

HOW SHOULD THE LAW OF TORTS REFORM, IF AT ALL, THE  
'REASONABLE MAN' STANDARD?

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## INTRODUCTION

Tort law covers a broad spectrum, ranging from civil wrongs involving negligent behaviour to trespass and violations of a person's physical integrity (e.g. in the cases of assault and battery).<sup>1</sup> For the purposes of this research, the tort of negligence (being that it is the most prominent and shares a deep history with themes of reasonableness) will act as the primary focus, with occasional references to other torts throughout.

English tort law defines negligence as the act of doing something (where a duty existed to act) that a reasonably prudent person in their position would not do based on the considerations that commonly guide human conduct.<sup>2</sup> Negligence is all about the breach of one's duty to another, with the theme of reasonableness (and its accompanying test) recurring in various ways to set a fair and consistent benchmark. One that allows all involved parties and the courts to balance individual freedom to engage in risky behaviour against the need for protection from the harm associated with it.

The essential steps in establishing negligence unfold as follows:

- i. The claimant has suffered an actionable injury.
- ii. The defendant owes them a duty of care in relation to said injury.
- iii. The defendant has breached that duty.
- iv. This breach is the cause of the claimant's injury.

The reasonable man standard (henceforth RMS) is foundational to the element of breach (iii.).

Crucially, the RMS does not determine the existence of the duty itself, but rather the behaviour or standard of care, required in order to discharge the duty. In deciding whether a duty primarily exists, judges will turn to broader notions of reasonableness and fairness, asking whether it would be just and reasonable to impose such a duty on the defendant.<sup>3</sup> Once the element of duty has been satisfied, the RMS is applied to assess whether the behaviour of the tortfeasor amounted to a breach: considering if they acted *below* the objective standard of a reasonable and prudent man given the circumstances.

For example, in the case of *Woodroffe-Hedley v. Cutbbertson*, an alpine guide was found to have breached his duty of care when he decided to use a single ice screw belay (instead of the standard

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<sup>1</sup> Donald Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6<sup>th</sup> edn, OUP 2017) 2.

<sup>2</sup> *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex Ch 781 (per Alderson B at [480]).

<sup>3</sup> *Caparo Industries plc v. Dickman* (1990) 2 AC 605 HL (per Lord Bridge at [617]-[618]).

two) on a mountaineering expedition — a decision which cost the life of his client.<sup>4</sup> As noted by Dyson J in the judgement, the defendant had fallen short of the standard expected of a reasonably competent and cautious alpine guide.<sup>5</sup>

Given the recurring importance of the RMS in many corners of the common law, it is unsurprising that legal scholars have pricked flaws in both the character itself and its application. Far from being a perfect standard, the reasonable man is a ‘creature of the law’s imagination’, a construct created by and existing within a flawed legal system.<sup>6</sup> The RMS has swept up plenty of criticisms over the years, a running theme in legal scholarship. The age-old question of whether the RMS is in dire need of legal reform creeps up routinely, with some going as far as championing for his complete departure from the law.<sup>7</sup> Before we can delve into this debate head-on, we must first piece together an understanding of the figure behind what is often deemed the common law’s most controversial legal character.<sup>8</sup>

What attributes and abilities does he hold?

What is his background?

## WHO IS THE REASONABLE MAN?

The concept of the reasonable man was first explicitly mentioned in the English tort case of *Blyth v. Birmingham Waterworks* 1856, although some scholars backpedal the date of his birth to the 1837 case of *Vaughan v. Menlove*. In *Blyth*, a faulty water hydrant installed by the defendants on public land had leaked into the plaintiff’s cellar, causing property damage. In his judgment Baron Alderson clarified the concept of negligence by zoning in on the behaviour of one particular figure. The court was asked to consider whether a reasonable man would have foreseen and taken the necessary precautions against the risks posed by the defective water pipes. If the court deemed that the reasonable man would have acted with greater precaution, then the conduct of the tortfeasors (in this case, the Birmingham Waterworks Company) would fall below the legal standard of care they owed to Blyth.

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<sup>4</sup> *Woodroffe-Hedley v. Cuthbertson* (20 June 1997) QBD (unreported).

<sup>5</sup> *Ibid*, 4.

<sup>6</sup> Fleming James Jr. (1951). *Qualities of the Reasonable Man in Negligence Cases*. *Missouri Law Review*, 16(1), 1-26.

