

The reasonable person: a gendered concept?

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I INTRODUCTION

All lawyers are familiar with the concept of the reasonable person. It stands alongside many other useful phrases of legal shorthand that are in themselves terms of art. This particular term of art is examined in a way that exposes its gendered basis. Gender is of course a social construct whereby one learns behaviour that is appropriate to one's sex. The inquiry into the gendered nature of the reasonable person is of importance because of the universality of the standard. It is argued that if this standard is to be applied to every person, it should be inclusive of women's perspectives.

The scope of the inquiry is limited to negligence law,¹ and to the reasonable person standard rather than to other concepts of reasonableness which are found in many other areas of the law.² The article examines the origin of the reasonable man standard, and discusses its function and its imposition as a gendered standard to both men and women. Some of the dangers of re-labelling the reasonable man as the reasonable person when this entails no more than a change of name are also discussed.

II THE ORIGINS OF THE REASONABLE MAN

The origins of the reasonable man in negligence law are well-documented. Roman law had its "good father of the family".³ The man of ordinary prudence was first mentioned in reported English law in the appropriately named case of *Vaughan v Menlove* in 1837.⁴ He became the prudent and reasonable man, or simply the reasonable man, almost twenty years later in *Blyth v The Birmingham Waterworks Co.*⁵

The stereotypical maleness of the reasonable man reached its zenith with the American formulation of "the man who takes the magazines at home, and in the

1 It does not, for example, extend to discussions of a reasonable woman standard in sexual harassment law; see C Forrell "A Reasonable Woman Standard of Care" (1992) 11 U Tas LR 1, and N Ehrenreich "Pluralist Myths and Powerless Men: the Ideology of Reasonableness in Sexual Harassment Law" (1990) 99 Yale LJ 1177.

2 For example, the use of reasonable force in self-defence or the requirement of reasonable reliance in the law of constructive trusts.

3 See G Calabresi *Ideals, Beliefs, Attitudes and the Law* (Syracuse University Press, Syracuse, 1985) 23; expressed as *bonus paterfamilias* or *diligens paterfamilias*.

4 (1837) 3 Bing (NC) 468, 132 ER 490. The term, however, appears to pre-date the case: "The case taken by a prudent man has always been the rule laid down" (per Tindel CJ at 475).

5 (1856) 11 Ex 78, 156 ER 1047.

evening pushes the lawn mower in his shirt sleeves",⁶ and in England he became popular as "the man on the Clapham omnibus",⁷ an image that brings to mind men out in the world conducting their business affairs. These characterisations have been described as typifying the "ordinariness"⁸ of this man, against which all conduct must be measured. However, although statute law has for a long time used the word "man" as a generic term meaning all people,⁹ the reasonable man was clearly by description of the male gender. The conduct of both men and women was therefore measured by reference to a concept defined by the male gender.

III THE FUNCTIONS OF THE REASONABLE MAN

The reasonable man standard has several functions. As is true of many legal abstractions, it provides a convenient shorthand way to apportion liability and thus resolve conflict. Many conflicts arise because of contradictions inherent in balancing individual needs with societal needs. The reasonable man concept promotes this balance by assuming an allegedly objective and neutral standard against which to measure competing interests and to apportion loss. As part of negligence law its function is to balance the desire for individual freedom of action with the desire to be free from harm from others. Negligence is conduct that fails to attain the balance between self-interest and altruism,¹⁰ and the reasonable man standard is one way of deciding where this balance lies.

The standard also seeks to prevent loss or damage occurring by establishing a minimum level of conduct that will be accepted without incurring legal liability. Or, to put it another way, it sets down the maximum permissible level of human failing.¹¹

The reasonable man standard therefore provides a code of conduct that is supposedly commonly understood. Any conduct not falling within acceptable bounds is therefore capable of being considered unreasonable. What is not often explicitly stated, however, is that these standards of conduct necessarily reflect attitudes. Objectification is only generally possible if it mirrors the attitudes that are dominant in society.

It is due to the nature of the reasonable man as a reflection of societal norms that he has altered in outlook and conduct as society has changed. Thus, the reasonable man has an important function in epitomizing the acceptable citizen and providing a consistent and yet flexible model against which conduct can be measured. Yet it is difficult to pinpoint accurately the attributes of the reasonable man. The most consistent characteristic is an ability to fit squarely within existing societal norms. Normative

6 *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, 224, an unnamed American author quoted by Greer LJ.

7 Above n 6, 224.

8 SMD Todd (ed) *The Law of Torts in New Zealand* (Law Book Co, Sydney, 1991) 259.

9 Interpretation Act 1978 (UK), s 6 and the Acts Interpretation Act 1924 (NZ), s 4 are statutes currently in force that contain provisions to this effect.

