

A Plea to North Carolina: Bring Fairness to the Assessment of Civil Battery Liability for Defendants with Cognitive Disabilities

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In certain instances, the courts appear to apply the law of civil battery in a confused and unfair manner to defendants with cognitive disabilities. In cases where there is the “appearance” of a civil battery—where the defendant causes harmful or offensive contact to the plaintiff—courts appear to assume the existence of the requisite intent and, accordingly, the commission of the tort. As justification, the courts frequently offer that “the insane are liable for their torts.”

This Article agrees that a cognitive disability, or “insanity” to employ the terminology often used by the courts, is not an affirmative defense to intentional torts in general or to battery in particular. The Article argues, however, that a relevant and diagnosable cognitive disability may in certain instances have bearing on the plaintiff’s ability to meet the burden of proving the necessary, prima facie element of intent. In such instances, fairness and the proper application of the law of battery demand that the plaintiff meet this burden of proof before the case can move forward.

North Carolina cases are among those that appear to confuse the prima facie element of intent with the affirmative defense of insanity. However, these North Carolina cases are now decades old and ripe for a revisit. This timing, coupled with the willingness of North Carolina courts to think innovatively about complex legal issues, makes the North Carolina judiciary an excellent candidate to clarify the law of civil battery as applied to persons with relevant and diagnosable cognitive disabilities. This Article is a plea to North Carolina courts to bring clarity to the law of civil battery and fairness to the assessment of liability in defendants with cognitive disabilities.

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INTRODUCTION

North Carolina legislators and judges frequently refuse to bow to national majority positions and trends in tort law. For example, North Carolina is one of the few states to continue to recognize contributory negligence as a complete bar to recovery in negligence actions,¹ to continue to recognize the heart balm torts of alienation of affections and criminal conversation,² and to continue, against widespread popularity to the contrary, to reject strict liability as a basis for recovery in an action arising out of products liability.³

1. See, e.g., *Scheffer v. Dalton*, 777 S.E.2d 534, 541 (N.C. Ct. App. 2015) (“In North Carolina, a plaintiff’s right to recover in a personal injury or wrongful death action is barred upon a finding of contributory negligence.” (citing *Brewer v. Harris*, 182 S.E.2d 345, 350 (N.C. 1971); *Prior v. Pruett*, 550 S.E.2d 166, 173 (N.C. Ct. App. 2001), *disc. rev. denied*, 563 S.E.2d 572 (N.C. 2002))).

2. In 1984, the North Carolina Court of Appeals attempted to abolish alienation of affections and criminal conversation. See *Cannon v. Miller*, 322 S.E.2d 780, 804 (N.C. Ct. App. 1984). On appeal, the North Carolina Supreme Court vacated the decision of the court of appeals. *Cannon v. Miller*, 327 S.E.2d 888 (N.C. 1985) (“It appearing that the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court. It is therefore ordered that the petition for discretionary review is allowed for the sole purpose of vacating the decision of the Court of Appeals purporting to abolish the causes of action for Alienation of Affections and Criminal Conversation.” (citing *Cannon*, 322 S.E.2d 780)).

3. See, e.g., DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 5.3, at 273 (2005) (“The American Law Institute approved *Restatement (Second) of Torts* § 402A at its annual meeting in 1964 and published it the following year in volume 2 of the *Second Restatement*. With a gusto unmatched in the annals of Restatements of the Law, the new doctrine swept

North Carolina legislators and judges repeatedly demonstrate a willingness to be innovative in addressing complex legal issues. Examples include the creation of the North Carolina Business Court,⁴ designed to address and resolve complex business issues, and the Veterans Court,⁵ a specialized criminal court established to work through the complicated issues experienced by military veterans.

North Carolina is urged to once again stray from the national majority positions in tort law and be innovative in addressing complex legal issues. This time, the issue to be addressed is the intentional tort of battery and the assessment of liability for adults with pertinent and diagnosable cognitive disabilities.

While much of the discussion herein would apply to intentional torts in general, this Article focuses on the intentional tort of battery. Battery appears most prevalently in the cases cited in this Article. Further, battery presents an additional issue of intent with regard to how it is applied to the other operative elements of the tort,⁶ which makes battery particularly interesting with respect to its application to defendants with diagnosable cognitive disabilities.

For purposes of the intentional tort of battery, the majority rules and principles of law, under certain circumstances, appear to place adults with cognitive disabilities in a uniquely unfair position. The law of intent, while fair on its face, often applies unfairly because of flawed legal analysis by the courts or, in certain instances, a lack of analysis.

North Carolina currently appears to follow the flawed application of the law, but its law is grounded in a handful of cases that are now decades to a century old.⁷ The courts decided these cases at a time when the

across the face of America as courts and legislatures embraced § 402A and the bold new doctrine that it proclaimed: ‘strict’ liability in tort for harm caused by defective products. Tort law has probably never witnessed such a rapid, widespread, and altogether explosive change in a rule and theory of legal responsibility.’ (footnotes omitted). *But see* N.C. GEN. STAT. § 99B-1.1 (2015) (“There shall be no strict liability in tort in product liability actions.”).

4. N.C. GEN. STAT. § 7A-45.3 (2015) (“The Chief Justice may exercise the authority under rules of practice prescribed pursuant to G.S. 7A-34 to designate one or more of the special superior court judges authorized by G.S. 7A-45.1 to hear and decide complex business cases as prescribed by the rules of practice. Any judge so designated shall be known as a Business Court Judge and shall preside in the Business Court.”).

5. Jamie Markham, *Veterans Treatment Court*, N.C. CRIM. L., UNC SCH. OF GOV’T: NORTH CAROLINA CRIMINAL LAW (NOV. 12, 2014, 12:35 PM), <http://nccriminallaw.sog.unc.edu/veterans-treatment-court/> [<https://perma.cc/C374-TCD4>].

6. *See infra* notes 64–98 and accompanying text (discussing the issue of “single intent” versus “dual intent”).

7. *See infra* notes 127–46 and accompanying text.

treatment of persons with cognitive disabilities, in general, was problematic given the basic misunderstanding and lack of knowledge about such disabilities. Many advancements in the understanding of cognitive disabilities have occurred since these decisions were rendered. Thus, North Carolina is now in an excellent position to revisit these rules and to bring honesty and fairness to the application of the law.

This Article is a plea to North Carolina to hold the plaintiff to his burden of proving the *prima facie* element of intent, for purposes of civil battery, even when the defendant has a pertinent and diagnosable cognitive disability. Such proof requires reliable evidence from qualified witnesses on the defendant's ability to form the requisite intent. Therefore, specialized courts may be necessary to fully assess such issues, or these cases may of necessity be combined with cases in other courts to the extent they exist, where mental health issues are common.

Part I of this Article discusses courts' tendencies to fail to analyze or discuss the *prima facie* element of intent when assessing the civil battery liability of a defendant with a cognitive disability. It further discusses their inclination to focus instead on the inapplicability of the defense of insanity, which they justify with the statement that "the insane are liable for their torts." Part II explores North Carolina's early and current position on these issues, which tends to follow the analysis found in other jurisdictions. Part III discusses how North Carolina might lead the way in bringing fairness to the assessment of civil battery liability for defendants with cognitive disabilities.

I. THE NATIONAL POSITION—A FLAWED ANALYSIS

Liability for intentional torts is grounded in a finding that the defendant acted with intent to cause some form of harm to the plaintiff.⁸ In contrast, liability for negligence is grounded in the defendant's failure to act in an objectively, and sometimes subjectively, reasonable manner that caused harm to the plaintiff.⁹ Although the application of the law of negligence and of the various intentional torts in general to defendants with pertinent and diagnosable cognitive disabilities each may present problems,¹⁰ this Article is concerned with the application of the law of battery, specifically the intent requirement, to these defendants.

8. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 24, at 47–48 (2000).

9. *Id.* § 26, at 50.

10. See, e.g., Johnny Chriscoe & Lisa Lukasik, *Re-examining Reasonableness: Negligence Liability in Adult Defendants with Cognitive Disabilities*, 6 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 1, 51 (2015) (discussing issues in the application of negligence principles to defendants with cognitive disabilities).

