The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature"

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THE REASONABLE MAN OF NEGLIGENCE LAW: A HEALTH REPORT ON THE “ODIOUS CREATURE”

Osborne M. Reynolds, Jr.*

It seems hard to analyze any area of torts without eventually saying, “This breaks into 3 categories.” Traditionally, there are three requisites to liability in a negligence action. There must be conduct deviating from the accepted standard, harm to some person or property must be a product of the deviating conduct, and causation of the harm by the conduct must be proven. Beyond this, public policy may draw boundaries to the realm of liability, employing proximate cause, intervening cause, foreseeability, or duty devices. There may also be defenses to the otherwise-established liability such as plaintiff’s contributing deviation from the standard. But in the beginning, there is always the standard and the breach. The breach may be of some duty set by statute. It may be violation of a rule of conduct established by the courts to govern specific situations, as in cases controlled by the rules on land-occupiers’ liability to trespassers, licensees, and invitees. In most cases, our standard is no mere lifeless rule; we employ an active human guide known as the reasonable man. Anything that the reasonable man would do is non-negligent conduct. Any course of action he would not pursue leads, given the other elements of the action, to negligence liability. This man has not been universally approved, accepted, or loved.

Present Importance of Reasonable-Man Concept

At a time when strict liability seems encroaching on areas where negligence law formerly ruled, and proposals for various “insurance plans” indicate a shift from a fault standard to a compensation-goal in our tort thinking, the reasonable man may appear threatened with extinction. There are at least three (of course) reasons that the reasonable man’s state of health and usefulness should now concern us. First, if he is truly an inadequate, unrealistic, and unmanageable creation and cannot be readily transformed into something more satisfactory, perhaps we should

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admit failure in our attempts to make fault a requisite to negligence liability. Advocates of an increase in strict liability and of all-encompassing insurance plans may find support in our past and present failure. Second, even if the concept of compensation-for-all prevails and fault ceases to be the key to tort liability, some residue of our reasonable man is likely to remain. Many current proposals leave room for the fault standard when recovery is sought above certain limits or when certain circumstances are present. Fault in tort law has never meant moral blame and always involved a degree of strict liability.

Third, the reasonable man, although most familiar to us for his work in tort cases involving possible negligence, is by no means confined to this area. He helps us determine what physical contact suffices for battery. We are instructed by him as to what apprehensions justify recovery for assault or for intentional infliction of mental anguish. He informs us when the defenses of mistake and consent may be available and when self-defense will justify what would otherwise be an actionable tort. Indeed, almost all the possible defenses to intentional torts, including defense


2 Thus, the reasonable man concept might be used in determining contributory negligence or other misconduct that would result in elimination or reduction of an award. But cf. Franklin, Replacing the Negligence Lottery, 53 VA. L. REV. 774, 801 & n.112 (1967).


5 Osborn v. Veitch, 1 F. & F. 317 (1858); PROSSER, TORTS 39 (3d ed. 1964). There is also authority that actual, not necessarily reasonable, apprehension is the only requirement. Howell v. Winters, 58 Wash. 436, 108 P. 1077 (1910).


7 Mistake is not normally an excuse in itself. Whittier, Mistake in the Law of Torts, 15 HARV. L. REV. 325 (1902). But it will often bring into existence another privilege. A reasonable belief may justify the use of self-defense even if the belief is mistaken. Keep v. Quallman, 68 Wis. 451, 32 N.W. 233 (1887).


9 Zell v. Dunaway, 115 Md. 1, 80 A. 215 (1911); Dallas Consol. Elec. St. R.R. v. Pettit, 47 Tex. Civ. App. 354, 105 S.W. 42 (1907), are among numerous cases stating that self-defense may be used where the reasonable man would believe it necessary.
of others and defense of property, employ a reasonableness standard. The necessity of such a standard has especially been stressed where discipline is cited as an excuse. Nor do we escape our reasonable friend entirely even when we enter areas of so-called "absolute liability." Such liability is traditional in the situation of personal injuries inflicted by animals. Yet, if the animal is not wild or "abnormal" in character, the owner is strictly liable only if he possesses scienter—such notice of the animal’s dangerous propensities as would put the reasonable man on guard. If scienter is not shown, liability may still be imposed, but only by a return to our usual negligence and reasonable man rules. Products liability is an area in which recovery is increasingly based on strict liability and/or breach of warranty; yet, it has been recognized that the normal negligence action may still have use, especially where parties other than the retailer are sued. Throughout areas in which strict liability is applied, proof of fault is usually dispensed with only as to consequences reasonably to be expected from the dangerous or abnormal activity, a limitation that may dog the steps of strict liability as it overtakes areas of former fault liability.

Aside from the oft-made tripartite division of torts into intentional and negligent acts and strict liability, the area contains assorted hybrids

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10 The privilege may be exercised when reasonable to do so. Beavers v. Calloway, 270 App. Div. 873, 61 N.Y.S.2d 804 (1946). In some jurisdictions, however, if the intervenor reasonably but mistakenly believes the force is justified, he may be held criminally liable on the theory he “steps into the shoes” of the person he defends. People v. Young, 11 N.Y.2d 274, 229 N.Y.S.2d 1, 183 N.E.2d 319 (1962). Presumably the same rules would apply as to possible civil liability, but the cases on reasonable but mistaken belief are rare. See Sloan v. Pierce, 74 Kan. 65, 85 P. 812 (1906) (reasonable belief not present); Patterson v. Kuntz, 28 So. 2d 278 (La. App. 1946) (reasonable belief was present).


12 The use of force to retake chattels, and the entry upon another’s land to do so, are surrounded by the reasonable man principle, as is detention of a person for investigation. See Prosser, Torts 114-15 (3d ed. 1964).