10 JG Fleming *The Law of Torts* (8 ed, Law Book Co, Sydney, 1992) 107.

11 H Allen "One Law for All Reasonable Persons?" (1988) 16 Intl J Soc of Law 419, 420.

behaviour as an ideal is tempered by allowances made for human error, but as a question of degree it is not always easy to predict whether any given behaviour would be considered reasonable.

The provision of a standardized abstract notion removes the need to set down detailed guidelines in the form of rules or regulations for every major kind of human activity or conduct. Indeed the reasonable man has flourished because of the very lack of rules regulating negligent conduct. However, the standard is not totally objective. While a certain minimal level of knowledge is imputed, those with specialist knowledge are judged by a standard more relevant to that higher level of knowledge. When people hold themselves out as possessing a high degree of skill in some areas such as, for example, that of a surgeon, the standard becomes not a reasonable man or woman, but that of a reasonable surgeon. These modifications, while they create sub-classes of people, do not go as far as subjectifying the standard to an individual level. The law thus always maintains a certain distance from total subjectivity and this supports the notion that the standard is for the common good.

Indeed, one of the functions of the standard is to eliminate idiosyncrasies; to remove the personalized nature of the conduct by measuring it against a commonly accepted standard. It also attempts to remove the idiosyncrasies of those who sit in judgment and assess liability by requiring them to take account of current social standards by asking what a reasonable man would have done, rather than what they themselves might have done.¹²

The encouragement of conformity is another function of the reasonable man standard, and this is achieved by its discounting any difference as "unreasonable". The "ordinariness" of the reasonable man becomes a measure of normative behaviour, and conduct that accords with the standard is promoted by its legal acceptability.

If, however, the objectivity of the reasonable man prevented any matter pertaining to the individual defendant from being relevant, the standard would as a result merely be one of strict liability.¹³ To avoid this, there are therefore some specific factors in any case in point that are permitted personal consideration, most notably, the physical attributes of the defendant, his age and his financial position. Account is taken of these factors so that the defendant is not required to live up to an impossible model. Subjectivity is given less consideration when mental attributes such as memory, intelligence and emotional stability are under examination, it being acceptable in these respects to apply the standard required by the community.

The reasonable man has, therefore, been introduced and retained as a legal concept because he is useful. The essence of his usefulness lies in his abstractness, his

12 Conversely it may be argued that the lack of statutory rules places judges in a position to dictate these social standards, using objectivity as a convenient screen for the imposition of their own standards; above n 8, 260.

13 Above n 8, 259.

objectivity and his ability to moderate his conduct to fall squarely within current social practice.

IV THE MALENESS OF THE REASONABLE PERSON STANDARD

For some time now, the reasonable man appears to have been transformed into the all-embracing term "the reasonable person". The consequences of this change of label are discussed below, but it is pertinent first to enquire whether the reasonable man standard, prior to its currently fashionable gender neutrality, encompassed women's experiences as well as those of men. If indeed it did not, it follows that some alteration would have been required to justify the nomenclature of personhood.

A strong indicator that the reasonable man standard was based on male perspectives and experiences when it first came into existence is the legal position of women at that time. In 1837, when *Vaughan v Menlove* was decided in England, no woman in the entire Western world was eligible to vote. Further, women were not considered to be persons of full legal capacity. To be a woman meant that one was under a distinct legal disability, as a person, who, like a child, was something less than an adult male.¹⁴ Women at that time were restricted from operating in the public sphere and so were much less likely to be named as defendants in tortious actions. This was compounded by the nature of loss that the law of torts has traditionally considered actionable, namely loss to which a monetary value can be ascribed. Economic activity was again an area where few women were involved. The work that women did away from the public sphere was recognised and valued even less in the 1830s than it is currently, and therefore it was not often considered worthy of legal protection, except where a disability meant that the work had to be alternatively obtained at a price and could thus be given a monetary value. Women were therefore far less likely to appear as either plaintiffs or defendants in a negligence case.

Since its inception, the reasonable man standard has been endowed with attributes that are stereotypically and exclusively male. In both the 19th and 20th centuries, the reasonably prudent man,¹⁵ the man on the Clapham omnibus¹⁶ or on the Bondi tram,¹⁷ or the plain old man in the street has meant just what was indicated: a male person.

This stereotypical maleness did not seem inappropriate in the typical negligence case involving activities and situations that were overwhelmingly male. The logic of male judges using male norms to measure male conduct appeared to make sense. The problem, however, is that the standard was never considered to be anything other than universal and women have subsequently been required to meet the same standard without any attempt being made to include a woman's perspective based on her differing experiences.