Presumably, in certain instances a person with a cognitive disability is correctly deemed liable for committing a battery.¹¹ On occasion, however, such a person may be found liable under circumstances that can be described as unfair and unjust. In these instances, the loose application of the rules operates to subject a person with a cognitive disability to *de facto* strict liability.

A. *Intentional Conduct*

Defendants with cognitive disabilities have been found liable for committing a variety of intentional torts.¹² Central to each tort is the element of intent.

Intent is defined as acting with the purpose of causing some tortious result or with substantial certainty that some tortious result will occur.¹³ Accordingly, a battery occurs when the defendant causes harmful or offensive contact with the plaintiff's person, with the purpose of causing such contact or with substantial certainty that such contact will occur.¹⁴ Further, unlike the characteristics of negligence law's reasonably prudent

11. This Article does not argue that the mere existence of a cognitive disability, or even a diagnosed cognitive disability, necessarily precludes liability for an intentional tort in general or a battery specifically. A defendant may have a diagnosable cognitive disability and still be able to form the requisite intent for battery, depending on the nature of the disability.

12. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 135, 1072–73 (5th ed. 1984) (“Thus an insane person has been held liable in a tort action for assault and battery, false imprisonment, trespass on land, destruction of property, conversion, wrongfully suing out an injunction, alienation of affections, infringement of a patent, and injuries caused by the defective condition of his property.” (footnotes omitted)).

13. DOBBS, *supra* note 8, § 24, at 49 (“Intent is not a general state of mind. One has a purpose to, or a substantial certainty of accomplishing one or more specific objectives.”).

14. See, e.g., Jean Macchiaroli Eggen & Eric J. Laury, *Toward a Neuroscience Model of Tort Law: How Functional Neuroimaging Will Transform Tort Doctrine*, 13 COLUM. SCI. & TECH. L. REV. 235, 257–58 (2012) (“One of the first definitions that students of tort law learn is the meaning of intent. The most recent version of the *Restatement of Torts* provides that ‘[a] person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.’ Thus, in a claim for battery, which is generally defined as intentionally causing a harmful or offensive contact, the plaintiff must prove that the defendant desired to cause the harmful or offensive contact and that such contact did occur, or that the defendant believed that the harmful or offensive contact was substantially certain to occur. Moreover, if this requirement is met, ‘it is immaterial that the actor is not inspired by any personal hostility to the other, or the desire to injure him.’ The focus of the intent is the consequence that results, not the act itself. This meaning of intent is consistent throughout the intentional torts.” (footnotes omitted) (first quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (AM. LAW INST. 2010); then quoting RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (AM. LAW INST. 1965))).

person,¹⁵ the foundational element of intent is defined in the same manner regardless of who the defendant is and regardless of his physical or mental abilities or disabilities.¹⁶ While the law *defines* intent the same for everyone, it often *applies* to persons with cognitive disabilities somewhat presumptively which leads to unfair results with little or no real analysis.

It is sometimes stated, with supporting policy reasons, that persons with cognitive disabilities, or who are “insane” in the common parlance of the courts, are liable for their torts.¹⁷ It is interesting to note the origin of this rather conclusory statement, at least as provided by one author:

Mentally disabled persons usually have been classed with infants, and held liable for their torts. The rule seems to have originated in a dictum in a case decided in 1616, at a time when the action of trespass still rested upon the older basis of strict liability without regard to the fault of the individual. When the modern law developed to the point of holding the defendant liable only for wrongful intent or negligence, the dictum was still repeated, and there have been numerous decisions in accord with it.¹⁸

The case referenced in the quoted passage is *Weaver v. Ward*, in which the court stated “if a lunatick hurt a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass.”¹⁹

Regardless of this rather rocky start, the principle that persons with cognitive disabilities are liable for their torts is firmly rooted in American tort law.²⁰ Moreover, for purposes of intentional torts, the law defines

15. The “reasonably prudent person” is an objective standard that does not account for the attributes of the particular defendant. See Chriscoe & Lukasik, *supra* note 10, at 2–20 (discussing the historical development of differing and subjective definitions for the reasonably prudent person as applied to children and defendants with physical disabilities, but continuing to apply an objectively reasonable prudent person standard to adults with cognitive disabilities).

16. DOBBS, *supra* note 8, § 25, at 50 (“Both children and mentally disabled persons may be held responsible for intentional torts. The real question in intentional tort claims against them is the same as in other suits, that is, whether they in fact entertained the intent required to establish a particular tort.” (footnotes omitted)).

17. *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 624 (Wis. 1970) (“The policy basis of holding a permanently insane person liable for his tort is: (1) Where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it; (2) to induce those interested in the estate of the insane person (if he has one) to restrain and control him; and (3) the fear an insanity defense would lead to false claims of insanity to avoid liability.”). See also *German Mut. Fire Ins. Soc’y of Liberty v. Meyer (In re Guardianship of Meyer)*, 261 N.W. 211 (Wis. 1935).

18. KEETON ET AL., *supra* note 12, § 135, at 1072 (footnotes omitted).

19. *Weaver v. Ward* (1616) 80 Eng. Rep. 284; Hobart 135.

20. *Kaczer v. Marrero*, 324 So. 2d 717, 719 (Fla. Dist. Ct. App. 1976) (“[W]e hold that the common law principle that an insane person is responsible in damages for his tortious acts has not been abrogated in Florida. The principle is based not only upon the fact that, at

intent in the same manner for all defendants making such a rule appear fair on its face.

However, if the ultimate question is whether a person with a cognitive disability is liable for his torts, then the penultimate question would seem fairly to be one of whether he committed a tort in the first instance. For the intentional tort of battery, the determinative question would be whether he formed the requisite intent to commit the battery. This is the question courts on occasion appear to skip in reaching the conclusion that “insane persons are liable for their torts.”²¹ This statement presumes the commission of an intentional tort and therefore, presumes intent on the part of the defendant with a cognitive disability.

In the past, courts tended to label such defendants as lunatics,²² insane persons,²³ or mentally deranged,²⁴ and while such labels are a product of

common law, torts were not grounded upon the fault concept, but also upon the idea that the victim of a wrongful act must be compensated.” (footnote omitted) (citation omitted) (citing *Williams v. Hays*, 38 N.E. 449 (N.Y. 1894)); *McIntyre v. Sholty*, 13 N.E. 239, 240 (Ill. 1887) (“It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism, on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed.”); *Cross v. Kent*, 32 Md. 581, 583 (1870) (“The distinction between the liability of a lunatic or insane person in civil actions for *torts* committed by him, and in criminal prosecutions, is well defined, and it has always been held, and upon sound reason, that though not punishable criminally, he is liable to a civil action for any *tort* he may commit.”); *Williams*, 38 N.E. at 452 (“The ground of the liability is the damage caused by the tort. That is just as great, whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other; and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction.”); *Shedrick v. Lathrop*, 172 A. 630, 632 (Vt. 1934) (“Insanity of the defendant is no defense to the award of compensatory damages. An insane person is liable in damages for his torts.” (citing *Morse v. Crawford*, 17 Vt. 499 (1845); 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 65 (D. Avery Haggard ed., 4th ed. 1932); *Seals v. Snow*, 254 P. 348 (Kan. 1927))).

21. See, e.g., *Carter v. Scott*, 750 S.E.2d 679, 681 (Ga. Ct. App. 2013) (“[A]n insane person is liable for his torts the same as a sane person . . .” (quoting *Cent. of Ga. Ry. Co. v. Hall*, 52 S.E. 679, 684 (Ga. 1905)) (citing *Continental Cas. Co. v. Parker*, 307 S.E.2d 744 (Ga. Ct. App. 1983))); *Banks v. Dawkins*, 339 So. 2d 566, 568 (Miss. 1970) (“It is the general rule in this and other states that, although a person may be suffering from a mental condition so as to be insane, nevertheless he is required to respond in compensatory damages for injuries resulting from his torts.” (citing *Feld v. Borodofski*, 40 So. 816 (Miss. 1906))).