<sup>7</sup> See: R.T. Austin, ‘Better Off with the Reasonable Man Dead, or The Reasonable Man Did the Darndest Things’ (1992) *BYU L Rev* 479. See also: J. Horder, ‘Can the Law Do Without the Reasonable Person?’ (2005) 55(2) *University Toronto Law Journal* 253.

<sup>8</sup> Jeutner, V. *The Reasonable Person: A Legal Biography*. (Cambridge University Press, 2024) 21.

It is obvious that Baron Alderson envisioned the perspective of an ordinary, prudent layman existing in the contemporary setting of 19<sup>th</sup>-century England. This character was never intended to display extraordinary prudence, but rather the ordinary level common to the typical ‘man on the Clapham omnibus.’<sup>9</sup> Similarly, the judges in *Vaughan v. Menlove* spoke of ‘the man of ordinary prudence’ in their judgments.<sup>10</sup> Other jurisdictions have slightly reformulated this image to suit their own notions of averageness. For example, in the United States, the reasonable man was imagined as the one who peruses the magazines at home and, in the afternoon, mows the lawn in his shirt sleeves.<sup>11</sup> The picture drawn by these ideas and connotations is quite the same: a mediocre man of average intelligence, with a common background.

Reflecting on the likely passengers of the omnibus in 19<sup>th</sup>-century Birmingham sharpens the picture further. Invented by the French, the Clapham omnibus was a relatively modern mode of public transport (compared to others such as the stagecoach, for example), but its high fares and late operating hours placed it beyond the reach of the working classes. Therefore, its ridership was drawn almost exclusively from the more affluent strata of English society, leading some historians to characterise it as a ‘middle-class vehicle.’<sup>12</sup> The reasonable man, among the omnibus passengers, was undoubtedly intended to represent someone of a particular socio-economic standing and privilege. I shall later consider how this language can obscure the diverse social conditioning shaped by factors such as, inter-alia, gender and wealth class, by confining the reasonable ‘man’ to a narrow and exclusionary identity.

Pinpointing the precise characteristics of the reasonable man has proven challenging, with different courts and judges offering varied interpretations of the qualities the figure embodies or excludes. Lord Reed acknowledged that the standard of the reasonable man is determined by *how* the courts decide to interpret and apply this ‘impersonal’ standard.<sup>13</sup> It is up to the judges to dictate what the reasonable man might have had in contemplation, or what (given the circumstances of the unique case) he ought to have foreseen.<sup>14</sup> Free as the courts are to shape the personality of the reasonable man, their depictions must remain ‘anchored to [the] reality’ in which we all live.<sup>15</sup> In *Glasgow Corporation v Muir*, Lord Macmillan ascribed two key qualities to the reasonable man: he is free from both ‘over-apprehension’ and ‘over-confidence.’<sup>16</sup> This

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<sup>9</sup> *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex Ch 781 (per Alderson B at [480]).

<sup>10</sup> *Vaughan v. Menlove* (1987) 3 Bing NC 468, 132 ER 490.

<sup>11</sup> *Hall v. Brooklands Auto Racing Club* (1933) 1 KB 205 (CA) (per Greer LJ).

<sup>12</sup> Read, D. *England 1868-1914: The Age of Urban Democracy* (Longman 1979) 31.

<sup>13</sup> *Healthcare at Home Ltd v. The Common Services Agency* (2014) UKSC 49 (2014) 4 All ER 943.

<sup>14</sup> *Glasgow Corporation v. Muir* (1943) AC 448 (HL) (per Lord Macmillan).

<sup>15</sup> Jeutner, V. *The Reasonable Person: A Legal Biography*. (Cambridge University Press, 2024) 86.

<sup>16</sup> *Ibid*, 14.

underscores the notion that the reasonable man was not intended to be an entirely perfect being, nor a prodigy stripped of common human failings.

In his leading work *The Common Law*, Oliver W. Holmes drew a captivating analogy between the divine perspective of God upon man and the way the common law views an individual.<sup>17</sup> A merciful and forgiving God may allow for a degree of human fallibility that the law (to an extent) cannot. Holmes observed that the courts decline to take into account all of a person's 'personal equation' when applying the standard, for the sake of uniformity. In this sense, the law does not seek to view people as God does, according to the American jurist.

