Essays on Legal Profession

'The Elusive Standard of Reasonableness'?

Amelia Skelding*

Abstract – This essay explores and analyses the development of the 'reasonable man' standard in the law of tort and the lack of general legal consensus surrounding its practical application. By exploring whether defendants should be judged against the reasonable man, woman or person, this essay invariably exposes the objectivity-subjectivity debate. The central argument canvassed by this essay is that the application of the standard of reasonableness raises a number of difficulties, and that, as a result, precarious balance must be met between creating an overly generalised constraint on society and creating a confusing standardless doctrine.

Keywords: Reasonable Man, Reasonable Woman, Reasonable Person, Subjectivity, Objectivity, Tort, Negligence, Standard of Care, Reasonableness

*Amelia Skelding is currently a second year law student at the University of Durham. Her LinkedIn profile can be accessed here.
1. Introduction

In establishing whether the standard of care in negligence has been met, the courts compare what the defendant has done to the imagined actions of the so-called ‘reasonable man’. But who is this judicial construct that we are to be judged against? While it is agreed that the reasonable man is not all-knowing and makes ‘reasonable’ mistakes, there is disagreement over whether these qualities should be linked to the characteristics of a man – as opposed to a person or woman.

The less contentious ‘reasonable person’ terminology still raises questions. In general, the test attempts to apply an objective standard which is not dependent on the capabilities of the defendant. This is best illustrated in the Court of Appeal decision of Nettleship v Weston\(^1\) where a learner driver was unable to reach the ‘objective’ standard to which she was held. The majority sought to avoid the ‘endless confusion and injustice’\(^2\) that would follow if the standard were to be varied according to skill. Cane, however, asks, “Is the reasonable person black, coloured or white? Male or female? Young, middle-aged or old? Christian, Muslim or of some other, or no, religion? Rich, poor or averagely affluent? Perhaps none of these differences between people is relevant, for instance, to questions about how a reasonable person would drive a car, but some or all of them may be relevant in some contexts”\(^3\). The lack of logical basis by which to limit the potentially innumerable variations of the ‘reasonable person’ contributes to the subjectivity versus objectivity dichotomy which poses a serious challenge when trying to define ‘reasonableness’.

2. The Reasonable Man

One of the earliest reported uses of the reasonable man standard occurred in a 19\(^{th}\) century British case of Vaughan v Menlove\(^4\). The court stated that “[i]nstead...of saying that the liability for negligence should be coextensive with the judgment of each individual...we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe”.\(^5\) The reasonableness test is intended to reflect changing social morals

\(^{1}\) [1971] 2 QB 691.
\(^{2}\) ibid, 700.
\(^{3}\) P Cane, Atiyah’s Accidents, Compensation and the Law (7\(^{th}\) edn, CUP 2006) 37.
\(^{5}\) ibid, 493.
and present a standard that imposes the same behavioural expectations on everyone, thereby limiting the possible bias of judges.

Feminists and other legal scholars have argued that despite the claims of gender neutrality, the standard of the reasonable man embodies a male viewpoint and consequently holds women to a standard that does not take them into account—this criticism goes beyond a dislike of the way the standard is expressed. Conaghan, for example, notes “this gender specificity is not just a linguistic convention, whereby both sexes are denoted by reference to the masculine: the reasonable man is, in fact, male”. Therefore, the description is not merely semantic, but reflects a gendered understanding of reasonableness.

There are two main aspects to this critique. Firstly, the ‘reasonable man’ is a conception devised by judges to set a standard considered appropriate by them. It is not based on statistical evidence of what most people actually think and do. Due to the under-representation of women, ethnic and other minority groups within the judiciary, it is likely that the standard reflects the particular perspectives, assumptions and prejudices of a specific section of society—namely the old, white, upper-class men who make up the majority of the judiciary.

Judges tend to characterise this hypothetical figure as a male. For example, in *Hall v Brooklands AutoRacing Club*, Lord Bowen uses the imagery of ‘the man on the street’, ‘the man on the Clapham omnibus’ and ‘the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves’. The representation of a man in a busy public realm by day and a leisurely domestic evening life may be the objectives of a suburban middle-class male but it doesn’t encapsulate the existence of a woman managing her home and work duties.