22. See, e.g., *Lincoln v. Buckmaster*, 32 Vt. 652, 661 (1860) (“[A] lunatic is liable for his torts.”).

23. See, e.g., *Seals v. Snow*, 254 P. 348, 349 (Kan. 1927) (“[A]n insane person is civilly liable for his torts.”).

their time, the courts would then make the blanket statement that they are *all* liable for their torts.²⁵ The tendency to wrap the intent element into the denial of an affirmative defense of insanity appears to relieve the plaintiff of its duty to prove the presence of actual and subjective intent as part of the plaintiff's prima facie case of battery.²⁶ While this Article does not take issue with the denial of insanity as an affirmative defense to a civil battery, in certain instances the failure to require proof of actual intent by the plaintiff may result in intentional tort liability where the defendant acted only negligently.²⁷ Moreover, such a tendency may result in an application of *de facto* strict liability in instances where the harm to the plaintiff was purely accidental.

B. McGuire v. Almy

A notable illustration is the 1937 case of *McGuire v. Almy*.²⁸ In this case, a registered nurse sued an "insane person"²⁹ who was a patient under her care.³⁰ Upon hearing a crashing sound coming from the defendant's room, the sound of the defendant breaking furniture, and while knowing the defendant was "ugly, violent and dangerous," the plaintiff entered the defendant's room to remove the broken debris so the defendant would not hurt herself.³¹ The defendant then struck the plaintiff with a piece of the broken furniture, and the plaintiff sued for civil assault and battery.³² The defendant verbally threatened the plaintiff,³³ thus admittedly there was at least some proof that the defendant was capable of forming the requisite intent to commit a civil battery. Nonetheless, it is the court's general discussion of the liability of the "insane" that is relevant to this Article.

24. See, e.g., *McGuire v. Almy*, 8 N.E.2d 760, 762 (Mass. 1937).

25. See *id.* at 763 ("For this case it is enough to say that where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable.").

26. See *id.*

27. While, at first, it would seem to make little difference that the defendant is deemed liable for an intentional tort where he actually committed only an act of negligence, particularly with regard to those with cognitive disabilities because they are generally not liable for punitive damages. One fact that makes a tremendous difference is that liability insurance generally precludes coverage for harm caused intentionally by an insured. See *infra* note 162.

28. *McGuire*, 8 N.E.2d at 760.

29. *Id.* at 761.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 763.

In affirming a verdict for the plaintiff,³⁴ the court began with a recitation of the common principles regarding persons with cognitive disabilities and their torts:

[W]e find that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent, nor do the courts discuss the effect of different kinds of insanity or of varying degrees of capacity as bearing upon the ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it, although it is sometimes said that an insane person is not liable for torts requiring malice of which he is incapable.³⁵

Holding persons with cognitive disabilities liable for intentional torts without considering “the effect of different kinds of insanity or of varying degrees of capacity”³⁶ or the “ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it,”³⁷ risks establishing liability without intent. This, in essence, results in a form of strict liability. In concluding that mental capacity is irrelevant to liability, the court gives little concern to the necessity of proving the prima facie element of intent and instead focuses on the admittedly inapplicable defense of insanity.

Furthering the point that intentional tort liability for such defendants is a blanket conclusion rather than the product of reasoned analysis, the *McGuire* court observed with great candor that “[t]hese decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged.”³⁸ Further, the court acknowledged the “suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.”³⁹

The *McGuire* court also noted the criticism of the rule and the reason for that criticism:

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal mediaeval

34. *Id.* at 764.

35. *Id.* at 762.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault.⁴⁰

Nonetheless, the court rationalized application of the rule by explaining that it was consistent with holding infants liable for intentional torts⁴¹ and by explaining that fault is not in this day a “universal prerequisite to liability.”⁴² The court, again with great candor, then rationalized the rule with the legal thinking that has allowed the rule to exist these many years: “[I]t would be difficult not to recognize the persuasive weight of so much authority so widely extended.”⁴³

McGuire highlights several important points regarding the liability of persons with cognitive disabilities for intentional torts.

First, at least the older cases—from which the pertinent rules developed and that are still used today—generally treat persons with cognitive disabilities as though their disabilities are the same. They labeled the individuals as lunatics, mentally incompetent, or insane and held them liable without regard to the nature or extent of their cognitive disabilities.⁴⁴

Second, once so labeled, and in the apparent absence of the requirement of proof of actual intent, courts distinguished between intentional and negligent conduct on the part of persons with cognitive disabilities presumably based more on conduct than on mental state. For example, if a person with a cognitive disability engaged in conduct that would suggest an intentional tort if performed by a person without a cognitive disability, the court would draw the conclusion that the person with a cognitive disability acted intentionally. The court would reach this conclusion, without individual case by case analysis and without regard to whether the person did or did not harbor the requisite intent to commit the tort at issue.⁴⁵

Third, while the labels used to classify persons with cognitive disabilities are perhaps more sensitive today, the blanket rule of liability without discussing the presence of actual intent largely remains the same.⁴⁶

Fourth, the first three points suggest the risk that, by consuming the element of intent within the inapplicable defense of insanity rather than as

40. *Id.*

41. *Id.* at 763.

42. *Id.* Although unclear, here the court presumably refers to applications of strict liability.

43. *Id.*

44. *Id.* at 762.

45. *Id.*

46. *Id.* at 763. While *McGuire* is now eighty years old, the rule it promulgated remains largely unchanged. *See, e.g., infra* note 53.

part of the plaintiff's prima facie case, a person's cognitive disability becomes irrelevant. Accordingly, such evidence would likely be deemed inadmissible at trial.⁴⁷ The same rule would apply in federal courts⁴⁸ as well as in North Carolina courts.⁴⁹

Fifth, the courts' notions of broader justice and local convenience make it undesirable, to this day, for the courts to entertain thoughts of meaningful changes in the analysis.⁵⁰

These observations should raise concerns about the largely fault-based tort system that has dominated tort law in the United States for decades.⁵¹ In fact, the principle that the "insane are liable for their torts" appears to be more of an explanation for straying from a fault-based tort system than an affirmation of that system.⁵²

In a fault-based system, so long as intent is applied fairly across the board of potential defendants, if a person acts with intent to commit the conduct that defines an intentional tort then he should be deemed liable, without regard to whether he has a cognitive disability. For example, if a defendant acts with the purpose of causing harmful or offensive contact or with substantial certainty that it will occur, then he is liable for battery regardless of a cognitive disability.

47. See FED. R. EVID. 402 (deeming only relevant evidence admissible); N.C. GEN. STAT. § 8C-402 (2015) (deeming only relevant evidence admissible in North Carolina courts).

48. FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). FED. R. EVID. 402 ("Irrelevant evidence is not admissible.").

49. N.C. GEN. STAT. § 8C-401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); N.C. GEN. STAT. § 8C-402 ("Evidence which is not relevant is not admissible.").

50. *McGuire*, 8 N.E.2d at 762.

51. DOBBS, *supra* note 8, § 1, at 2 ("Tort liability can be defined in part by the grounds on which it is invoked. The term 'tort' is derived from the Latin roots meaning 'twisted,' as if to say tortious conduct is twisted conduct, conduct that departs from the existing norm. As the word itself suggests, torts are traditionally associated with wrongdoing in some moral sense. In the great majority of cases today, tort liability is grounded in the conclusion that the wrongdoer was at fault in a legally recognizable way. It is not ordinarily enough to impose liability that the defendant has merely caused harm by accident or happenstance; he must also be at fault. This fault approach is often associated with ideals of freedom; you will be free to act without liability, so long as you are not at fault in your actions.").

52. See *Yancey v. Maestri*, 155 So. 509, 511 (La. Ct. App. 1934) (noting "[t]he common law considers the effect of the insane person's act, while the civil law regards the cause of it. The difference of view is the result of the method of approach which the two schools of thought have pursued.").