Some judges and scholars have suggested framing the perspective of the reasonable man in line with the standards of a 'civilised society' generally speaking. In practice, this would equate reasonableness with what is socially deemed as 'normal' and commonplace and opens up the possibility of entrenching those (possibly harmful) stereotypes tied to characteristics such as race and gender. Lord Lloyd echoed this sentiment in a 1997 House of Lords decision (*ex parte Barry*),<sup>18</sup> while also acknowledging the difficulties posed by contemporary standards, which can shift and fluctuate over time: what was once embraced by Victorian England might be considered taboo in today's age. This reasoning implies that as society evolves, so too does this objective standard — so that the 'reasonable man' first conceived of in Birmingham may appear quite distinct from his modern counterpart, whom one judge reimagined as 'the person on the Boris bus with their Oyster card.'<sup>19</sup> This exposes another potential weakness in the RMS, one that will be explored in greater depth in the following chapter.

## CRITICISMS

Criticism of the RMS is extensive — perhaps too extensive to cover fully in this limited space. However, certain critiques carry particular weight and appear repeatedly in the debate. A dominant strand, fuelled by feminist scholarship, challenges the test's inherently male-oriented origins (as previously discussed) and, consequently, its potential inadequacy when applied to female defendants.

A brief look back at the metaphors used to describe the 'man on the Clapham omnibus' supports the claim that judges, in moulding the standard into shape, had their male contemporaries in mind. From its birth, the reasonable man seemed far from all-encompassing;

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<sup>17</sup> W. Holmes, Oliver. *The Common Law* (Dover Publications 2009) 5-6.

<sup>18</sup> *R v. Gloucestershire County Council ex p Barry* (1997) AC 584 (HL) (per Lord Lloyd).

<sup>19</sup> *Owens v. Owens* (2017) EWCA Civ 182 (2018) 1 WLR 438 (per Sir James Munby P at [41]).

it was instead acutely tailored to the male members of society. If, as some have argued, the reasonable man is inherently male, he may arguably become a mere mirror of male social norms and standards.<sup>20</sup> Feminist scholars have erected several concerns arising from this.

Most notably, the usage of explicitly male terminology has the effect of ‘othering’ women.<sup>21</sup> Within this framing, men straddle the normative category, while any person falling outside of this group (women included) fall outside the representation of the common law’s reasonable ‘man.’ This ‘othering’ has made an appearance in case law in two distinct fashions.<sup>22</sup> In some earlier caselaw, courts have shown reluctance to apply the RMS to female defendants. In others, they have done the opposite: holding all women to the same skills, physical capabilities, and intelligence expected of men. This raises further concerns that women risk being penalized for responding in ways deemed stereotypically feminine due to their biological characteristics, especially in the context of rape and sexual assault.<sup>23</sup>

On this topic, the argument could be broadened to encompass other social groups and their behaviours.<sup>24</sup> For example, the way a black working-class woman might respond in a situation could differ materially from that of her white counterpart of a higher wealth bracket.<sup>25</sup> This sheds light on a broader problem with many objective standards: they cannot accommodate the unique personal circumstances of every individual. Consequently, judges and juries applying the RMS are not expected to place themselves in the position of a low-income black woman or a working-class white man, but instead to rely on this supposed race-blind and gender-neutral RMS as their principal benchmark.

It is worth noting that *Blyth* itself was decided by an all-male jury. This point connects to a further feminist critique of the RMS: that applying an objective standard inevitably requires judges to draw on their own implicit sense of what is reasonable.<sup>26</sup> Since the UK judiciary has historically been, and remains, predominantly male-dominated, such interpretations are likely shaped and constrained by the comparatively narrow life experiences of those making the decisions. As Mayo Moran observes, the reasonable man often ends up looking suspiciously like

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<sup>20</sup> Bender, L. *A Lawyer’s Primer on Feminist Theory and Tort*. (1988) 38 *J Legal Educ* 3, 22.

<sup>21</sup> Conaghan, J. *Tort Law and the Feminist Critique of Reason* in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Routledge Cavendish 1996) 58.

<sup>22</sup> Jeutner, V. ‘*The Reasonable Person in Clapham*’ in *The Reasonable Person: A Legal Biography*. (Cambridge University Press, 2024) 96-106.

<sup>23</sup> Moran, M. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP 2003) 42-55.

<sup>24</sup> *Ibid*, 22.

<sup>25</sup> See: Wilson, A. ‘*Being Black*’ in *In Black and White: A Young Barrister’s Story of Race and Class in a Broken Justice System* (Endeavour 2021) 147-156.