14 A Sachs and J Wilson *Sexism and the Law* (Martin Robertson, Oxford, 1978) 6.

15 Above n 5.

16 Above n 6, 224.

17 Above n 10, 106.

A perusal of recently reported New Zealand negligence cases¹⁸ highlights the fact that the law of negligence continues to deal primarily with the experiences of men. This is not to say that women have not had an impact. The emphasis, however, remains on professionals, an area of work where men are over-represented, particularly in the areas of banking,¹⁹ engineering,²⁰ and local authority employees such as planners and issuers of building permits.²¹ The law practitioners featured in some of the negligence cases are male.²² Other cases deal with companies,²³ insurance agents²⁴ and agricultural and horticultural advisors.²⁵ Women, while not being excluded from these activities, are typically under-represented in them. The appearance of women in the cases is restricted as a result of all these factors to that of occasional plaintiffs, typically older women, and usually widowed.²⁶ These representations reinforce the notion of women as inexperienced in business transactions and requiring assistance and protection from men. It is clear that a number of the limitations that have traditionally excluded women and women's experiences from negligence law have continued to have an effect.

If the maleness of the reasonable person standard is so obvious as to be not easily denied, the law may fall back on its objectivity or its use of "man" a generic term, inclusive of all of humanity.²⁷ However, as the very use of objectivity to establish an unquestionably fair standard when that standard is not based on the experiences of the majority needs to be exposed, and as the generic use of "man" to mean "human" was initially used to exclude women, these do little to disabuse us of the fact that the reasonable man was indeed a man.²⁸

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- 18 Those reported in the New Zealand Law Reports from 1991 until the time of writing.
- 19 *Wild v National Bank of New Zealand Ltd* [1991] 2 NZLR 454.
- 20 *Rowlands v Collow* [1992] 1 NZLR 178.
- 21 Above n 20.
- 22 For example, *Mouat v Clark Boyce* [1992] 2 NZLR 559 and *Slater Wilmshurst Ltd v Crown Group Custodian Ltd* [1991] 1 NZLR 344.
- 23 *Dancorp Developers Ltd v Auckland City Council* [1991] 3 NZLR 337.
- 24 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd; Mortensen v Laing* [1992] 2 NZLR 282.
- 25 *Trevor Ivory v Anderson* [1992] 2 NZLR 517.
- 26 The plaintiff in *Mouat v Clark Boyce* [1992] 2 NZLR 559, who was persuaded to enter into a disadvantageous business transaction by her son, was "a widow aged 75 and not in good health"; and one of the two woman plaintiffs in the group of neighbours in *Rowlands v Collow*, above n 20, was widowed one week after construction on the driveway at issue was started.
- 27 Acts Interpretation Act 1924, s 4: "words importing the masculine gender include females".
- 28 In 1913 women were precluded from practising law because they did not fall within the definition of "person", even though the Solicitors Act 1843 allowed suitably qualified *persons* to be articulated and stated that "every word importing the masculine gender only shall extend and be applied to a female as well as a male"; *Bebb v Law Society* [1914] 1 Ch 286.

Given that the reasonable man concept encapsulates the ordinariness²⁹ and the normalcy of the standard against which conduct is measured, its restriction to male experiences implies that to be other than male is to be other than ordinary or normal. All conduct including that of women is in fact measured against a male standard. Women, therefore, are assessed for liability against an ideal that they can never achieve. Furthermore, it is an ideal that may not be able to take account of their experience. To be reasonable, a woman must act in a way that an ordinary man would have acted.

V THE DEVELOPMENT OF THE REASONABLE PERSON

Although it was strictly unnecessary to do so, because of statutes such as the Acts Interpretation Act 1924, the inaccuracy of bestowing a universal standard with a gender specific title became increasingly obvious (due, at least in part, to a growing awareness of the importance of gender neutral language) and the reasonable man became more frequently referred to as either the reasonable man or woman, or the reasonable person.³⁰

The move to the label of reasonable person is understandable given that, ideally, the concept is reflective of community standards and values. Indeed it may be reflective of a shift in attitude. However, this renaming process may contain inherent dangers. The reasonable man has always possessed a self-evident gender and if this remains unaltered, then the fact that the definition of what is ordinary or normative has been developed by reference to males and male conduct is lost within the gender neutrality of "person" or the non-sexist use of reasonable man (or woman). It will not be clear that women must behave according to, and will be judged by, male standards, because superficially their reasonableness will be tested against their personhood. The object should have been to replace the universal but previously masculine standard with an equally universal but now neutral or androgynous one, drawn from the totality of human experience.³¹ If this has not happened then the reasonable person is a far more insidious piece of sexist language than the reasonable man, concealing as it does the gendered nature of the concept.