However, the frequently repeated maxim that the “insane” are liable for their torts,⁵³ in itself, arouses some suspicion. If the court proves that the defendant is capable of acting with intent and if the court proves he has actually acted with intent, why is it necessary to single out the “insane” with a special principle that they are liable for their torts? Perhaps because they sometimes are held liable for the appearance of intent rather than proof of its existence. If the defendant with a cognitive disability commits an act that ordinarily would appear to be committed with the requisite intent to support liability—walking up to an individual and punching him—the disabled defendant is deemed liable, with the maxim supplanting proof of actual intent.

Also problematic is the fact that, similar to the *McGuire* court, other courts deem it necessary to offer strained justifications for holding defendants with cognitive disabilities liable.⁵⁴ If the defendant acted with actual intent to commit the basis of an intentional tort, battery for instance, no other justification is needed to hold him liable. Yet, apparently in the absence of a finding of true intent supported by expert evidence on the issue, the strained justifications continue:

A number of different explanations have been given for the liability of the mentally disabled, none of which has gone unchallenged. It has been said that “where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it.” So far as this is anything more than an historical survival, it represents a conclusion that it is better that the estate of the lunatic should be taken to give compensation for the damage he has done than that it should remain to be administered by guardians for his own incompetent benefit. It has been said also that if he is held liable, his custodians and those interested in his estate will be stimulated to keep him in order; and that since insanity is easily feigned, there would be too much temptation to pretend it. Coupled with this is perhaps an unexpressed

53. See *Polmatier v. Russ*, 537 A.2d 468, 469–70 (Conn. 1988) (“The majority of jurisdictions that have considered this issue have held insane persons liable for their intentional torts.” (footnote omitted) (citing RESTATEMENT (SECOND) OF TORTS § 895J (AM. LAW INST. 1965))); *Carter v. Scott*, 750 S.E.2d 679, 681 (Ga. Ct. App. 2013) (“the rule is that an insane person is liable for his torts” (quoting *Cent. of Ga. Ry. Co. v. Hall*, 52 S.E. 679 (Ga. 1905))); *Shelter Mut. Ins. Co. v. Williams ex rel Williams*, 804 P.2d 1374, 1378 (Kan. 1991) (“An insane person who shoots and kills another is civilly liable in damages to those injured by his tort.” (quoting *Seals v. Snow*, 254 P. 348 (Kan. 1927))); *Banks v. Dawkins*, 339 So. 2d 566, 568 (Miss. 1976) (“[A]lthough a person may be suffering from a mental condition so as to be insane, nevertheless he is required to respond in compensatory damages for injuries resulting from his torts.” (citing *Feld v. Borodofski*, 40 So. 816 (Miss. 1905))).

54. See *supra* note 20 and accompanying text.

fear of introducing into the law of torts the confusion and unsatisfactory tests attending proof of insanity in criminal cases.⁵⁵

In a fault-based tort system, fault, as evidenced by intent for purposes of the intentional torts in general and for battery in particular, is itself sufficient justification to hold a defendant liable for committing a tort. The presence of actual intent for purposes of intentional torts makes it unnecessary to engage in crystal-ball predictions that liability will make the defendant's guardians more likely to keep him in order.⁵⁶ Requiring actual intent also makes it unnecessary to rest liability upon some general concern, applicable to all areas of tort law, that the defendant might fake his disability,⁵⁷ or to base liability on a generalized fear that actual analysis of mental capacity might become as confusing as proof of insanity in criminal cases.⁵⁸ However, if liability is grounded in something other than proof of actual intent—such as by confusing the necessity of intent with the inapplicability of insanity as a defense—then such justifications may exist to help overlook the unfair treatment of those with cognitive disabilities.

Particularly telling is the “two innocent persons” explanation.⁵⁹ This justification suggests the application of strict liability. In a fault-based tort system, “innocent persons” are not held liable for harm caused accidentally and without fault, unless they are subject to strict liability.⁶⁰ It is at best odd to use a strict liability rationale to justify holding defendants with cognitive disabilities liable for either negligence or intentional torts.

The rather conclusory statement that all insane persons are liable for their torts, without individual assessment, is also likely a product of deeper analytical problems inherent to the intentional torts. These problems are particularly present in the tort of battery, perhaps the most frequent tort for which persons with cognitive disabilities might be sued.

One such problem arises from the practicalities of trial practice and proof of intent. Rarely would a defendant in an intentional tort action admit during direct or cross examination that he acted with the intent,

55. KEETON ET AL., *supra* note 12, § 135, at 1073 (footnotes omitted).

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. *See, e.g.,* Chriscoe & Lukasik, *supra* note 10, at 51 (“[T]ort law traditionally compensates the plaintiff when the plaintiff is *legally entitled* to compensation. Tort law does not compensate the plaintiff *every time* she suffers harm. Loosely speaking, the plaintiff is entitled to compensation only where the defendant acted with fault or where the defendant engaged in conduct to which strict liability applies, assuming no defenses are present.” (footnotes omitted)).

purpose, or substantial certainty of causing harm to the plaintiff.⁶¹ Thus, if the defendant stands two feet from the plaintiff and throws a punch in the plaintiff's direction that breaks the plaintiff's nose, his expected testimony might be that he did not want to harm the plaintiff.

However, the jury can disregard the defendant's self-serving testimony of his intent, assess the evidence that the defendant was standing two feet away from the plaintiff when he threw a punch in his direction and hit him on the nose, and conclude that the defendant acted with the requisite intent to commit a battery. The defendant's subjective intent is determined circumstantially and somewhat objectively by his conduct.⁶²

Now, if the defendant happened to have a pertinent and diagnosable cognitive disability that precluded him from actually forming such intent, a jury might reach the same conclusion—that the defendant had intent—based on the defendant's conduct and without regard to his cognitive disability. In the absence of any expert testimony regarding the defendant's ability to actually form the requisite intent to commit the intentional tort, there is no evidence for the jury to consider and assess other than the defendant's objective conduct. Of course, this outcome would be particularly predictable where evidence of the cognitive disability was not even admissible because deemed irrelevant under the rule that “insane” persons are liable for their torts.⁶³

The distinction between the two defendants in the above hypotheticals is critical to the point. In the first hypothetical, the defendant's contention was not that he was incapable of forming the requisite intent, but that he factually did not form the requisite intent. In this instance, use of the defendant's conduct as circumstantial evidence of intent is appropriate.

The second defendant's contention was that he was simply incapable of forming the requisite intent in the first instance. This contention would at least appear to demand proof to the jury through expert testimony, whether favorable or unfavorable to the defendant, that the defendant was

61. Keith N. Hylton, *The Theory of Tort Doctrine and the Restatement (Third) of Torts*, 54 VAND. L. REV. 1413, 1424–25 (2001) (“Since we cannot know with certainty whether another person has acted ‘purposefully or knowingly,’ the determination of intent is a matter of inference. Proof of purposeful or knowing conduct must, as Holmes stressed, hinge on whether the facts are such that a reasonable person would have known that his conduct would lead to harm, or that the probability of harm flowing from his conduct was very high. Viewed in this way, the determination of intent is not very different from the determination of negligence. Since defendants will not walk into court and admit intent or negligence, both require proof of facts that would lead a reasonable person to conclude that the defendant acted under the requisite mental state.” (footnote omitted)).

62. *See id.*

63. *See supra* notes 48–49 and accompanying text.

or was not capable of forming the requisite intent to commit a battery. Instead, the cases at least appear to move to the same conclusion of liability for both such defendants based largely on conduct serving as circumstantial evidence of intent.

C. *The Unique Problems in Battery*

One analytical problem, unique to the intentional tort of battery, may wrongly influence liability for all potential defendants, particularly defendants with cognitive disabilities. Battery raises the question of how the element of intent applies to the remaining elements of the tort. Battery is generally defined as acting with intent to cause, and actually causing, harmful or offensive contact.⁶⁴ The question is whether the plaintiff must prove only that the defendant *intended* to cause contact with the plaintiff and that the contact *resulted* in harm or offense, or whether the plaintiff must prove that the defendant *intended* the contact *and* that he also *intended* the harm or offense.