13 Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925). See generally Miller, Resort to Corporal Punishment in Enforcing School Discipline, 1 Syracuse L. Rev. 247 (1950). There is some authority that a good faith belief in the reasonableness of the degree of force will protect the one whoinflicts it; see Cooperrider, Child v. Parent in Tort, 43 Minn. L. Rev. 73 (1958).


15 Negligence liability has been imposed in such cases as Weaver v. National Biscuit Co., 125 F.2d 463 (7th Cir. 1942); Gardner v. Koenig, 188 Kan. 135, 360 P.2d 1107 (1961).


17 See Harper, Liability Without Fault and Proximate Cause, 30 Mich. L. Rev. 1001 (1932). As to trespassing animals, see 32 Harv. L. Rev. 420 (1919). This is using “reasonableness” as a kind of proximate cause rule to limit liability.
and bastards. Here too, the reasonable man is found: in nuisance, misrepresentation, defamation, and invasion of privacy, among others. He also appears in a number of non-tort areas of the law, perhaps most frequently when the self-defense justification is raised in criminal cases. But his influence is also felt when courts weigh matters as diverse as the extrajudicial statements a lawyer may ethically make regarding a case, and what constitutes marketable title to real property. His identity may sometimes be concealed by references to mere abstractions such as "reasonableness," but there is little doubt of his shadowy presence. Such terms as "negligence," "reasonableness," and "due care" are flexible enough, as used in any legal area, to be subject to constant shifting by outside influences, and the various fields of the law are never so sharply separated as to disallow such influence.

18 Particularly is the reasonable man found in nuisance cases based on negligent conduct. Often the courts do not make clear whether negligence, intent, or strict liability is the basis. Leading cases emphasizing the need to show unreasonableness in establishing nuisance include McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907); Vestal v. Gulf Oil Corp., 149 Tex. 487, 235 S.W.2d 440 (1951).

19 Reasonable reliance is an element of misrepresentation. Two outstanding cases of actual but unreasonable reliance are H. Hirschberg Optical Co. v. Michaelson, 1 Neb. 137, 95 N.W. 461 (1901); Ellis v. Newbrough, 6 N.M. 181, 27 P. 490 (1891).

20 It is often said that the court must first decide whether words are reasonably capable of a defamatory meaning, then submit the question of actual interpretation to the jury. Davis v. R.K.O. Radio Pictures, 191 P.2d 901 (8th Cir. 1951). A defamatory meaning will generally be recognized as possible and harmful only if it results from a reasonable interpretation of the material. DeHusson v. Hearst Corp., 204 F.2d 234 (7th Cir. 1953).

21 Where the action is based on intrusion upon solitude it must be such intrusion as would disturb the reasonable man. Harms v. Miami Daily News, Inc., 127 So. 2d 715 (Fla. 1961); Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956). Where the basis is publication of private facts, the reasonable man standard is also employed. Sidis v. F and R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), cert. denied, 311 U.S. 711, 61 S.Ct. 393, 85 L.Ed. 462 (1941). There is some doubt as to use of the reasonable man standard where the action is based on non-consensual use of name, picture, etc.

22 Another notable use of the reasonable man occurs in malicious prosecution: the action lies only if the criminal proceedings were brought without such cause as would have led the reasonable man to take that action. Perry v. Hurdle, 229 N.C. 216, 49 S.E.2d 400 (1948). Cf. J. Salmmon, Torts 589-93 (14th ed. 1965).

23 Leading cases applying the reasonable man test include Coats v. State, 101 Ark. 51, 141 S.W. 197 (1911); People v. Anderson, 44 Cal. 65 (1872); State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949). The amount of force that may be used is also limited by a reasonableness standard; People v. Williams, 32 Cal. 280 (1867); People v. Katz, 263 App. Div. 883, 32 N.Y.S.2d 157 (1942).


26 D. MELLINKOFF, THE LANGUAGE OF THE LAW 374 (1953): "No lawyer, and only an unusual client, is shocked to hear it said that negligence is a lack of reasonable care, but there
Background and Application of the Reasonable Man in Negligence Law

Just who is the reasonable man of negligence, and how did he develop? Where defined or named as being other than "reasonable," our friend is often called "the ordinary prudent man" and is said to lead a judge or jury to a decision on what was the proper thing to do in the case at hand.27 One of his most frequently discussed characteristics is that he knows the law (though the same result is achieved by holding ignorance of the law no excuse) and that, in the absence of justification or excuse, he will not violate it.28

Though abstractions such as "unreasonable conduct" might make use of the mythical man unnecessary, he has been thought to introduce, despite his fictional nature, an element of realism; he focuses attention on our dealing with the conduct of some actual person; he emphasizes that we must judge a human being with human failings.29 This person is then placed in the position of the actor at the time and place of injury, and we are left to decide what he would have done. He is equipped for his job with, according to various definitions, ordinary care, sense, and skill, and is influenced by factors that usually affect human conduct—though all this is subject to criticism as still leaving him vaguely defined.30

The reasonable man's development by the courts is generally thought to have been necessitated by the difficulty of applying a constantly changing standard based on individual capabilities and limitations, and the need of those who live in society to expect and require that all others behave, to some minimal extent, in a prescribed way.31 The prescribed way may be very broad, encompassing many alternatives. In any given situation there may be numerous courses of conduct open to the reasonable man, including some that hindsight will show to have been unwise or dangerous.32

In developing a personality for our standard man, the courts have been forced to choose between endowing him with characteristics that resemble those of the actor whose conduct is being judged, or setting a

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29 Seavey, Negligence—Subjective or Objective?, 41 Harv. L. Rev. 1, 9 (1927).

30 Id. at 10, where the author states that no single expression can indicate all the reasonable man's qualities. The article then attempts to describe those qualities.