Secondly, and more controversially, it is argued that the standard of reasonableness prioritises the ability to adopt a position of detached objectivity from which to weigh up the costs and benefits of a particular course of action—an ability traditionally associated with men. Assuming that this is true, the application of ‘a standard of reasonable care’ seems to embody a male way of thinking, and as a result, excludes differences in the way women think and act. The issue is not with the language of the reasonable ‘man’, but with the very notion of reasonableness being

---

7 [1933] 1 KB 205.
8 *ibid*, 244.
gendered. Therefore, the ‘rebranding’ of the reasonable man is so difficult because it attributes a "false universality to what is in fact a partial and loaded standard".9

That being said, many feminists do not view their role as one of providing new, comprehensive standards or of offering an alternative to replace the existing system. Schroeder, for example, emphasises that while legal feminism has been “particularly successful in challenging assumptions and, sometimes, even in changing the law of "obvious" gender issues such as employment discrimination, rape and abortion, it has been less successful in developing overarching jurisprudential approaches”.10 References to female characteristics are often made in court decisions, but the sporadic nature of the recognition does not amount to a general tendency to take special note of female qualities. The lack of success could be due to the perception that female intervention would result in the ‘softening’ of ‘the hard, cold logic of male reasoning’.11 Barnett calls attention to the inaccuracy of this assumption by noting that feminist legal methods seek to ‘complement traditional legal method’ through the ‘incorporation of alternative views, experiences, perceptions and values’ that might be otherwise excluded.12 In addition, there cannot be one triumphant feminist theory because that would imply that women are so original and homogeneous in their thought that they all think alike. Consequently, feminist legal theory can only attempt to influence, not reconstruct jurisprudential methods. According to Professor Schwartz, the term ‘reasonable man’ has undergone a ‘terminological change’ meaning the ‘male/female bias no longer exists’;13 however, this is highly debatable as the use of new terminology does not directly result in a change in the attitude of the court and the issue is not merely one of semantics. The substantial development needed in the judicial system to overcome this problem may only be possible once the ratio of male to female judges changes, allowing greater weight in the judicial sphere to the female voice.

9 ibid, 58.
3. **The Reasonable Person**

Although the ‘reasonable man’ standard was originally intended to be gender-neutral, used in the generic sense to mean ‘person’ or ‘human being’, it took on a male-centric perspective because it was written about or by men. Bender contends that even after the standard was renamed the ‘reasonable person’ standard, it still represents what is reasonable from the masculine perspective of the mostly male legal community or the female legal community, which is trained to think like men.\(^{14}\)

The recent case of *Coventry v Lawrence*\(^{15}\) highlights that tort law is now ‘judged by the standard of the ordinary reasonable person’.\(^{16}\) The legal personification of virtuous conduct embodied in the reasonable person has been questioned by feminist legal scholars in relation to the objectivity and universality of the standard, as well as its identity. The reasonable person is based on the metaphor of personhood; it may perhaps be better perceived, not as an individual or an identity, but instead as a ‘relational ideal’.\(^{17}\) Context means the reasonable person can change in different situations. This causes concern if one begins from the assumption that the reasonable person is in fact an indivisible entity, that is, a person. However, if context is taken to mean that in one situation, a defendant with a particular relationship to a victim should be treated differently from a different defendant with a different relationship, then the tension has been significantly reduced. The very vagueness of the ‘reasonable person’ could be seen as a way of alleviating judicial strain. However, it also exposes the debate over whether reasonableness should be a normative or positivist notion.\(^{18}\)

In relation to the reasonable person, there is some dispute over whether the standard should be defined in accordance with a normative ethical commitment, be it welfare maximisation, equal freedom or ethic of care, or in accordance with an observed practice or perception. Miller and Perry radically state that ‘only normative definitions are logically acceptable’.\(^{19}\) They argue that normative definitions are categorically preferable to positive definitions because the latter are

---


\(^{15}\) [2014] UKSC 46.

\(^{16}\) *ibid*, 176.


\(^{19}\) *ibid*, 25.
logically unacceptable, whereas the former merely raise partially surmountable practical problems. While acknowledging that any definition deriving from a normative ethical theory may raise practical problems, such definitions are generally usable and may be developed to serve their underlying rationales more effectively. In contrast, positivism is founded on the idea that the reasonable person’s characteristics can be deduced by observation. They contend that any judge who claims to understand the nature of the reasonable person from his or her familiarity with society is mistaken because such a task is not merely difficult or impractical, it is impossible.