One writer described the question as one of “single intent” and “dual intent”:

In particular, several torts scholars have recently debated the question of whether battery does (and should) require both intent to cause a bodily contact and intent to cause either harm or offense (“dual intent”) or whether it is sufficient that the defendant intends a bodily contact that turns out to be either harmful or offensive (“single intent”).⁶⁵

Courts vary, and if a court does make any effort to analyze the liability of persons with cognitive disabilities on a case by case basis rather than through conclusory statements, the liability of such a defendant may hinge on the approach a court chooses to follow.⁶⁶ If liability is based on the intent to make contact with another, such intent would seem to be satisfied, at least circumstantially, by the mere appearance that the defendant’s act was volitional and not involuntary.⁶⁷ On the other hand, if liability for battery is based upon proof that the defendant intended to bring about a particular consequence—harm or offense—then the question of intent involves a deeper consideration of the mental state of the defendant and his capacity to understand and appreciate those consequences.

64. See, e.g., DOBBS, *supra* note 8, § 28, at 52–53.

65. Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1588 (2012).

66. See *infra* Section I.C and Section I.D.

67. Of course, the tort of battery requires a volitional act, but that alone is insufficient to create blameworthiness without the intent to cause harm or offense.

In the case of *Wagner v. State*,⁶⁸ the defendant's employees were escorting a "mentally handicapped man" through a store when he attacked the plaintiff, grabbing her hair and throwing her to the floor.⁶⁹ The plaintiff sued the Utah State Development Center for failing to supervise the attacker, who was the defendant's patient.⁷⁰

The state contended the man's conduct constituted intentional battery and that it was, therefore, not liable under state law providing tort immunity to the state for intentional torts.⁷¹ Pertinent to this contention was the defendant's argument that a battery occurs where a person intends contact that results in harm or offense, but that the person need not also intend the harm or offense.⁷²

The plaintiff argued that battery requires intent to make contact and intent to cause the harm or offense.⁷³ The plaintiff conceded that her attacker acted with intent to cause contact but argued her attacker still did not commit a battery.⁷⁴ Her argument was that, because battery also requires proof that the attacker intended harm or offense, her attacker was mentally incapable of forming the intent to cause harm or offense.⁷⁵

Thus, squarely before the court was the issue of whether battery requires proof only of intent to make contact or also requires proof of intent to cause harm or offense.⁷⁶

The court, relying largely on the *Restatement (Second) of Torts*⁷⁷ and to some extent on case law, concluded that battery requires only proof of intent to cause contact of which results in harm or offense.⁷⁸ Thus, battery requires proving single intent and not that the harm or offense was also intended by the defendant.⁷⁹

68. *Wagner v. State*, 122 P.3d 599 (Utah 2005).

69. *Id.* at 601.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 603.

75. *Id.*

76. *Id.*

77. *Id.* See RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1965) ("An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.").

78. *Wagner*, 122 P.3d at 603.

79. *Id.* See Moore, *supra* note 65.

A similar case with a like result is *White v. University of Idaho*.⁸⁰ In *White*, the defendant, a piano professor, touched the plaintiff on her back.⁸¹ The unexpected contact resulted in serious injuries to the plaintiff, including “thoracic outlet syndrome on the right side of her body, requiring the removal of the first rib on the right side.”⁸² She also suffered from “scarring of the brachial plexus nerve which necessitated the severing of the scalenus anterior muscles.”⁸³ While the defendant admitted that he intentionally touched the plaintiff, he contended that his purpose was to demonstrate a piano technique.⁸⁴ The plaintiff contended that the contact was without consent and that “she found it offensive.”⁸⁵

Similar to *Wagner*, the plaintiff in *White* argued that the defendant’s conduct constituted negligence instead of the intentional tort of battery.⁸⁶ The plaintiff made this argument because she also sued the defendant’s employer, the University of Idaho; if the defendant’s act was deemed to be battery, the university would be immune from liability.⁸⁷ Accordingly, directly before the court was the issue of whether battery requires only proof of intent to cause contact (“single intent”) or proof of intent to cause contact and intent to cause harm or offense (“double intent”).⁸⁸

The Idaho Supreme Court affirmed a partial summary judgment for the university.⁸⁹ Specifically, it held that the intentional tort of battery does “not require an intent to injure or harm, but merely an intent to do the act complained of,” which in this case was contact with the plaintiff.⁹⁰

Cases such as *Wagner*⁹¹ and *White*⁹² seem to miss the fault concept embodied in the intentional tort of battery. They require only intent to cause contact that ultimately results in harm or offense but do not require proof of intent to cause harm or offense. It is the intent to harm or offend that makes the defendant who commits a battery truly blameworthy.⁹³ Requiring only the intent to cause contact subjects the defendant, with or

80. *White v. Univ. of Idaho*, 797 P.2d 108 (Idaho 1990).

81. *Id.* at 109.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* See also Moore, *supra* note 65 (discussing single and double intent).

89. *White*, 797 P.2d at 111.

90. *Id.* (relying on *Rajspic v. Nationwide Mut. Ins. Co.*, 718 P.2d 1167 (Idaho 1986)).

91. *Supra* notes 68–79 and accompanying text.

92. *Supra* notes 80–90 and accompanying text.

93. See, e.g., DOBBS, *supra* note 8, § 30, at 59.

without a cognitive disability, to liability for an intentional tort where he may have been merely negligent or imposes strict liability where the defendant acted innocently.

Consider the hypothetical of two college roommates, X and Y. Neither, for purposes of generalization, have a cognitive disability. They return to their apartment one evening after having dinner. Roommate X steps forward to unlock their apartment door when he makes it obvious that he does not have his key to their apartment. Roommate Y, sensing the problem, says, "Here, catch." He then, simultaneously with his words, tosses his apartment key to Roommate X. Roommate X, however, while hearing Roommate Y's words, has only enough reaction time to turn toward Roommate Y. The apartment key strikes Roommate X in the eye, causing significant harm.

Roommate Y, in this hypothetical, acted with the intent to cause contact with Roommate X, albeit not contact with Roommate X's eye. While Roommate Y did not intend to cause harm or offense to Roommate X, under cases such as *Wagner* and *White*, Roommate Y is liable to Roommate X for the intentional tort of battery.

If such facts were submitted to a jury along with an instruction for liability based on negligence, a jury might conclude that Roommate Y acted negligently. Alternatively, it might conceivably conclude that Roommate Y did not fail to act as a reasonably prudent person under the circumstances. However, the law of *Wagner*⁹⁴ and *White*⁹⁵ would hold Roommate Y liable for the much more egregious tort of battery. In effect, requiring only proof of intent to cause contact may result in intentional tort liability for what might otherwise be negligent or innocent conduct.

While few cases or authors address the distinction between the intent to cause contact and the intent to cause both the contact and the harm or offense, at least one author has noted the problem:

The Restatement's formula is perhaps ambiguous, but it probably means intent to harm or offend as well as an intent to touch is required. This is in line with the fault principle and also with the freedom to act encouraged by that principle. To see this, suppose that in the illustrative example, the defendant is a wife who hugs her husband, but the hug unexpectedly causes a bone spur to break off and impinge upon a nerve in her husband's spine. If the wife intended neither harm nor any violation of the husband's implicit consent to friendly physical contact, the intent is not tortious or faulty. Except under a general regime of strict liability that is inconsistent

94. *Supra* notes 68–79 and accompanying text.

95. *Supra* notes 80–90 and accompanying text.

with the fault principle, the physical contact alone seems to furnish no ground for liability.⁹⁶

The hypothetical offered in this quotation makes several direct points. Given the choice between non-liability and liability for negligence, the wife would likely escape liability. This is so because, assuming she had no foreseeability of the potential harm to her husband, the wife did not fail to act as a reasonably prudent person under the circumstances. However, if liability for battery becomes an option, and if intent is satisfied by intent to cause contact followed by consequential-but-unintended harm or offense, the wife would be liable for the intentional tort of battery.

The distinction between battery and negligence is not the measure of damages but rather the frame of mind with which the defendant conducts himself. It seems inconsistent with the notion of fault-based liability for a defendant to be held liable for battery—generally considered to be more egregious conduct than negligence—unless the defendant *intended harm*, or at least offense.