32 See the excellent discussion in Terry, Negligence, 29 Harv. L. Rev. 40, 47-49 (1915).
norm that all persons should be expected to meet. [T]he latter course has prevailed, but with some variation among the different areas of character. The one big exception to the reasonable man’s unvarying personality and his use as a purely objective standard is that he normally assumes the physical characteristics of the actor, whether blind, crippled, or in excellent shape. These, it may be said, are among the circumstances in which the reasonable man is placed; or it may simply be admitted that in this regard we use a subjective standard. It has been noted that clumsiness is not necessarily inexcusable in the actor. If indicating merely a lack of care or moral concern for the welfare of others, it is not excused. If caused by paralysis, lack of nerve response, or other physical defect, it may be excused, provided the actor has exercised the care of the reasonable man with such defect.

Where moral matters are concerned our reasonable friend is put to his greatest use. A purely objective standard is employed in determining if the actor properly balanced possible benefit to himself against possible harm to others in choosing his course of conduct. Where knowledge is concerned, the standard is also largely objective. The actor is held to have certain minimum knowledge that all in the society in which he travels are expected to have, including knowledge of his own ignorance and physical shortcomings. Memory and attentiveness are likewise judged by the objective standard. But in all matters involving knowledge, experience, and memory, there are modifications to our application of the reasonable man rule. Persons holding themselves out as having special knowledge in a given field are judged by the standard of the reasonable man with such information and ability. All persons are generally held to make use of whatever knowledge and experience they have where the reasonable man with such would have employed them.

Skill is usually said to be judged objectively, but again there is a

34 Seavey, supra note 29, at 16-17.
35 James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 4 (1951).
36 Id. at 5-7, 9-14.
37 Id. at 7-9.
39 James, supra note 35, at 6, 14.
modification. A person driving a car, mending a wound, or constructing a building is held to the standard of the reasonably competent person in that endeavor. Intelligence, sanity, and emotional stability are, despite the obvious hardship, also judged by the objective standard. But it has occasionally been held that the standard for judging negligence is not correctly expressed by a jury instruction referring to the "man of ordinary intelligence" since caution, prudence, and care are the relevant qualities in telling the jury how to evaluate conduct. It has even been held that it is not enough in the instruction to speak of "the reasonable man," as this may imply that we consider reasoning power only, our friend must accurately be described as the reasonably or ordinarily prudent man.

It is inevitable that judge and jurors will still be influenced by their own life patterns and roles in deciding what a reasonable man would do. However, the relative absence of any set of absolute rules, violation of which leads to liability (such as do exist on the criminal side of the law), makes some type of formula essential. If negligence is treated as consisting of some particular state of mind, it may be questioned whether a standard such as a hypothetical man would be any more needed here than in the intentional torts or on the criminal side. The requisites would be simply the act and the culpable state of mind. But it appears generally agreed today that negligence is a particular kind of conduct. This presents the alternatives of countless rules proscribing given behavior, or a more flexible and generally applicable, though also more vague, standard.

That a completely objective standard is not essential to negligence law is shown by situations in which subjective factors are allowed to be introduced. Two such situations commonly arise. While a minimum amount of knowledge is usually considered a part of the standard, it is sometimes recognized that a stranger in a community may be allowed to show his lack of awareness of what is generally regarded as common knowledge within

40 James, supra note 35, at 15-17. But cf. Seavey, Nigilgence—Subjective or Objective?, 41 Harv. L. Rev. 1, 26-27 (1927), stressing the subjective factors that may enter the picture where skill is concerned, especially if a beginner is being judged.

41 James, supra note 35, at 21-22, 25-26. The author states, however, that a subjective standard will likely be used as to the contributory negligence of insane plaintiffs.

42 Van Cleve v. St. Louis, M.S.R.R., 124 Mo. App. 224, 101 S.W. 632 (1907). An intelligent man, the court noted, could be either unusually cautious or unusually imprudent.


45 Edgerton, Negli gence, Inadvertence, and Indifference: The Relation of Mental States to Negligence, 39 Harv. L. Rev. 849 (1926), is the outstanding article refuting the notion that negligence is a state of mind; cf. Whittier, Mistake in the Law of Torts, 15 Harv. L. Rev. 335, 343-44 (1902).
Children are customarily judged not by the adult reasonable man standard but according to their age, intelligence, education, and experience. There is a certain obvious fairness in not expecting a child to behave as an adult, but, the question is clearly raised: if we can deal with each minor subjectively, why not with each grown-up?

Criticisms of the Reasonable Man and Responses Thereto

The reasonable man may be considered an unrealistically high standard. Any given individual sometimes shows his faults, and sometimes makes mistakes—and so does the reasonable man. Any given individual will also often fall below the level of what can be called rational, prudent, or careful, and this the reasonable man does not do:

Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious creature stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.

Especially since the advent of the automobile and its rapid rise to prominence in tort cases, concern has been expressed that our standard is outdated. Who can, faced with miniskirts and other distractions along our roadways, exercise reasonable care at all times? No one has perceptions that never fail, or fail only when reasonable for them to do so. Criticism may arise concerning cases that express an unnecessarily high opinion of what the reasonable man would do—indicating, for instance, that he should

46 Comment, Negligence—Knowledge—Minimum Standard of Knowledge—Duty to Know, 23 Minn. L. Rev. 628, 651-52 (1939). The same article states, at 634-38, that there are certain facts which everyone is held at his peril to know, and others, as noted at 638, that every ordinary individual is at least presumed to know. But see Terry, Leading Principles of Anglo-American Law § 200 (1884) (no facts that everyone at his peril must know).

47 Two important cases involving alleged primary negligence of minors are Harvey v. Cole, 155 Kan. 239, 153 P.2d 916 (1944); Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911). The leading case applying the subjective standard to a minor's primary negligence has traditionally been Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931); but this authority was limited by Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966), holding that a minor driving a car (or, according to some language in the opinion, engaging in any activities normally engaged in by adults) will be held to the same standard as an adult. The Daniels case is indicative of a trend to hold minor drivers to the same standard as adults; see 1962 Duke L.J. 138 (1962); 2 Idaho L. Rev. 103 (1965).