<sup>26</sup> Martin, R. *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury* (1994) 23 *Anglo-American Law Review* 334, 342.

the judge himself.<sup>27</sup> Nowhere is this more accurately depicted than in *Sayers v. Harlow UDC*, where a woman, trapped in a bus station toilet cubicle in the early morning, sustained an injury while attempting to climb out.<sup>28</sup> Three elderly male judges were tasked with placing themselves in the position of a woman (dressed in a tight skirt and high-heeled shoes) trapped in a lavatory while her impatient husband waited at the bus stop, and to decide what a ‘reasonable man’ would have done in her shoes.

Some legal scholars have defended the RMS on the basis that it merely reflects the prevailing standards of justification within society, rather than inherently imposing a male perspective.<sup>29</sup> Another critique is the conflation of reasonableness with what is merely socially acceptable. J.G. Fleming observed that because the RMS is often tied to ‘community valuations,’ courts tend to give considerable weight to whether a defendant’s conduct mirrored practices commonly accepted as normal by society at large.<sup>30</sup> While normal behaviour may at times be reasonable, this assumption cannot invariably hold, as it risks reinforcing harmful stereotypes. Moran perfectly illustrates this with the example of ‘playing boys and playing girls’: young male defendants, whose imprudent behaviour is excused as natural under the notion that ‘boys will be boys,’ may benefit from a far more expansive understanding of innocence in the eyes of the law.<sup>31</sup>

The few steps taken by the common law to address the flaws of the RMS have themselves attracted criticism. The gradual shift from the ‘reasonable man’ to the ostensibly more inclusive ‘reasonable person’ standard was intended to draw the test away from its male-centred origins. Yet feminist critics have dismissed this as a largely cosmetic change, arguing that the standard continues to mirror a predominantly male perspective at the expense of the female experience.<sup>32</sup> It is evident, then, that the RMS *is* in dire need of reform. The subsequent chapter will turn to the question of whether the various legal reform proposals erected over the years are truly permissible.

## EVALUATING PROPOSALS

Perhaps the strongest rationale for legal reform has centred on subjectivizing the traditionally objective RMS, moving beyond its mere recasting as a neutral ‘person.’ One prominent proposal has thus been the subscription to a ‘reasonable woman standard’ (RWS) to confront the

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<sup>27</sup> Moran, M. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP 2003) 172.

<sup>28</sup> *Sayers v. Harlow UDC* (1958) 1 WLR 623 (CA).

<sup>29</sup> Gardner, J. *The Many Faces of the Reasonable Person* (2015) 131 *Law Q Rev* 563.

<sup>30</sup> Fleming, J.G. *The Law of Torts* (9<sup>th</sup> edn, LBC Information Services 1998) 133.

<sup>31</sup> Moran, M. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP 2003) 193-215.

<sup>32</sup> See: Bender, L. *A Lawyer’s Primer on Feminist Theory and Tort*. (1988) 38 *J Legal Educ* 3. See also: Cahn, N. *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice* (1992) 77 *Cornell L Rev* 1398.

shortcomings of the RMS when applied to female defendants.<sup>33</sup> As previously discussed, gender-neutral language may do little more than conceal the standard's inherent maleness: transforming an explicit male norm into an implicit one.

Several scholars have supported this view, with M. Moran vocalising the need for a distinct female standard, particularly in cases of sexual assault and harassment.<sup>34</sup> In such contexts, the discretion often lies with (predominantly male) judges, who are tasked with assessing the merits of a claim through their own particular perspectives. A man is unlikely to imagine himself trapped in a bathroom cubicle while sporting a skirt and heels or forced to resist the unwelcome and persistent advances of a male colleague. In the nervous shock case of *Chester v. Waverley Corp*, Australian judge Latham CJ characterised a mother's experience of witnessing her young son being dragged into a ditch and drowned as inflicting 'no consequence of more than a temporary nature,' a remark that starkly exposes his limited appreciation of a mother's perspective.<sup>35</sup>

