965) (arguing that the fear of the flood of litigation should not deter courts from providing proper remedies in meritorious claims for emotional harm recovery).

157. *See* Ellis, *supra* note 6, at 1087 (explaining that cost of litigation is so expensive that defendants would be less likely to feign a mental disability because the litigation costs are not worth the risk of feigning the disability and likely losing on the claim).

158. *Id.* at 1088.

bilities or disorders, including ASD, Down syndrome, schizophrenia, depression, and anxiety.¹⁵⁹ Each of these mental disabilities or disorders impact the everyday life of those with the particular disability;¹⁶⁰ however, that does not necessarily mean that each of these disabilities or disorders equally impact every individual's capacity to exercise the ordinary care required by the reasonable person standard.¹⁶¹ Though there are instances where an individual may have a mental disability that does not impact the individual's ability to exercise ordinary care, which raises this concern of the subjective standard being extended too far,¹⁶² scientific advancements and neuroimaging are available to determine abnormal brain functioning and detect specific mental disabilities that do impact the cognitive function of a defendant.¹⁶³ This scientific technology and testing would allow courts to determine how a reasonable person with the same mental disability or mental capacity would respond in certain circumstances to analyze whether the defendant conformed to the standard of care.¹⁶⁴

CONCLUSION

The objective reasonable person standard that courts apply to defendants with mental disabilities is no longer supported by the rationales previously presented by courts and commentators. The fears surrounding the Mentally Disabled community are antiquated given society's current understanding and acceptance of those with mental disabilities, making many of the policy reasons that favored an objective reasonable person standard for defendants with mental disabilities outdated. Based on the subjective standards used for children, those with physical disabilities, and contributory negligence; the exceptions to the objective reasonable person standard for defendants with mental disabilities in certain circumstances; and the advancements in science that permit an accurate determination of how mental disabilities impact cognitive function, the reasonable person standard should be subjectivized to consider an individual's mental disability when determining negligence liability. Though there are still concerns regarding the increased cost of identifying and measuring the impact of mental disabilities on cognitive function and extension of the subjective rule

159. See Lisa Jo Rudy, *Is Autism a Mental Illness?: How Doctors Define Autism*, VERYWELL HEALTH (May 1, 2020), <https://www.verywellhealth.com/is-autism-a-mental-illness-4427991>; *Mental Disorders*, MEDLINE PLUS (May 30, 2020), <https://medlineplus.gov/mentaldisorders.html>.

160. Janice Connell, John Brazier, Alicia O'Cathain, Myfanwy Lloyd-Jones, & Suzy Paisley, *Quality of Life of People with Mental Health Problems: A Synthesis of Qualitative Research*, 10 HEALTH & QUALITY LIFE OUTCOMES 1, 4–15 (2012) (explaining how different mental disabilities or illnesses impact different areas of everyday life including an individual's motivation, mood, physical well-being, independence, self-perception, among many other areas).

161. See Ellis, *supra* note 6, at 1088 (explaining that an individual may suffer from a mental disability such as severe anxiety that impacts their everyday life, however that individual is of typical intelligence and has the ability to exercise the ordinary standard of care required by the objective reasonable person standard).

162. See *id.*

163. Cosgrove, *supra* note 142, at 432.

164. See *id.*

to certain mental impairments that should not be afforded subjectivity, public policy no longer favors a rule that holds a defendant liable for failure to meet a standard of care that they are incapable of meeting. In cases involving a defendant with a mental disability, the test for determining negligence should be whether the defendant exercised the same standard of care that a reasonable person with the same mental disability would have exercised under the circumstances.

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