48 Herbert, Uncommon Law 1-6 (7th ed. 1952). But cf. Yerkes v. Northern Pac. Ry., 112 Wis. 184, 88 N.W. 33 (1901), indicating that the care exercised by the reasonable man is the same as that of the great majority of mankind.

not leave a woman suffering a headache to walk unaided the last 700 feet to her home when he might possibly have been able to drive through the water-covered road.\(^{50}\) Some rather extreme judicial statements are the result of assigning certain knowledge to the reasonable man rather than a necessary result of the use of such a standard. Thus, use of the standard does not force a holding that inability to read English amounts to negligence.\(^{51}\) Some criticism of the standard as too high arises from the corollary, accepted in most jurisdictions, that the reasonable man will normally obey all laws and will thus not fly in the face of even an ordinance that he might reasonably and prudently consider stupid or outdated.\(^{52}\) Direct criticism of the standard is found in court statements that a person should not be penalized for failing to act in a way in which he is incapable of acting.\(^{53}\)

The reasonable man principle does have the advantage of leaving to judge and jury the decision of whether due care was exercised without laying down absolute, specific requirements.\(^{54}\) An innkeeper must exercise reasonable precaution for the safety of his guests but is not, at common law, required to have fire escapes.\(^{55}\) So, while perhaps seeming somewhat autocratic and conformist in effect, the reasonable man rule allows for individualism.

Most arguments against the reasonable man have concentrated on the harshness to incompetent defendants.\(^{56}\) There are three other arguments against our familiar friend. First, it may be suggested that mere submission of a case to a jury under such a standard greatly favors the plaintiff. The submission indicates that the judge has found that, in addition to the duty of reasonable care we all owe one another, there was a specific duty here owed plaintiff by defendant and that there is at least the possibility

\(^{50}\) In Tuligren v. Amoskeag Mfg. Co., 82 N.H. 268, 133 A. 4 (1926), it was held that defendant's motion for judgment should not have been granted under these facts.

\(^{51}\) Weirs v. Jones County, 86 Iowa 625, 53 N.W. 321 (1892). The trial court had instructed that failure to read the sign by a plaintiff unable to read English would be contributory negligence, and the appellate court indicated agreement. By far the stronger basis of the decision was emphasized by the higher court: the county was not negligent since it had placed a large sign saying “Bridge unsafe” along the road; it had no duty to post notice in other languages.


\(^{53}\) Seattle Elec. Co. v. Hovden, 190 F. 7, 9 (9th Cir. 1911), citing Baltimore & Potomac R.R. v. Cumberland, 176 U.S. 232 (1900). Both of these cases, however, limited their language to contributory negligence.

\(^{54}\) Terry, Negligence, 29 Harv. L. Rev. 40, 50-51 (1915).

\(^{55}\) Yall v. Snow, 201 Mo. 511, 100 S.W. 1 (1906).

\(^{56}\) James & Dickinson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769, 782-85 (1950).
that the duty has been breached and the breach has caused the harm. Given a tendency on the part of juries to sympathize with an injured plaintiff, this may be all they need to bring in an automatic verdict for him. All the jury is told is that defendant should be held liable if he acted unreasonably (and if the causation and duty requirements are met); hindsight clearly shows unreasonableness since there was injury. The strength of this argument must depend on whether one believes that admonitions by the court are likely to prevent jurors from being affected by such readily available hindsight.

Second, if the reasonable man can be harsh on defendants at times, it may be urged that he can be even more unfair to a plaintiff who has himself deviated from the standard. Application of the same standard to both plaintiff and defendant may theoretically result in plaintiff’s being barred from recovery by his contributing negligent conduct, though defendant’s conduct was far more unreasonable and contributed more to the injury. This is not really a defect in the standard, but a necessary result of the tendency in the United States to apply the rather extreme contributory negligence rule rather than the principle of comparative negligence. This objection could be eliminated, if we would apply the reasonable man standard to defendants but use a more subjective rule for plaintiffs. It has been suggested that this is not only desirable but is in fact what juries now do. If truly desirable, the rule might well be adopted outright, but it would seem only a way station on the road to comparative negligence, under which the reasonable man may remain the standard.

Third, a rather general criticism made of the present standard is that it is not sufficiently humanitarian, since it requires rational but not necessarily ethical or good Samaritan conduct. This argument is generally aimed more at the duty concept in negligence than at the reasonable man. While duty may be considered a circumstance in determining reasonable conduct or may serve the proximate cause function of cutting off liability, the most widely encountered and criticized use of the term is found in cases in which no affirmative conduct is involved. In such cases the conduct is passive, as in sitting by and watching on the dock while a person drowns. Here the law may find no liability because there is no duty. This rule has been the subject of adverse reaction. It is possible to frame this rule in

67 Green, The Duty Problem in Negligence Cases, 28 COLUM. L. REV. 1014, 1030 (1928). See Green, Judge and Jury 161-64 (1930), suggesting the kind of instruction that could be given if psychology provided accurate measuring devices.

68 James & Dickinson, supra note 56; James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 2 (1951).

reasonable man terms; the man who waits on the dock is acting reasonably in not risking his own life, even though he might also be reasonable in going to the rescue. The cases have generally not employed this rationale. (It should also be noted that there is a trend toward finding duty in a great many more situations). The reasonable man has largely appeared in situations of nonpassive conduct.

Even in situations of such conduct, the reasonable man may be considered not very humanitarian and thus subject to justified criticism. It has been said that excessive altruism would be a departure from the standard, though seldom actionable. It may be that courts have scrupulously avoided introducing moral characteristics into the standard man because their whole aim in using the creature is to pass the buck to the jury. This avoids any possible implications as to the actor's own personality by personifying the qualities of reasonableness and prudence only in terms of an abstract man. The standard man recognizes no moral duties above and beyond what the law prescribes. He always balances the risks of harm to others with the benefits he seeks for himself, but he may well decide in his own favor:

One driving a car in a thickly populated district on a rainy day, slowly and in the most careful manner, may do injury to the person of another by throwing muddy or infected water upon that person. Society does not hold the actor responsible because the benefit of allowing people to travel under circumstances so far outweighs the probable injury to bystanders that such conduct is not disapproved.