As compelling as the notion of a reasonable woman may be, some fear that she may perpetuate, rather than diminish, the discrimination embedded in the RMS.<sup>36</sup> M. Meeds outlines many reasons for the limitations of the RWS, arguing chiefly that because women are not a monolith, the perspective applied in the RWS is likely to reflect a narrow conception of womanhood, overlooking the experiences of other classes and ethnicities. This raises the contentious possibility of an endless road of 'reasonable' standards, accounting for differences such as race and religion — there could be a 'reasonable Christian woman standard', or a 'reasonable black Muslim standard' etc. Meeds strongly refutes this idea, asserting that any white male individual should take high offence at the suggestion that they are inherently incapable of assessing, fairly and objectively, whether racial or sexual harassment has manifested based solely on their gender or race.<sup>37</sup>

Furthermore, the reality remains that (predominantly male) judges and juries will continue to apply the standard, potentially struggling with a subjective RWS. To address this, some have suggested that actively diversifying the judiciary (and thus those in charge with applying the test) could overcome this.<sup>38</sup> Reforming the ratio of male to female judges, with a greater weight to the

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<sup>33</sup> Cahn, N. *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice* (1992) 77 *Cornell L Rev* 1398.

<sup>34</sup> Moran, M. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP 2003) 263-287.

<sup>35</sup> *Chester v. Waverley Corporation* (1939) 62 CLR 1 (per Latham CJ at [21]).

<sup>36</sup> Meeds, M. *Applying the Reasonable Woman Standard in Evaluating SH Claims: Is it Justified?* (1993) 65 *S Cal L Rev* 207, 220.

<sup>37</sup> *Ibid*, 36.

<sup>38</sup> Rackley, E. *Women, Judging and the Judiciary: From Difference to Diversity*. (Routledge 2012).

female voice, could enable the legal system to adopt values and norms divorced from maleness.<sup>39</sup> However, this represents a gradual measure and is not guaranteed to succeed as, once again, women are not a monolith — a female judge is not confined to a particular perspective simply by virtue of her gender.

Another frequently cited proposal pertains to the fundamental content of the RMS. As discussed in earlier chapters, the reasonable man was designed to reflect the ‘average’ male member of society, and many scholars have situated the character of the RMS within the community and society to which he belongs. C. Jaeger, in *The Empirical Reasonable Person*, offers an alternative perspective, by drawing a distinction between two possible interpretations of the RMS: one in which he behaves as the average member of the community, and another in which he acts as an above-average member.<sup>40</sup> The choice between the ‘average’ versus ‘aspirational’ models may tackle some of the underlying issues in the original conception.

The author advocates reforming the RMS by assessing the reasonableness of conduct through empirical observation and set beliefs and principles, rather than reasonableness merely reflecting a behavioural median. This approach would essentially divorce reasonableness from normalcy and rely on limited observations of human behaviour, rather a principle-based definition of reasonableness. Building on this, C. Jaeger argues that established principles (most notably, economic principles) provide clearer guidance for assessing the standard of reason by which a defendant should be judged. For example, a defendant may be expected to choose the most cost-efficient and economically rational option in order to meet the standard of the reasonable person. One downside of this approach, however, may be that it promotes a justice system grounded in ‘cold rationality’ rather than an ‘ethic of care’ that emphasises empathy and human interconnectedness.<sup>41</sup>

All things considered, reforming the RMS should primarily aim to provide a clearer and more consistent account of what is objectively reasonable, while appropriately limiting judicial discretion — where possible, different judges should be able to reach a consensus as to which actions are reasonable. By grounding the standard in principle-based definitions and treating the reasonable person as an aspirational figure, the law could encourage conduct that is both measured and, for instance, economically sound — thereby establishing a clearer benchmark for defendants to meet.

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<sup>39</sup> Ibid, 38.

<sup>40</sup> Jaeger, C. *The Empirical Reasonable Person* (2021) 72 Alabama L Rev 887, 938-949.

<sup>41</sup> Barnett, H. *Introduction to Feminist Jurisprudence* (Cavendish 1998) 26.

## CONCLUSION

The debate surrounding the RMS has highlighted both his flaws and the appetite for legal reform, though there is a recognition that no simple, cookie-cutter solution exists. Conceived as an objective benchmark, the RMS has too often mirrored the biases of those who have crafted and continue to apply it — privileging male, white, and middle-class perspectives, despite the adoption of a ‘reasonable person’ label. Attempts at reform (via, for example, subjectivising the standard and introducing the RWS) have themselves unearthed a host of challenges. What is ultimately needed is a clearer articulation of reasonableness in the ‘reasonable’ man standard, specifying the factors a defendant ought to have considered and criteria (whether economic or otherwise) by which their conduct should be assessed, without conflating normal behaviour with what is truly reasonable.