Courts should refrain from holding defendants with cognitive disabilities liable for intentional torts, simply inferring intent from conduct, and relying on an archaic and generalized maxim—likely sourced from dictum⁹⁷—that the “insane” are liable for their torts. However, even if a court analyzes the defendant’s conduct on an individual level, the single intent approach to battery places the defendant in only a slightly better position than reliance on an outdated maxim. As stated earlier,⁹⁸ proof of intent to cause contact would seem to require little more than proof of volitional body movement.

D. *A Case for the Times*

In cases involving intentional torts allegedly committed by defendants with cognitive disabilities, courts should adopt the dual intent requirement.⁹⁹ Specifically, they should require proof that (1) the defendant acted with actual, subjective intent—meaning to act with

96. DOBBS, *supra* note 8, § 30, at 59.

97. KEETON ET AL., *supra* note 12, § 135, at 1072; *see supra* text accompanying note 18.

98. *Supra* text accompanying note 67.

99. *See* Moore, *supra* note 65, at 1631–32 (“There are . . . some recurring situations in which the choice between single and dual intent *is* likely to make a significant difference. These situations involve . . . those defendants, such as the insane or children, who may have the capacity to intend a bodily contact, but who either lack the capacity or are unlikely to appreciate that the intended contact will be either harmful or offensive.”). *But see* RESTATEMENT (THIRD) OF TORTS § 102 (AM. LAW INST. Tentative Draft No. 1, 2015) (“The intent required for battery is the intent to cause a contact with the person of another. *The actor need not intend to cause harm or offense to the other.*” (emphasis added)).

purpose or substantial certainty¹⁰⁰—and, at least for purposes of battery, (2) that the defendant’s intent was not only to cause contact but also to cause either harm or offense.

At least one relatively recent case leads the way in requiring such dual proof. In *White v. Muniz*,¹⁰¹ the eighty-three year-old defendant, Everly, lived in an assisted living facility.¹⁰² The plaintiff, Muniz, worked as a shift supervisor for the facility.¹⁰³ One day Everly struck Muniz in the jaw as Muniz attempted to change Everly’s adult diaper.¹⁰⁴ The following day, a physician determined that Everly suffered from “[p]rimary degenerative dementia of the Alzheimer type, senile onset, with depression.”¹⁰⁵ Muniz sued Everly for assault and battery, as well as Everly’s personal representative, White, for negligence.¹⁰⁶

The trial court instructed the jury that “[a] person intends to make a contact with another person if she does an act for the purpose of bringing about such a contact, whether or not she also intends that the contact be harmful or offensive.”¹⁰⁷ Nonetheless, the trial court further instructed the jury that “[y]ou may find that she acted intentionally if she intended to do what she did, even though her reasons and motives were entirely irrational. *However, she must have appreciated the offensiveness of her conduct.*”¹⁰⁸

From a jury verdict favorable to defendants Everly and White,¹⁰⁹ the plaintiff appealed to the Colorado Court of Appeals.¹¹⁰ The Colorado Supreme Court explained the decision of the Colorado Court of Appeals:

The court of appeals reversed the decision of the trial court and remanded the case for a new trial. The court of appeals reasoned that most states continue to hold mentally deficient [defendants] liable for their intentional acts regardless of their ability to understand the offensiveness of their actions. “[W]here one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it.” The court of appeals

100. See RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) (“The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”).

101. *White v. Muniz*, 999 P.2d 814 (Colo. 2000) (en banc).

102. *Id.* at 815.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 815–16 (emphasis original).

109. *Id.* at 816.

110. *See id.*

reasoned that insanity may not be asserted as a defense to an intentional tort, and thus, concluded that the trial court erred in “instructing the jury that Everly must have appreciated the offensiveness of her conduct.”¹¹¹

It is worth observing, at this point in the discussion of the history of the case, that the court of appeals’ opinion represents all that is wrong in the assessment of intentional tort liability for defendants with cognitive disabilities, especially with regard to the tort of battery.

In the tradition of older cases, the court of appeals placed the defendant, Everly, in her presumed appropriate class and then generalized that “most states continue to hold mentally deficient [defendants] liable for their intentional acts.”¹¹² This “analysis” involves no discussion of whether such defendants actually acted with subjective intent even where they have no “ability to understand the offensiveness of their actions.”¹¹³ The court then justified this principle with the traditional “where one of two innocent persons must suffer a loss”¹¹⁴ language that is, arguably, a better justification for strict liability.

On appeal to the Colorado Supreme Court, the court stated the issue before it: “The question we here address is whether an intentional tort requires some proof that the tortfeasor not only intended to contact another person, but also intended that the contact be harmful or offensive to the other person.”¹¹⁵ The court addressed the issue without regard to the defendant’s cognitive disability before turning to the proof of intent required for a defendant with such a disability.¹¹⁶ By offering a more intensive analysis for defendants with cognitive disabilities, the court’s opinion could serve as a model for the assessment of intentional tort liability for this class of defendants.

The court began by observing that “[s]tate courts and legal commentators generally agree that an intentional tort requires some proof that the tortfeasor intended harm or offense.”¹¹⁷ With particular regard to battery, the court added:

Historically, the intentional tort of battery required a subjective desire on the part of the tortfeasor to inflict a harmful or offensive contact on another. Thus, it was not enough that a person intentionally contacted another *resulting* in a harmful or offensive contact. Instead, the actor had to

111. *Id.* at 816 (citation omitted) (quoting *Muniz v. White*, 979 P.2d 23, 25–26 (Colo. App. 1998), *rev’d*, 999 P.2d 819 (Colo. 2000) (en banc)).

112. *Id.*

113. *Id.*

114. *Id.* (quoting *Muniz*, 979 P.2d at 25).

115. *Id.*

116. *Id.* at 816–18.

117. *Id.* at 816 (citing *KEETON ET AL.*, *supra* note 12, § 8; *DOBBS*, *supra* note 8, § 30).

understand that his contact would be harmful or offensive. The actor need not have intended, however, the harm that actually resulted from his action. Thus, if a slight punch to the victim resulted in traumatic injuries, the actor would be liable for all the damages resulting from the battery even if he only intended to knock the wind out of the victim.¹¹⁸

The court then noted that, recently, some courts have defined the tort of battery as a single intent tort.¹¹⁹ That is, intent to cause contact is all that is necessary as opposed to defining battery as a double intent tort requiring proof of intent to cause contact and intent to cause harm or offense.¹²⁰ Most importantly, the court noted the impact a single intent definition might have on defendants with cognitive disabilities, stating: “[W]hen evaluating the culpability of particular classes of defendants, such as the very young and the mentally disabled, the intent required by a jurisdiction becomes critical.”¹²¹

The court concluded this portion of its opinion by finding that Colorado law “requires the jury to conclude that the defendant both intended the contact and intended it to be harmful or offensive.”¹²² Upon deciding the necessary intent for liability, the court turned its attention to the requirement of actual proof of subjective intent, particularly with regard to defendants with cognitive disabilities:

A jury can, of course, find a mentally deficient person liable for an intentional tort, but in order to do so, the jury must find that the actor intended offensive or harmful consequences. As a result, insanity is not a defense to an intentional tort according to the ordinary use of that term, but is a characteristic, like infancy, that may make it more difficult to prove the intent element of battery. Our decision today does not create a special rule for the elderly, but applies Colorado’s intent requirement in the context of a woman suffering the effects of Alzheimer’s.

....

With regard to the intent element of the intentional torts of assault and battery, we hold that regardless of the characteristics of the alleged tortfeasor, a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act.¹²³

118. *Id.* at 816–17 (footnote omitted) (citations omitted) (citing RESTATEMENT (SECOND) OF TORTS § 16(1) (AM. LAW INST. 1965)).

119. *Id.* at 817 (emphasis in original) (citing *Brzoska v. Olson*, 668 A.2d 1355, 1360 (Del. 1995); *White v. Univ. of Idaho*, 797 P.2d 108, 111 (Idaho 1990)).

120. *See id.*

121. *Id.*

122. *Id.* at 818.