The reasonable man is not a static creation; his conduct necessarily varies with the circumstances and inevitably will vary as changing morality affects jurors' views of what he would do. What is reasonable may change, though it will no doubt always lag behind the highest ethics of the day.

Other Possible Standards

Granting that the reasonable man may have harsh effects on subpar defendants, may work toward preventing recovery by slightly imprudent plaintiffs, and may not be our ethical ideal, what possible substitutions or


Prosser, Torts 337-39 (3d ed. 1964), and cases cited therein. See also, A Note on the Failure to Rescue, 52 Colum. L. Rev. 631 (1952).

Supra note 29, at 11.

See Haack v. Rodenbour, 234 Iowa 368, 12 N.W.2d 861 (1944) (no duty to build fence to guard against bulls except as specified by statute).

modifications might be made? We might suggest "the average man," fallible and occasionally imprudent. One objection to the reasonable man is that he is unrealistic. "He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound. . . ." The average man would sometimes not be so cautious. It has been suggested that our standard really represents an average of conduct applied to knowledge and memory as well as caution. The reasonable man is often said to have an average will. While even careful men are sometimes careless, the reasonable man is always up to the standard. "He is the careful man being careful." Our more humanized standard would recognize occasional departures from the ideal.

Despite attempts to do so, it is really impossible to draw a picture or character sketch of our reasonable man that is meaningful in any particular case. If we adopt an average and more fallible man, it might be possible to construct a fairly precise formula or set of general characteristics that all persons are expected to have, at least during some time-period of history. We would then lose the flexibility of allowing a person to be anything he wants and behave in any way he wants so long as he is reasonable. Furthermore, there would be great difficulty in deciding under what circumstances the average man would be irrational or imprudent. He need not always measure up to those standards we now employ. When would his departure be excusable and when not? It would not suffice to declare our model simply average and fallible; we would end up either returning to the reasonableness standard or adopting some new adjectives to describe the excusable harms committed. In practice, courts have rejected any attempt to use the average or ordinary man as a guide.

Another possibility is "the attentive man." We might emphasize more

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64 Supra note 48. In the work, at 6, is the famous statement that the cases do not refer to a reasonable woman. See also Terry, Negligence, 29 Harv. L. Rev. 40, 47-49 (1950), where the author discusses "abnormal persons" and concludes women are not among them except possibly as to courage.


66 Seavey, supra note 29, at 11, n.11.


68 A good discussion of this advantage of the reasonable man is found in Terry, Negligence, 29 Harv. L. Rev. 40, 47-48 (1915); cf. Bohlen, Mixed Questions of Law and Fact, 72 U. Pa. L. Rev. 111, 13 (1924).

69 Austin & N.W.R.R. v. Beaty, 73 Tex. 592, 11 S.W. 858 (1889). The terms in combination with other words such as "prudence" have often been allowed, however; see supra note 65.
the mental state of the actor and require that he be everattentive, that his thoughts and intents be cautious ones.\textsuperscript{70} As always, extrinsic evidence would be necessary to establish the state of mind. While the average man standard would normally be lower than our current one, the attentive man standard would often be higher, holding liable the person of indifferent attitude whose actions, even if not unreasonably dangerous, resulted in harm. Therein would lie such a standard’s chief fault: “The liability which it would impose is liability for a coincidence; the coincidence between relative indifference (or inadvertence) in the actor, and conduct which whether dangerous or safe happens to result in harm.”\textsuperscript{71} On the other hand, there might be no liability for truly risky acts performed by a person with a proper mental attitude; consequently, society’s right to require that people \textit{act} in conformity with certain expectations would be jeopardized.

Why not another kind of standard, the “ideal man”? This would remove the objection that our present standard is not ethical enough and would require people, at their peril, always to do their best to prevent harm to others, rather than merely refrain from acts that are imprudent. The notion of an ideal man has sometimes been criticized as undefinable and as failing to take into account the knowledge of the actor.\textsuperscript{72} If our ideal man is judged as behaving in an ideal manner \textit{under the circumstances} and is required to use whatever knowledge he possesses, or if he is surrounded by much the same circumstantial limitations as have been imposed on the reasonable man, then these objections can be refuted.\textsuperscript{73} A more serious objection is that it would be difficult to formulate a definition of the ideal man acceptable to any significant group of people. The ability of society to obtain compliance with a minimal standard would be lessened.

If the average man in society would be difficult to assemble, and if ideas of the ideal man would be difficult to assimilate, why not turn to a man who can be considered typical in his community, the “composite man” of his time and place? Such a standard would be different from the present while not necessarily higher or lower in all cases. Courts in the past have rejected any instruction to jurors indicating that they should judge a defendant’s conduct according to what they individually or collo-


\textsuperscript{71} Edgerton, \textit{supra} note 65, at 868.

\textsuperscript{72} \textit{Wharton, Criminal Law} \S 489 (10th ed. 1896). He is mainly concerned with the reasonable man as employed in criminal cases involving self defense, but his criticisms could be directed at the rule’s use in tort cases of reaction to danger.