Reasonableness is an omnipresent overarching legal concept; its broad application means a positivist standard would be unsuitable. Although both normative and positive approaches conceive the reasonable man as a hypothetical construct against which the defendant’s behaviour is judged, positivist theory approximates the standard using observable data, meaning the reasonable person is in a sense a derivative of society. The inappropriate nature of the positivist approach can be proved by applying the reasonableness model created by Miller and Perry, which is analogous to Kenneth J Arrow’s 'impossibility theorem'. Arrow employed an axiomatic methodology in which he formulated three axioms that needed to be satisfied: non-dictatorship, Pareto (which requires that a law that is good for each individual must be considered good for the collective), and independence of irrelevant alternatives (which requires that the outcome must not depend on the presence of irrelevant alternatives). The mathematical nature of Arrow's model allows for the creation of a similar structure for defining reasonableness.

Miller and Perry adopt a model in which the reasonable person is an ‘aggregate of society’. An aggregate is a representative of a group, derived from that group. After accumulating and assessing the opinions of society to form a societal belief of reasonableness, they outline five basic axioms that a positive definition of the reasonable person must satisfy: respect for unanimity, responsiveness, anonymity, neutrality and minimal functionality. In applying these axioms, they conclude that the ‘positive definition is a myth’. It is ‘impossible for the reasonable person to satisfy all five axioms at the same time’ because ‘the reasonable person cannot possibly respect unanimity and be responsive, anonymous, neutral, and minimally functional’.

---

20 ibid., 376.
21 ibid., 381.
22 ibid., 283.
Therefore, a normative approach, which is based on welfare maximisation, equal freedom and a feminist ethic of care, would be more appropriate.

Welfare maximisation is founded on a cost-benefit philosophy; the economic definition holds that a person acts unreasonably if he or she takes less than the socially optimal level of care. Equal freedom focuses on the protection of certain rights that every person enjoys and that everyone is obliged to respect, promoting a more utilitarian attitude. The principle of innate freedom includes an innate right to equality, binding the two concepts together. A feminist ethic of care theory adapts the traditional standard of reasonable care by adding female traits, arguably manipulating subjective elements into the objective standard to some extent. These three factors support a more appropriate normative approach because they accurately represent the important values of the reasonableness doctrine.

Although the ‘reasonable person’ standard has been accepted by most courts as the correct measure for evaluating allegedly culpable conduct, most notably in negligence cases, its applicability has recently been challenged in cases of sexual harassment. At the heart of this, there is a debate surrounding the suggestion that men and women differ in their judgments of behaviour to such a great extent that the same standard for both is not suitable.

4. The Reasonable Woman

The rejection of the ‘reasonable person’ standard in favour of the ‘reasonable woman’ approach in sexual harassment cases is explained by the fact that a sex-blind reasonable person standard tends to be male-biased and systematically ignores the experiences of women. In this context, MacKinnon notes that “sexual harassment, the event, is not new to women. It is the law of injuries that it is new to”.23 Women inevitably live in greater fear of sexual assault than men. Therefore, the perception of what is reasonable in such circumstances is significantly shaped by gender. The majority of victims of sexual harassment are women, so the standard in most cases is now the ‘reasonable woman’.

Alder and Pierce suggest that courts use a “two-step ‘subjective/objective’ approach” to modify the traditional ‘reasonable person’ standard, thereby considering the perspective of both the

23 C MacKinnon, Sexual Harassment of Winking Women (Yale University Press 1979) 103.
victim and that of a reasonable person.\textsuperscript{24} Adopting a sex-specific standard raises many questions, primarily about the issue of whether it is fair to hold males to a standard that, because they are males, they may be unable to appreciate or fully understand. The adoption of a reasonable woman standard protects females from behaviour that they find offensive, but that males might not necessarily perceive in the same way. However, the standard assumes the perspective of a 'reasonable' woman so males would be protected from the claims of hypersensitive victims.

The US case of \textit{Ellison v Brady}\textsuperscript{25} adopted the reasonable woman, rather than the reasonable person standard. The court explained that “[i]f we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination”.\textsuperscript{26} Similarly, in \textit{Radtke v Everett}\textsuperscript{27}, the court stated: “[w]e believe that in a sexual harassment case involving a woman, the proper perspective to view the offensive conduct from is that of the “reasonable woman”, not that of the “reasonable person””.\textsuperscript{28}

Efforts to eradicate social problems, such as sexual discrimination, inevitably result in substantial legal and ethical issues. Objections to the reasonable woman combine doctrinal and practical concerns. For some scholars, the desire to prove that women are equal has led to reluctance in showing that they are different, mainly because differences can be used to justify unequal treatment and opportunity. A second objection to the reasonable woman standard is that it does not take into account whether the defendant ‘intended’ to harass. According to Sanger, “her experience, not his intent, focuses the inquiry”.\textsuperscript{29} In other words, if sexual harassment cases were limited to those in which harm was intended, it would offer no security to women.