123. *Id.* at 818–19.

Critically, the court made clear that it was not creating a new or “special rule for the elderly.”¹²⁴ The young, the elderly, nor those with cognitive disabilities need new rules regarding intentional tort liability. The statements of law are currently fair, but their application needs a cleansing clarification. First, intent, for purposes of battery, must be applied in such a way to make the defendant’s conduct blameworthy, or to require fault. Specifically, the necessary intent must be dual intent, both intent to cause contact and the intent to cause harm or offense. Second, the courts need to require the plaintiff to prove the defendant had such actual, subjective intent, regardless of the defendant’s age and regardless of the presence or absence of a cognitive disability. As the court noted, “insanity” may not be a defense to intentional tort, but it is not entirely irrelevant.¹²⁵ Evidence of a cognitive disability is wholly relevant to the plaintiff’s proof of intent in the prima facie intentional tort case.¹²⁶

II. NORTH CAROLINA’S POSITION

North Carolina is rather ideally positioned to bring the assessment of intentional tort liability for persons with cognitive disabilities into modern times for three reasons: (1) It appears that it already requires proof of intent to cause contact and proof of intent to cause harm or offense for purposes of battery;¹²⁷ (2) its application of the law of intent for the purpose of assessing the liability of the “insane,” though inaccurate, is sufficiently dated to be ripe for a revisit;¹²⁸ and (3) its legislators and judges appear to be amenable to innovative thinking to resolve complex legal questions.¹²⁹

A. *Intent and Cognitive Disabilities*

North Carolina’s approach to the assessment of intentional tort liability for persons with cognitive disabilities is grounded primarily in a couple of cases that are decades old and which, as might be expected, exhibit the same summary and conclusory analysis found in other cases of the time.

In the 1910 case of *Moore v. Horne*,¹³⁰ the defendant “assaulted the plaintiff with a pistol and injured him.”¹³¹ The defendant was subsequently

124. *Id.* at 818.

125. *Id.*

126. *Id.*

127. *See Andrews v. Peters*, 330 S.E.2d 638, 641 (N.C. Ct. App. 1985).

128. *See Moore v. Horne*, 69 S.E. 409, 410 (N.C. 1910).

129. *See supra* notes 4–5 and accompanying text.

130. *Moore*, 69 S.E. 409.

adjudicated “insane,”¹³² and the plaintiff brought suit against him for the injuries he suffered.¹³³ The defendant later appealed from a verdict against him at trial.¹³⁴ Pertinent to the court’s analysis was the fact that plaintiff claimed only compensatory and not punitive damages.¹³⁵

The court began with basic statements regarding tort liability of defendants with cognitive disabilities that were traditional for the time:

The plaintiff does not claim punitive damages, but actual or compensatory damages only. A lunatic is liable in a civil action for any tort which he may commit. The proper measure of damages in an action against a lunatic for tort committed by him is compensation for the injuries sustained. It cannot include punitive damages.¹³⁶

Of significant interest to this Article is the fact that the court cited with approval the 1887 Illinois case of *McIntyre v. Sholty*,¹³⁷ a case that also involved harm caused by a “lunatic.”¹³⁸ Regarding the *McIntyre* decision, the *Moore* court stated that “[t]he court excluded the evidence of insanity in the case, and the ruling of the trial court was affirmed. An insane person is just as responsible for his torts as a sane person.”¹³⁹

From *Moore* and its reliance upon *McIntyre*, North Carolina apparently developed the rule that not only are the “insane” liable for their intentional torts, but that evidence of their disability is not even admissible at trial presumably because those cases deemed it irrelevant.

Such a rule of inadmissibility makes legal sense within the context of the often-stated maxim that “insanity” is not a defense to intentional torts. However, if the plaintiff must prove intent as a part of his prima facie case for intentional tort, as the law would seem to require, then the defendant’s cognitive disability is entirely relevant to plaintiff’s ability to meet his burden of proof of establishing intent.¹⁴⁰ Again, as was traditional for the day, intent, for purposes of intentional torts and liability of defendants with cognitive disabilities, appears to have been established from the

131. *Id.* at 410.

132. *Id.*

133. *Id.*

134. *Id.* at 409.

135. *Id.* at 410.

136. *Id.* (citing *McIntyre v. Sholty*, 13 N.E. 239 (Ill. 1887)).

137. *McIntyre*, 13 N.E. 239.

138. *Id.* at 240.

139. *Moore*, 69 S.E. at 410 (citing *Williams v. Hays*, 38 N.E. 449 (N.Y. 1804); 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 171 (John Lewis ed., 3d ed. 1906); THOMAS G. SHERMAN & AMASA S. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 122 (5th ed. 1898)).

140. *See supra* notes 122–23 and accompanying text.

defendant's conduct rather than from proof of the defendant's actual, subjective state of mind.

In the 1938 case of *Bryant v. Carrier*,¹⁴¹ the plaintiff sued the defendant, who had been declared "legally insane,"¹⁴² for alienation of affections and criminal conversation.¹⁴³ The twist to the case was that the plaintiff wanted to recover punitive damages as well as compensatory damages.¹⁴⁴

The court again stated the basic principle of the day that "[w]hile an insane person is civilly liable for his torts, this liability is for compensatory damages only, and does not include punitive damages."¹⁴⁵ Then, the court approved of the introduction of evidence relevant to the defendant's sanity, but for purposes of proving the defendant had the capacity to act with the aggravated intent necessary to support an award of punitive damages.¹⁴⁶

These cases, products of their time, are suited for reexamination by the North Carolina courts when the opportunity presents itself. The liability of a defendant with a cognitive disability should not be based on the traditional conclusory statements of liability, but instead upon proof of actual, subjective intent. Such proof requires the plaintiff to prove, often with expert testimony, no doubt, that the defendant was capable of forming the requisite intent for the tort at issue. This position does not change existing law but only begs for the proper application of existing law.

B. *Single and Dual Intent*

As discussed earlier, certain courts take a single intent approach for purposes of battery and require the plaintiff to prove only that the defendant acted with the intent to cause contact with the plaintiff and that the contact resulted in harm or offense.¹⁴⁷ Other courts take a double intent approach and require the plaintiff to prove that the defendant acted with the intent to cause contact and with the intent to cause harm or offense.¹⁴⁸

141. *Bryant v. Carrier*, 198 S.E. 619 (N.C. 1938).

142. *Id.* at 620.

143. *Id.*

144. *Id.*

145. *Id.* (citing *Moore v. Horne*, 69 S.E. 409 (N.C. 1910); *Bollinger v. Rader*, 69 S.E. 497 (N.C. 1910); *Jewell v. Colby*, 24 A. 902 (N.H. 1891)).

146. *Id.*

147. *See supra* Section I.C (discussing *Wagner v. State*, 122 P.3d 599 (Utah 2005); *White v. Univ. of Idaho*, 797 P.2d 108 (Idaho 1990)).

148. *See supra* Section I.D (discussing *White v. Muniz*, 999 P.2d 814 (Colo. 2000) (en banc)).

Even if a court analyzes intent on an individual basis, requiring the plaintiff to prove the defendant acted with the requisite subjective intent, such a requirement is all but completely meaningless if the court takes a single intent approach to liability for battery. This statement is true regardless of whether the defendant does or does not have a cognitive disability.

Requiring only intent to cause contact removes the fault and blameworthiness that attaches to the double intent approach. Proof of intent to cause contact would require little, if any, more than proof that the defendant acted volitionally.

It does not appear the North Carolina appellate courts have been squarely faced with the issue of whether to apply a single or double intent approach. However, in a relatively recent decision by the North Carolina Court of Appeals, the court included language to suggest a double intent approach, if only tangentially.