\textsuperscript{73} The Wharton statements are specifically repudiated by Hoard v. State, 80 Ark. 87, 95 S.W. 1002 (1906).
lectively would have done\textsuperscript{74} or according to what might be considered typical or normal.\textsuperscript{76} Jurors often \textit{are} correctly instructed to bring to bear on the case their own experience and knowledge in order to determine how a prudent person would behave.\textsuperscript{78} It has been said of the reasonable man by a noted writer:

In foresight, caution, courage, judgment, self-control, altruism and the like he represents, and does not excel, the general average of the community. He is capable of making mistakes and errors of judgment, of being selfish, of being afraid—but only to the extent that any such shortcoming embodies the normal standard of community behavior.\textsuperscript{77}

Indeed, we use a jury, given the reasonable man instruction, so that we may obtain the community's judgment of what is proper.\textsuperscript{78} The reasonable man has been called “an ordinary member of the community,”\textsuperscript{79} and it is often admitted that juries are presumed to consist of such men even though this cannot be alluded to in the instructions. It is the community standards and reactions that ultimately determine what the law is to be and what is to be considered “justice.”\textsuperscript{80} If we are concerned with setting a standard of conduct, it does not seem that a standard of what is typical in the community would be satisfactory. This would encourage each jurisdiction to go its own way just at a time when regionalism is increasingly recognized as necessary in our laws and government. Of course, the instruction to the jury could refer to what the community considers proper, reasonable, or prudent. This would do little more than add the community limitation to our present standard. Indications are that such a limitation is now being increasingly rejected even where used in the past, such as for medical doctors.\textsuperscript{81} It may well be that the type of


\textsuperscript{75} Austin & N.W.R.R. v. Beatty, 73 Tex. 592, 11 S.W. 858 (1889) (ordinary man improper).

\textsuperscript{76} \textit{See} City of Americus v. Johnson, 2 Ga. App. 378, 58 S.E. 518 (1907).


\textsuperscript{80} Seavey, \textit{supra} note 29, at 3-5, 28.

instruction used has some effect on the jury, but so do the conditions and standards of the community in which the jury members live.\textsuperscript{82} Thus, the reasonable man may necessarily become somewhat a community composite. If we broaden the meaning of community to take in a wide area or the whole nation, we are back to our average man.

The most often suggested substitute for the reasonable man is a subjective standard that would simply require each person to act reasonably or do his best according to his own abilities. It would expand the "under the circumstances" limitation by including not only the actor's physical characteristics but also his mental and emotional make-up. This subjective standard is very often used in determining the primary negligence of children.\textsuperscript{83} It is frequently employed in assessing the contributory negligence of a child, but is almost universally rejected with regard to adults.\textsuperscript{84} It is highly unusual if a case indicates a willingness to hold an adult plaintiff or defendant to a lower standard than that of the reasonable man even though the party may be shown to have less than ordinary mental powers.\textsuperscript{85} Writers have pointed out that if the fault principle is to be retained, it could well be refined by a more subjective standard of conduct in line with personal moral shortcomings.\textsuperscript{86} Recent studies of human behavior have made the determination of each individual's abilities more feasible. At the same time, it must be conceded that a standard that might tend to favor defendants runs counter to the current trend toward increased strict liability and greater recognition of compensation as the tort goal.\textsuperscript{87} What would not run counter to this trend is the double standard that seems practiced

\textsuperscript{82}See the results of the study reported in Green, \textit{The Reasonable Man}, 1 LAW & SOCY. REV. 241 (1968). See also \textit{Sherie & Howland, Social Judgment} (1961).


\textsuperscript{87}James & Dickinson, supra note 86, at 779-82, 784.
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anyway, a subjective role for plaintiffs though an objective one for defendants. This allows accident prone persons to recover for their injuries even if they contribute to them, but holds them to the universal standard in their actions toward others because society finds objectionable the harms they inflict even if they cannot be avoided.\(^8\) It has been recognized that so long as we retain such a system, we actually have situations of strict liability (i.e., liability despite the actor's having done his best) within what is called a fault category—negligence.\(^9\)

Could we really apply to primary negligence a standard of "the best the actor could have done"? There is a good deal of guesswork in determining each actor's own abilities, and we would still be holding him to generally accepted standards of conduct or effort.\(^90\) As noted, the standard could be called a uniform and subjective one that merely introduced additional "circumstances." It may be suggested that our present standard—man really turns out rather subjective in use, not only as to physical characteristics, but as to skill.\(^91\) Furthermore, the presumption that everyone has knowledge of what the reasonable man in the locality would know is often rebuttable by a showing of special circumstances.\(^92\) The objective and subjective standards are thus not miles apart.

The ghost of a "reasonable Menlove"\(^83\) must continue to haunt us so long as there is the possibility of a person occasionally being held liable for not meeting a level of judgment and prudence that is beyond his mental or emotional capabilities. Is it really necessary to the overall welfare of society to have "a sacrifice of individual peculiarities going beyond a certain point"?\(^94\) Doubtless, the standard does work unfairness in some cases, and this would seem to lend strength to arguments for all encompassing insurance plans that would compensate plaintiff while not punishing the innocent defendant.\(^95\) In the meantime, it is possible to argue for greater

\(^8\) Id. at 789, where strict liability is found preferable. The law now tends in this direction.
\(^90\) See Seavey, supra note 29, at 4.
\(^91\) Id. at 26-27. But cf. James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 15-17 (1951).
\(^92\) Supra note 46, at 651-652.
\(^93\) A reference to the leading English case in which a dull witted man was held to the reasonable man standard despite apparent inability to meet it; the case involved a danger of which defendant had been given warning, but this has not diminished its use as an example of the objective standard in application. Vaughan v. Menlove, 3 Bing. N.C. 467, 132 Eng. Rep. 490 (1837). It is sometimes stated that if a dull witted person is placed in a situation where he is unable to avoid accident, he will not be held liable for failure to meet the reasonable man standard. Salmond, Torts 299-300 (14th ed. 1965).
\(^94\) Holmes, The Common Law 108 (1881).
\(^95\) See Franklin, Replacing the Negligence Lottery, 53 Va. L. Rev. 774 (1967); Green,
recognition by courts of differences in individual background and experience, particularly where it is plaintiff's conduct being judged.\textsuperscript{96} That certain injury-prone people have more than their share of accidents seems proven.\textsuperscript{97} This heavy financial burden on the accident-prone may be impossible for them to bear and the accident-prone will find it hard to get insurance. Some compulsory or all embracing insurance plan may thus be inevitable. Presently we are at a somewhat unsatisfactory check point where we do not give compensation to all who need or, by any standard based on the injured person's own merit, deserve it. Yet, sometimes we impose liability on persons who cannot help what they have done. Because the reasonable man does seem to contribute to a state of society in which we can hold persons to certain expected levels, any insurance plan that is substituted for the present system should provide the reasonable man standard. We should be certain that the criminal side of the law is capable of supplying it adequately.\textsuperscript{98}