The main problem with the female redefinition of reasonableness is that it risks misjudging men with feminine perceptions and women with masculine perceptions; namely those who do not conform to their gender stereotype. A separate standard for women reinforces the anachronistic notion that men and women should not be treated equally; a reasonable woman standard sensitive to feminine ‘weaknesses’ may create the impression that women are subject to a more lenient standard than a ‘normal’ person because they are incapable of complying with normal

\textsuperscript{25} [1991] F2d 872 (9th Cir).
\textsuperscript{26} \textit{ibid}. 878.
\textsuperscript{28} \textit{ibid}. 487.
standards, thereby perpetuating gender biases. Against this backdrop, Finley believes that the reasonable person standard should not be applied differently to men and women, but instead must be generally more responsive to, and inclusive of, feminine perspectives. Applying a flexible test to everyone reduces the risk of misjudging those who do not conform to gender stereotypes and alleviates the impression of leniency toward women.

Distinguishing between reasonable women and reasonable men impairs the neutrality and objectivity of the concept of reasonableness, which was intended to be used to set equal boundaries on all conduct and to afford equal protection to all interests. Finley reiterates that ‘to be objective a standard does not have to be stereotyped—it can include consideration of the actual context of the event and how someone with the individual’s experiences would react without descending into pure subjectivity in the sense of asking only how the event looked to the individual. Therefore, while there is clearly a necessary element of subjectivity to the reasonableness standard, the effect and implications of this must vary.

5. The Objectivity and Subjectivity Debate

The subjective/objective dispute is founded on theoretical tensions because such a standard appears to unite opposites. First, objectivity suggests rule-like, fixed characteristics, whereas subjectivity implies flexibility. Second, the debate appears to conflate fact and norm; objectivity entails a norm-like inquiry about rules, whereas subjectivity involves an inquiry into minds or facts. These issues are at the core of the ‘identity characteristics’ question surrounding the reasonableness standard.

An entirely objective standard restricts the courts evaluation of what is reasonable to the perspective of a single character that may not satisfactorily represent what is considered reasonable by the general public. If all contextual components are eliminated, it does not set a representative measure. Rather, a truly objective legal standard should reflect the diverse perspectives of our modern multicultural and varied society. However, although the perspective is shaped by an infinite number of factors, an objective standard that incorporates too many individualised characteristics risks becoming subjective.

31 ibid, 57.
Equally, there are issues with an entirely subjective standard. The proverbial slippery slope is a potential problem with the application of a modified reasonable standard. Once courts begin to recognise different standards, there is no logical basis by which to limit the potentially innumerable variations. If the subjective components of the reasonable man standard include the specific characteristics of the defendant, then it becomes a standardless doctrine.

The main difficulty with adopting a hybrid standard, that is both objective and subjective, is finding the correct balance between the two concepts. Bourdieu accurately exemplifies the struggle: “[o]f all the oppositions that artificially divide social science, the most fundamental, and the most ruinous, is the one that is set up between subjectivism and objectivism”.32 The hybrid standard reflects a common sense approach; extreme versions of either concept fail to produce an effective model.

Some legal scholars have noted a shift in legal methodology. Norse, for example, argues that the law has moved from rules to context due to heuristics. Heuristics involve problem-solving through trial-and-error methods, using experience to learn and improve. She argues that this “anthropomorphizing move does more to obscure than reveal” because equality is inherently comparative and cannot be found in the perception of an individual, male or female.33 She highlights that the important question is “not whether the law has become too soft or subjectified but what we mean by its objectivity”.34 The law is mediated as it is applied, shaped by the norms of culture, gender and race. The reasonable person could be perceived as a heuristic that serves multiple purposes in applying majoritarian norms, but also allowing individualisation. In a world of uncertainty, heuristics are essential and in assessing their rationality, context is crucial.35

Social norms mean that the law is applied one way for cases involving women and another way for cases involving men. These norms come from the ecological rationality of custom, not law. Habits about how we view women and men are unconsciously invoked in law application as default cultural rules. Norse describes the way in which relational norms between men and

34 ibid, 35.
women influence law application as the ‘veil of relationship’. Ultimately, Norse argues that the reasonable man should not be eliminated. The metaphor is necessary because it invites emotional identification with the defendant in ways that are intended to elicit restraint and distinguish between lawful and unlawful behaviour. Anthropomorphising the standard creates a personalised debate that addresses the question as to whether the same rules are being applied to men and women. However, as these arguments are principally induced by form not substance, it devalues what is almost universally admitted to be a legitimate standard.