While there are strong arguments against a separate or different test of the reasonable woman, once again, women have become subsumed within a male category and have been forced to abandon their differences in order to be the same as, and therefore equal to, men. Therefore, while it is useful to state that the reasonable man is indeed male it is more instructive to expose the reasonable person as male and in doing so highlight the lack of universality of the test. This lack is obscured by the cloak of objectivity that the reasonable man has donned since his inception. Objectivity is a familiar tool and one that has been employed historically by the law to give an appearance of neutrality. However this neutrality is itself based on norms that men have claimed as male. This is evident in the emphasis on reason and rationality in the reasonable man; reinforcing the

29 Above n 8, 259.

30 This must be tempered with the fact that it is still apparently acceptable to refer solely to a reasonable man, even in recently published textbooks. See, for example, Todd, above n 8, 258 onwards, or Fleming, above n 10, 105 onwards.

31 Above n 11, 432.

age-old dichotomous portrayal of men as rational and women as instinctive and emotional.

VI THE ETHIC OF THE REASONABLE PERSON

Negligence law is concerned with apportioning loss and traditionally with the kinds of loss that are easily quantifiable in financial terms. For this to be so, that which has been lost must have been something to which a financial value can be ascribed, and historically these areas have been the public, male-dominated areas of paid labour and commercial activity.

The reasonable person purports to be an objective standard and therefore its application necessarily involves removing the defendant from the context in which the conduct took place, and abstracting that conduct to a commonly acceptable level. This lack of context alters the information that is considered relevant and may alter the outcome of a case.

Behind the reasonable person lie notions based on competing rights of individuals and rights of individuals vis-a-vis those of society. Such a standard operates successfully because of the esteem and correctness or fairness conferred on objectivity and rationality as ways of arriving at truth. It is the objectivity of the standard that allows it to be held up as an ideal.

Feminist writings have, however, exposed another ethic - that of the ethic of care. This is raised here as merely one example of how the inclusion of women's perspectives may impact on the reasonable person standard. The primary proponent of the ethic of care is Carol Gilligan. Her studies suggest that the ethic of care is a reflection of a woman's view which is based upon responsibility (used in the sense of "response to"), connectedness and contextuality. Although this approach has been criticized for ascribing to women the very attributes that have been conferred upon them by a patriarchal society,³² the idea that the reasonable person fails to provide a sufficiently humanitarian approach to the regulation of human conduct has been discussed for some time.³³ The standard of a reasonable woman in the area of sexual harassment law has also been considered.³⁴ However, this is an area of regulated conduct where two different tests may be applied with less of a cry of inequality and unfairness. If indeed the reasonable woman standard is different from that of the reasonable man then one answer

32 L Bender "From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law" (1990) 15 Vt LR 1, 39 discusses this criticism as made by commentators such as C MacKinnon.

33 O Reynolds "The Reasonable Man of Negligence Law: a Health Report on the 'Odious Creature'" (1970) 23 Okla LR 410.

34 Above n 1. For a discussion of the need to incorporate emerging theoretical ideas of the reasonable woman standard into practice in this area and also in the areas of self defence by battered women and the law relating to rape, see N Cahn "The Looseness of Legal Language: the Reasonable Woman Standard in Theory and in Practice" (1992) 77 Cornell LR 1398.

in the area of negligence law would be to employ a truly integrative standard, that is, one that imported notions of relationship and interconnectedness so that the standard of care reflects "caring for" and not simply "being careful".³⁵

Therefore, to be more truly universal the reasonable person standard needs to be reconsidered from an ethical point of view that provides a different ideal. This perspective may alter the type of culpable conduct, the kind of evidence that is relevant and the kinds of loss that are actionable. It may extend to an alteration of the law regarding assumption of risk. These changes have the potential to alter radically the fundamental bases of negligence law. Any change would, in line with the current judicial approach, be both incremental and along policy lines and would, it is to be hoped, have the aim and the effect of giving those gendered concepts of caring and connectedness a higher status and value.

VII A TRULY UNIVERSAL STANDARD

Tort law, and the law of negligence in particular, has a role to play in shaping and changing attitudes and expectations. Policy considerations are often explicit in judicial statements in this area and reconsideration of the applicability of the reasonable person standard as a universal measure is a dynamic process. It is through this process that what is expected of a reasonably prudent person has altered - a recent example arises in issues surrounding AIDS,³⁶ and the development of new technology has for many years required negligence law to adapt and modify its approach.³⁷ The same process is therefore well-equipped to respond to a societal shift that demands not only gender neutral language but the measurable inclusiveness of women's perspectives that its use implies.

The reasonable person standard, as part of a body of law that both reflects and influences human conduct, has a role that extends beyond questions of liability to the kind of values that are deemed worthy of promotion. Therefore it should be truly reflective of the universal standard that it purports to be.

35 L Bender "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J Legal Educ 3, 32; "[i]t is tragic that our law has been insightful enough to use the language of care but has understood it as only carefulness or acting within caution."

36 Above n 8, 276.

37 One of the more dramatic examples being the introduction of the motor car.