**Future of the Reasonable Man**

So long as we remain at the present check-point and headed in the present direction, the reasonableness standard suffices by meeting the test of holding everyone to the socially acceptable minimum while still being flexible enough to allow great variation in conduct. Such a standard allows for change as ideas of acceptability shift. No other suggested standard does this:

It is true that it would perhaps be as easy to say that the actor is not to be charged unless he was guilty of fault, with the assumption that he has

\textsuperscript{96} James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 2, 7 (1951). See also Green, Judge and Jury 178-81 (1930), as to subjective factors inevitably considered by courts and jurors.


\textsuperscript{98} See Franklin, Replacing the Negligence Lottery, 53 Va. L. Rev. 774 (1967). The author suggests, at 781, that the fault system is generally unnecessary to deterrence; his plan calls for reimbursement of the compensation fund for harms arising from entrepreneurial activities (at 806). Cf. Hall, Negligent Behavior Should Be Excluded from Penal Liability, 63 Colum. L. Rev. 632 (1963). An unsolved problem of deterrence is that some people act largely from irrational impulses and are little swayed by legal threats. See Menninger, Book Review, 38 Iowa L. Rev. 697, 700 (1953).
certain standardized qualities. But it is even more difficult to imagine the actor with different qualities than he has (which would have to be done unless a purely subjective test is used) than it is to imagine an entirely new personality in the actor's place with certain described qualities.\textsuperscript{89}

The present rule allows judge and juror to bring to bear on the question of liability their ideas of what is average, typical, ethical, and moral in society, while not limiting the standard to any one of these sub-points.

What changes are likely to occur in the reasonable man in the near future? A general trend should be noted away from the relatively independent man of prudence toward a man with a good number of absolute legal obligations. An increasing number of relationships toward others and responsibilities for instrumentalities are recognized as imposing on the "person in charge" a duty to know or to find out about any danger and to give warning to others.\textsuperscript{100} A man, for instance, will be presumed to know his own business and will be held to keep the premises in safe condition for those who enter.\textsuperscript{101} Statutes surround the standard man with duties that he will not ordinarily breach:

It is an unjust reproach to our old friend the ordinary prudent man to suppose that he would do such a thing in the teeth of the ordinance. It would mean changing his nature, and giving over the very traits which brought him into existence. And when by so doing he caused the very harm which the ordinance aimed to prevent, he would be the first to admit that he should break the ordinance at his peril.\textsuperscript{102}

Ignorance of the law is no defense, though a showing of unavoidable accident will normally excuse the conduct and prevent liability.\textsuperscript{103}

It has been suggested that torts be limited to situations involving

\textsuperscript{90} Seavey, \textit{supra} note 29, at 9. It is noted that the reasonable man is unlike most legal fictions in that it does not "keep us at least one step from the truth and conceal the operation of the legal machine." \textit{See MAINÉ, ANCIENT LAW} 24-27 (3d Amer. ed. 1864), discussing the function of legal fictions.

The reasonable man might be discarded if tort law regularly employed a formula such as suggested by Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947): weigh the three variables of probability of harm, gravity of injury if it does occur, and burden of precautions. \textit{But see} Seavey, \textit{Negligence—Subjective or Objective?}, 41 HARV. L. REV. 1, 8 n.7 (1927). Even under Hand's test it would seem that we need some standard by which to judge probability of harm and the other factors.


\textsuperscript{101} \textit{See} James, \textit{Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees}, 63 YALE L.J. 605 (1954).

\textsuperscript{102} Thayer, \textit{Public Wrong and Private Action}, 27 HARV. L. REV. 317, 326 (1914). Occasionally a statute may \textit{limit} the growth of a cause of action even if not intended to have that result. \textit{See} Nizer, \textit{Right of Privacy}, 39 MICH. L. REV. 526 (1941).

liability for intentional or negligent wrongdoing, while absolute liability be made a separate category.\textsuperscript{104} Regardless of what names are used for various areas, the truly significant factor is the growth of non-fault liability and the likelihood of its eventually swallowing fault. Such liability is appearing in three ways: through statutes imposing absolute liability, cases applying such liability for ultrahazardous or extraordinary activities, and statutes the violation of which is negligence per se in the absence of justification or excuse. This trend actually marks a return toward the earlier time when the norm was absolute liability. The trend is best exemplified by statutes of the workmen’s compensation type that show “a distinct reversion to the earlier conception, that he who causes harm, however innocent, must make it good.”\textsuperscript{105}

At first, United States courts were reluctant to participate, without legislative guidance, in any absolute liability movement. But recent cases have increasingly approved the broad application of strict liability found in the Exchequer Chamber opinion in the leading English case of \textit{Rylands v. Fletcher}:

The application of the rule is not restricted to anything ‘likely to escape,’ or to anything ‘having a tendency to escape of itself,’ or to ‘a substance likely to escape despite the utmost care to confine it.’ Nor is absolute liability limited to ‘unusual and extraordinary uses which are fraught with exceptional peril to others.’ It is not required that the thing brought upon the land should be some article which owners are not accustomed to bring on their land.\textsuperscript{106}

The House of Lords opinion in \textit{Rylands} may be taken as qualifying this,\textsuperscript{107} and England later unquestionably limited the \textit{Rylands} rule.\textsuperscript{108} But even


\textsuperscript{105}Smith, \textit{Tort and Absolute Liability—Suggested Changes in Classification}, 30 \textit{Harv. L. Rev.} 409, 418 (1917); this article is a continuation of the one by Smith cited supra note 104. \textit{Cf.} Smith, \textit{Sequel to Workmen’s Compensation Acts}, 27 \textit{Harv. L. Rev.} 235, 239 (1914): “In truth the statute rejects the test prevailing in the courts in A.D. 1900, and comes much nearer to endorsing the test which used to prevail in A.D. 1400.”