The subjective/objective standard debate is centred around equality. The ‘reasonable person’ standard inevitably evens out the analysing process, forcing us to choose between hyper-majoritarian views, the standard of law-abiding citizens, and hyper-minoritarian views, the standard of the particular defendant.

Similarly, the ‘reasonable woman’ standard deals with juxtaposing issues. To an extent, the standard exacerbates gender bias by applying a ‘weaker’ subjective standard to woman. But on the other hand, it avoids the gendered reasonableness standard and does not penalise women for being women. Moreover, it remains not only just but also required to ensure equal protection. If women can only gain equivalent protection by enclosing them within an alternative standard then so be it.

However, this ‘triumph’ for women has drawbacks. Inevitably, the reasonable woman standard receives a vast amount of criticism, and its acceptance creates a far weaker kind of equality than that which might have been achieved with a stronger frontal assault on the law’s double standards. Norse expresses concerns that concentrating on the reasonable woman or man “simply intensifies the focus on identity without any corresponding illumination of the persistent role of heuristics in law application”. As a result, she believes the objective/subjective standard debate should stop because it is a ‘dead end analytically’.

The reasonable person inquiry requires something more than a person, the subjective/objective problem continues the argument about whether we are creating ‘special’ new rules for favoured and disfavoured classes when the real hard work is in the law’s history, application, and meaning.

---

37 ibid (n 20) 50.
38 ibid (n 50).
Some scholars argue strongly against the reasonable woman standard. Ashraf, for example, argues that only a reasonable person standard should be used because the addition of gender to the standard will lead to the addition of other subjective elements such as race and ethnicity. Much discussion considers the ‘identity’ of the reasonable person and whether it should include characteristics of age (the reasonable young male), sex (the reasonable woman) or culture (the reasonable Asian woman). Amplifying the objectivity of the standard increases the risk of confusion. While using the reasonable woman standard forces courts to take women's views into account, there are concerns it could interfere with the elimination of discrimination; there is particular trepidation in relation to workplace discrimination.

Critics of the ‘reasonable person’ standard argue that it is male-biased and ignores the experiences of women. Arguments for the adoption of a sex-specific reasonable person standard propose, in connection with the workplace, that most employers are responsible for creating the ‘hostile’ environment, and most judges who are responsible for determining whether a ‘hostile’ environment exists are male. Therefore, they have a male perspective of what constitutes sexual harassment. Consequently, when they apply the reasonable person standard, they are applying a male-biased standard. However, the sex-specific reasonable person standard allows courts to consider prominent sociological differences between men and women, as well as being able to shield employers from the hypersensitive complainants due to the ‘reasonable’ aspect of the reasonable woman standard.

In professional negligence cases, the defendant is held to possess the knowledge, skill and care ordinarily possessed by members of that profession. *Bolam v Friern Hospital Management Committee*\(^{39}\) states that an ordinary man must “...exercise the ordinary skill of an ordinary competent man exercising that particular art”. The actions of the defendant are essentially judged against those of an ordinary skilled man professing to exercise that skill; consequently a subjective element is being added to the objective standard.

With reference to the workplace, discrimination will inevitably continue if prohibited conduct is not clearly defined. If people, specifically employers, cannot compare behaviour to a set standard, unacceptable conduct cannot be identified. The clearest standard is a wholly objective standard because adding subjective elements increases confusion for employers, employees/co-

\(^{39}\) [1957] 1 WLR 583 (QBD).
workers and judges. If a wholly objective standard was used in sexual harassment cases, courts may develop and accumulate precedents about which conduct is prohibited more quickly, offering greatly needed guidance to judges and employers.

There are three problems with a subjective standard. First, increased subjectivity could produce inconsistency in the results and conclusions reached by courts thereby creating confusion. In extremes, it could be that the same conduct found to be permissible by one court may be found impermissible by another court, through applying the same subjective standard. As a result, employers and judges will lack guidance on what conduct they should prohibit.