In *Andrews v. Peters*,¹⁴⁹ the defendant walked up behind the plaintiff and used the front of his knee to bump the back of plaintiff's knee.¹⁵⁰ This act caused the plaintiff's knee to buckle, upon which she fell and sustained an injury.¹⁵¹ The plaintiff sued the defendant for assault and battery.¹⁵²

While the issue before the Court of Appeals raised questions pertaining to the recovery in tort from a co-employee,¹⁵³ the court had occasion to address the required proof for battery.¹⁵⁴

Citing the *Restatement (Second) of Torts*, the court noted that "liability for the intentional tort of battery hinges on the defendant's intent to cause a harmful or offensive contact."¹⁵⁵ The court further observed that "[the defendant] does not deny that he intended to tap [the plaintiff] behind the knee. Although tapping [the plaintiff's] knee was arguably not in and of itself a harmful contact, it easily qualifies as an offensive contact."¹⁵⁶

The language of the case strongly suggests a dual intent approach to the tort of battery. Particularly instructive is the court's observation that the defendant "intended" to tap the plaintiff's leg and that such a tap qualifies as "offensive contact."¹⁵⁷ Thus, it would appear necessary for the

149. *Andrews v. Peters*, 330 S.E.2d 638 (N.C. Ct. App. 1985).

150. *Id.* at 639.

151. *Id.*

152. *Id.*

153. *Id.* at 640.

154. *Id.* at 640-41.

155. *Id.* at 641 (citing RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1965)).

156. *Id.*

157. *Id.*

plaintiff to prove in this case that the defendant intended the contact and that he intended the offense.¹⁵⁸

The language of *Andrews* should serve as authority when the court eventually finds itself in a position to address the issue head-on. The dual intent approach is the fairer of the two approaches. It avoids creating intentional tort liability for conduct that more fairly should be described as merely negligent conduct or even innocent conduct, in which case the liability becomes strict.

III. THE PLEA TO NORTH CAROLINA

The plea to North Carolina is relatively simple because it requires no changes to the law of intentional torts, but only a clear approach to its application.

Where the plaintiff brings suit for the intentional tort of battery, and an issue of the defendant's cognitive disability is fairly raised, refrain from relying on the conclusory maxim that "the insane are liable for their torts." Instead, courts should require the plaintiff to specifically prove, most likely through expert testimony, that the defendant was capable of forming the requisite intent for the tort. Particularly, with regard to the intentional tort of battery, require proof that the defendant both intended to cause contact and, more importantly, that the defendant intended to cause harm or offense.

The North Carolina cases cited earlier¹⁵⁹ and their reliance on the conclusory and non-analytical statement that the "insane" are liable for their intentional torts, without more, arose at a time when little was known about cognitive disabilities. Naturally, there was some concern that a defendant might fake a disability for more favorable treatment under the law.¹⁶⁰ "Today, in contrast to a century ago, with the assistance of manuals and medical experts and with experience from other contexts, courts are capable of separating those persons who experience a relevant cognitive disability from those only claiming to experience one."¹⁶¹

Perhaps, the most practical and honest rationale for the rule that "insanity is not a defense to intentional torts" is the concern that such a defense would bring to the civil courts the substantive, procedural and administrative difficulties that have plagued the criminal courts in regard to

158. *See id.*

159. *See supra* notes 127–46.

160. KEETON ET AL, *supra* note 12, § 135, at 1073 ("It has been said . . . that since insanity is easily feigned, there would be too much temptation to pretend it.").

161. Chriscoe & Lukasik, *supra* note 10, at 31.

such defendants.¹⁶² True, a cognitive disability should not necessarily be a defense to a civil action in an intentional tort such as battery, but the plaintiff should prove as part of his *prima facie* case that the defendant with a cognitive disability actually formed the requisite intent to commit the intentional tort. Therefore, similar issues surface as would be present if insanity was, in fact, a defense to intentional torts. Accordingly, the same concerns about substantive, procedural and administrative nightmares would again arise.

It has been noted, however, particularly in regard to distinguishing legitimate from non-legitimate claims of cognitive disability, that “[c]ourts already determine cognitive capability in the areas of contract, probate, health care, family law, criminal law, and even primary negligence cases involving children.”¹⁶³ Though perhaps not an enviable task, the assessment of a defendant with a cognitive disability and his capacity to act with the intent to commit an intentional tort is a task necessary to the fair and just application of the law of intentional torts. It is the rule of law.

Further, when faced with complex legal issues, North Carolina has generally responded with innovative solutions to resolve such complexities.¹⁶⁴

By way of example, civil cases involving business world litigants no doubt raise very specialized questions that require a certain level of expertise and experience to fully comprehend. Rather than surrender to such complexity, the North Carolina legislature created special Business Courts¹⁶⁵ and filled its seats with the experienced judges and lawyers necessary to fully evaluate and resolve these business issues.

Moreover, military veterans charged with criminal offenses who suffer from post-traumatic stress and other disorders, no doubt create unique legal issues as well as issues regarding their treatment and rehabilitation. In response, North Carolina judges created special Veterans Courts¹⁶⁶ to resolve such intricate issues.

Perhaps in response to the substantive, procedural, and administrative nightmares associated with the liability of defendants with cognitive disabilities, it is now time to create special Mental Health Courts to fairly resolve these problems. As with Business Courts and Veterans Courts,

162. *McGuire v. Almy*, 8 N.E.2d 760, 762 (Mass. 1937) (“[C]ourts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.”).

163. *Chriscoe & Lukasik*, *supra* note 10, at 30 (footnotes omitted).

164. *See supra* notes 4–5 and accompanying text.

165. N.C. GEN. STAT. § 7A-45.3 (2015).

166. *See Markham*, *supra* note 5.

Mental Health Courts would be frequented by judges, lawyers and other experts necessary to resolve the tort liability of defendants with cognitive disabilities.

Finally, there is the often stated concern that if the defendant with a cognitive disability is excused from liability then the injured plaintiff will not be compensated. The responses to this concern are multifaceted.

First, if a defendant with a cognitive disability is incapable of forming the requisite intent to commit the intentional tort for which he has been sued, he is not excused from liability. He simply is not liable in the first instance under a fair application of the rule of law.

Second, in a primarily fault-based tort system, there will always be injured plaintiffs who are not compensated by defendants who injured them but without legal fault.

Third, the present traditional approach of finding liability of those with cognitive disabilities based on the conclusory statement that the “insane” are liable for their torts does not guarantee that the plaintiff will be compensated, only that he will receive a judgment against the defendant. Unless the defendant is financially secure, the plaintiff will not recover from the defendant directly. Further, if the defendant was in some way covered under liability insurance, such insurance would likely not benefit the plaintiff because liability insurance policies generally excluded intentional harm caused by the insured.¹⁶⁷

Fourth, if the defendant with a cognitive disability is found not liable because of the applications of the law of intentional torts suggested herein, at least the plaintiff’s medical expenses will likely be paid, in whole or in part, by first-party medical insurance coverage.¹⁶⁸

CONCLUSION

There is an inherent fairness to the intentional torts, chiefly because the principles of law are the same for all defendants, whether young or old and without regard to physical or cognitive disabilities.

167. *See, e.g.*, ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 5.3(f), at 493–94 (Student ed. 1988) (“Losses which are intentionally caused by an insured generally are not covered by liability insurance, and this rule applies even when there is no clause in the applicable insurance policy that expressly excludes coverage for injuries intentionally inflicted by an insured—that is, no coverage exists when a loss results from an intentional tort which is not fortuitous from the point of view of the person whose interest the liability insurance policy is designed to protect.” (footnote omitted)).

168. *See* Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A(a) (2012) (incentivizing the purchase of health care insurance coverage).

However, the application of these rules of law, particularly in regard to the essential element of intent, may result in unfounded liability for defendants with cognitive disabilities because of the conclusory principle that the “insane” are liable for their torts. The basic deduction of liability is faulty in its logic because it conveniently skips the necessary proof of actual and subjective intent: The insane are liable for their intentional torts. This insane defendant injured the plaintiff. Therefore, this defendant is liable. Missing is the legal analysis concluding that the “insane” defendant intentionally caused injury to the plaintiff.

North Carolina legislators and judges have exhibited a willingness to ignore national trends in the law or to lead new trends in the law when they believe such decisions are reflective of the values of the citizens of the state and consistent with sound legal reasoning. Hopefully, this Article will inspire a similar willingness to fairly address the intentional tort liability of defendants with cognitive disabilities.