\textsuperscript{106}Smith, \textit{Tort and Absolute Liability, supra} note 105, at 410-11. This lower court opinion has often been taken as giving the rule of the case; American courts either accepting or rejecting the \textit{Rylands} principle commonly cite this opinion. \textit{See Prosser, The Principle of Rylands v. Fletcher, Selected Topics on the Law of Torts} 135 (1954). The opinions in the \textit{Rylands} litigation are: Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), rev’d, Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), aff’d, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

\textsuperscript{107}The House of Lords endorsed the so called Blackburn rule of the lower court (Exchequer Chamber) but also laid down what may be taken as another test: strict liability will be applied only if the land is put to a non natural use. \textit{See Smith, Tort and Absolute Liability, supra} note 106, at 411 & n.7.

where courts have not applied that case or any other strict liability theory, they have often achieved the same result by reverting to trespass grounds of liability or developing nuisance grounds, as in many blasting cases.\(^{109}\) It is generally conceded that non-fault trespass was largely eliminated in America for a time as a basis of liability "to confer on industrial enterprise an immunity from liability for accidental harm to others. Apparently, the idea was to tax enterprise with the cost of only those damages avoidably caused."\(^{110}\) But, beginning with application of res ipsa loquitur and progressing with expansion of nuisance law, a trend back to strict liability has been apparent in recent years, especially where business and industrial undertakings are involved. Two related lines of reasoning have been advanced for this position. A business should bear, as part of its overhead, the losses to others it causes through normal operations. Industry is best able to administer the loss-bearing, since it can pass the losses on to customers and spread them most fairly among the portion of society benefiting from the industry.\(^{111}\) With this kind of thinking prevalent, it seems likely that the reasonable man, and particularly the reasonable enterprise, will not be suddenly replaced but gradually smothered under absolute duties, until eventually the ultimate in loss spreading is achieved through one of the suggested all encompassing insurance programs.

In the 1920's, it was already being suggested that the fault system was not suited to the automobile age and should be replaced as to car accidents by something akin to the workmen's compensation system.\(^{112}\) In our present space age, it has been convincingly shown that automobile cases are not actually unique in proving the deficiencies of the fault principle.\(^{113}\) Studies have indicated that such large units as transportation companies,

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\(^{109}\) This tendency, as illustrated by blasting and explosion cases in particular, is discussed in detail in Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951). It has long been recognized that both the Rylands rule and cases that apply similar strict liability on other grounds may simply be steps toward some eventual system of better loss spreading than the fault concept supplies. See Bohlen, *The Rule in Rylands and Fletcher*, 59 U. Pa. L. Rev. 298 & 423 (1911).


\(^{111}\) Gregory, *supra* note 109. The use of res ipsa as a method of achieving liability without fault, though under another name, is discussed at 381-82. The loss bearing and loss spreading rationales are emphasized at 383-84.

\(^{112}\) Marx, *The Curse of the Personal Injury Suit and a Remedy*, 10 A.B.A.J. 493 (1924), mentioning, at 496, the 1921 report of a Massachusetts commission that believed negligence was being given undue importance in automobile cases.

\(^{113}\) See Franklin, *Replacing the Negligence Lottery*, 53 Va. L. Rev. 774 (1967), especially 774-78. This plan could even be expanded to cover disease. Id. at 777 n.10. See also Ryan and Greene, *Pedestrianism: A Strange Philosophy*, 42 A.B.A.J. 117 (1956), favoring the present fault system, but also questioning the uniqueness of automobile accidents.
insurance companies, and the government are in the best position to reduce accidents. Absolute liability tends to increase pressure on these large groups and enterprises. If the law requires a perfect score in result, the actor is more likely to strive for that than if the law requires only the ordinary precautions to be taken. . . . But the law as to large enterprises is hard to separate from that applicable to the individual; we strive to hide defendant's nature and wealth from the jury in order to prevent possible prejudice. There are also gaps remaining as to the insurance coverage and loss-spreading ability of the large enterprise, and certainly as to the individual. Therefore, a system of absolute liability without some widespread insurance plan would seem unlikely. It would impose too great a risk of extreme hardships. In 1927, it was predicted:

> With a mechanistic philosophy as to human motives and a socialistic viewpoint as to the function of the state, we may return to the original result of liability for all injurious conduct, or conceivably have an absence of liability for any conduct, with the burden of loss shifted either to groups of persons or to the entire community.

Although the author then stated the two ideas of liability and non-liability as opposites, they need not be so except where liability is considered to mean fault-imposed financial responsibility of the individual defendant. In the sense of payment by a responsible agency to the injured party, we may have liability based on the loss-shifting absence of liability. Only this combination seems likely to prove powerful enough to bring down the reasonable man. Even then, he will merely live a more restricted existence, outside negligence law and in exceptional negligence cases. Or he may determine situations in which large group liability will be imposed, though the hand-in-hand development of strict liability with such loss spreading appears more probable. Our present fault principle would not have remained the basis of tort law so long were it not for the relative degree of satisfaction with the reasonable man. He is almost certain to outlive the system that has brought him greatest fame. He still has fierce defenders, and an obituary now would be exaggerated and premature.


117 O'SullivAn, *The Inheritance of the Common Law* 18-30 (1951), describes and mourns the decline of the man of ordinary prudence and his replacement by a man with absolute state imposed obligations.