Second, there is a problem with the logical extension of the principle in other areas. If the reasonable woman standard is accepted as necessary in order to reflect the divergent views of what men and women consider sexual harassment, then perhaps the same ought to apply with regard to racial or religious harassment. Outcomes of cases could be altered when viewed from the perspective of the reasonable Muslim, Jewish, Catholic (or other religious) person, or based on national origin, where it must be viewed from the perspective of the reasonable Pakistani, Japanese, Mexican or a person of some other national origin. Therefore, a major problem for the courts is deciding where to draw the line as to which subjective characteristics of the defendant are to be given to the reasonable person.

Some suggest that the only subjective characteristic that should be ascribed to the reasonable person is the characteristic of the defendant on the basis of which the harassment is being claimed. For example, in the case of sexual harassment, the sex of the defendant should be attributed to the reasonable person, and in the case of national origin harassment, the national origin of the defendant should be applied to the reasonable person. However, as there is no rationale for drawing the line here—it is inevitable that a wholly or greatly subjective standard would be created. It would not present the clear guidelines that people need in this area in order to confirm that their conduct is not prohibited.

Third, judges cannot be expected to keep track of and understand the tangle of different perspectives involved. We cannot assume that judges will be able to comprehend, let alone apply, the standards using numerous perspectives. Undoubtedly, this will result in chaos. In addition, if male judges are forced to apply a reasonable woman standard, it cannot be proved whether they are applying a reasonable woman's perception or a male-biased view of what the
reasonable woman's perception is. Therefore, there are a range of issues with applying an overly subjective standard.

That being said, there are problems with a purely objective standard as well. The main criticism regarding the objectivity of the reasonable person standard has been that it fails to account for the differences in the perspectives of men and women because it assumes that there are some views of sexual harassment that we all share. To an extent, the same could be said of the reasonable woman standard, namely that it assumes a view of sexual harassment that all women are likely to share. Women, like society, are not a homogeneous group because everyone has diverse experiences, views and perceptions. However, subjective contextual elements such as gender reduce the risk of excessive generalisation. The criticism that the reasonable person standard assumes that people share a common view of something will be true of any wholly objective standard, hence the need for some elements of subjectivity.

Tort law attempts to achieve a balance between the rights of people in society by affording compensation for injuries sustained by one person as the result of the conduct of another. Tort law bases liability upon conduct that is socially unreasonable. It is undisputed that what is socially acceptable and unacceptable varies over time. In this context, Reynolds highlights that “...the reasonable [person] is not a static creation”.

As society evolves and opinions on morality change, so does the view of the judge. Environment psychologists, Stephan and Rachel Kaplan, believe that knowledge about human-environment interactions is currently underappreciated. The environment can be miniscule or vast, physically present or conceptual. The environment plays a major role in the understanding of human behaviour and is therefore a necessary consideration in defining reasonable conduct.

6. Conclusion

Although feminists believe that the ‘reasonable man’ standard in traditional tort law excludes women, its development into the ‘reasonable person’ or ‘reasonable woman’ standard will have a limited impact. The community which determines the conduct expected of the reasonable person consists of both men and women, not just of men. Arguing that judges factor their bias into account when evaluating certain conduct has never been said to be a sufficient reason for

---

discarding an objective standard. In any situation, under any given set of circumstances, people are bound to have differences, whether these differences are cultural, racial, economic, religious, or otherwise. We cannot control the biases a judge may bring with them or the characteristics of a defendant. In addition, even in the application of a subjective standard, judges may still consider his or her biases and perspectives.

Overall, the reasonable man/person/woman is a judicial construct which seeks to determine reasonable conduct in the circumstances of a particular case: the reasonable person is a personification of the judicial view of reasonableness. Cane argues that the reasonable person is invoked in order to obscure the role of the judge as a policy-maker. While it is likely, though not inevitable, that what is considered reasonable will reflect the view of a judiciary that continues to be unrepresentative, it does not mean that the reasonable person is simply a personification of the judges themselves or a decoy behind which they can do or pursue their own preferences and prejudices. There is a whole series of rules to which judges are confined which have been developed through case law, setting out the qualities of the reasonable man/woman/person; for example, the Bolam test.

Fundamentally, the lexical construction of the term is not important. ‘Reasonableness’ is the essential core of the standard. An overly objective standard constrains society by attempting to enforce an excessively generalised common view which does not exist, producing chaos. Equally, an exceedingly subjective criterion creates a standardless test and generates confusion as there is no set model to guide an individual's conduct. Therefore, a precarious balance must exist between these two concepts. Achieving the correct combination of the two is a challenge judges will continue to face as beliefs of morality and acceptable behaviour change. In sum, it can be argued that the reasonable person is a constantly evolving creature that will continue to repeatedly evade the solid grasp of the law.

---