

# The Reasonable Person Standard

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The reasonable person, once known as the reasonable man, is an imaginary character employed for the purposes of setting and communicating the law's requirements and expectations across a wide range of contexts. Although a creature of the common-law legal tradition, the same character has lately been enlisted to perform similar work in some civilian jurisdictions. Possibly the inaugural and certainly the best-known invocation of the character is in setting and communicating the 'standard of care' used for identifying negligence in the law of torts (*see* NEGLIGENCE, *see* TORTS). In *Blyth v Birmingham Waterworks* (1856) flooding of the plaintiff's property was caused by the failure, in very cold weather, of a valve in the defendant's mains water pipes. The court held that, to avoid liability for negligence, the defendant was not required to take every possible precaution to avoid flooding from its pipes, but to do only as much as 'a reasonable man ... would do' (Baron Alderson's words). Since the cold snap was unprecedented, the defendant was not negligent in having failed to proof the valve against it.

Nowadays, in addition to this role in the law of negligence, the reasonable person plays a role in determining how contracts are formed and interpreted, in the proof of criminal guilt, in the adjudication of various defenses to criminal charges, and in numerous other corners of the law. For example, only a defendant who committed a crime because threatened with consequences so grave 'that a reasonable person would not have acted otherwise' enjoys the defense of duress (*Director of Public Prosecutions for Northern Ireland v Lynch* 1975; *see* COERCION).

As the reasonable person has been put to ever more work in the law, specialized adaptations have emerged: the reasonable

juror, the reasonable public authority, the reasonable engineer, and so on. There is also the selectively reasonable person: one who is reasonable in some respects, but just like the defendant in others. Finally, we have imaginary characters endowed with traits other than reasonableness: the officious bystander, the prudent man of business, the fair-minded observer, and so forth.

The law's taste for imaginary characters, then, goes beyond its taste for the reasonable person. This entry deals only with the reasonable person. It does so in two stages. In section 1 the focus is on the 'person' aspect. What is supposed to be gained by the personification of a standard in this way? Many of the issues raised here also bear on the law's invocation of other imaginary characters. In section 2 attention shifts to the 'reasonable' aspect. What is reasonableness in the common law, whether personified or not? What problems attend the law's use of the standard?

### *1. Personification*

Following Baron Alderson's lead in *Blyth*, a court may ask: 'What would the reasonable person have done in the defendant's situation?' The answer seems obvious. The reasonable person would have done the reasonable thing. Does asking 'what would the reasonable person have done?' help anyone to work out what would have been the reasonable thing to do? No, say some. One already needs to know what would have been the reasonable thing to do in order to know what the reasonable person would have done. Personifying the reasonableness standard in the form of the reasonable person provides no extra guidance to anyone (King 2017: 730). This 'redundancy' objection mirrors a familiar objection to some kinds of 'virtue ethics' (see VIRTUE ETHICS). One needs to know what would be a good or suitable thing to do in order to know what the virtuous person would do. So there is no point in trying to work out what would be a good or suitable thing to do by asking what the virtuous person would do (Adams 2006: 7).

Three possible responses to the redundancy objection spring to mind. First, maybe the reasonable person does not always do the reasonable thing. Sometimes a court asks: ‘Would the reasonable person have lost self-control when provoked as the defendant was provoked?’ The defense of provocation is available, in a murder trial, only if that question attracts an affirmative answer (*see* HOMICIDE). Yet nobody suggests that the availability of the provocation defense makes the act of killing itself reasonable. The killing is excused, not justified. Indeed it is only partly excused: in common law the provoked killer is still guilty of manslaughter. Here the law holds that reasonable emotional responses can lead someone into unreasonable actions (Horder 1992: 57). So too can reasonable beliefs, e.g. when a defendant is misled into thinking he is being attacked and therefore needs to defend himself.

Does it follow that the reasonable person is capable of acting unreasonably? Yes and no. The law’s reasonable person is a person who is reasonable *in some respect relevant to the law* (King 2017: 727). In other words, the reasonable person always plays his or her standard-setting role in connection with a specific legal question. When the law’s question is what the reasonable person would believe, the answer is that (s)he would have reasonable beliefs. When the law’s question is what the reasonable person would feel, the answer is that (s)he would have reasonable feelings. And when the law’s question is what the reasonable person would do, the answer is that (s)he would act reasonably. It is not the law’s position that the reasonable person would always think, feel, and act reasonably all at once. Yet the fact remains that, to repeat, *when the law’s question is what the reasonable person would do*, the answer is always that (s)he would act reasonably. That leaves the redundancy objection intact. We still need to know what would be the reasonable thing to do in order to know what the reasonable person would do.

So the first response to the redundancy objection fails. A second possible response is this. Maybe we know other things

about the reasonable person that could help us to narrow down what (s)he would do in the current circumstances, and hence what would qualify in those circumstances as the reasonable thing to do. Hoping to do the right thing, a Christian may ask: 'What would Jesus do?' The Christian answer is: 'Jesus would do the right thing.' Doesn't that answer take the Christian straight back to square one? Doesn't (s)he still need to work out what would be the right thing to do, never mind Jesus? That conclusion may be too hasty. Maybe the Christian is aware of other things that Jesus did (or dispositions that Jesus had), such that (s)he can hazard a decent guess at what Jesus would have done in the current circumstances. Hazarding a decent guess at what Jesus would have done, based on what is already known of Jesus, may be a better procedure for alighting on the right thing to do than available alternatives, granting that Jesus always does the right thing. Asking what Jesus would do then adds deliberative value (Zagzebski 2010: 51-2). Likewise, perhaps, with the reasonable person. If the law already specifies what the reasonable person does (or is disposed to do) in other circumstances, could one not sometimes hazard a decent guess at what (s)he might do in the current circumstances? This reveals a possible benefit of the law's personified standards. One is invited to think about a complete (albeit imaginary) person such as the reasonable person. One endows that person with a personality, a character and a temperament. Inevitably one thinks about that person's established patterns of action, and dispositions towards action, and not just each of his or her actions in isolation. Now one has extra points of reference for working out what the reasonable person would do in new circumstances, and hence for working out what would be the reasonable thing to do in those circumstances. The 'hence' shows that the reasonable person is no longer redundant in setting and communicating the standard that (s)he embodies. (S)he adds deliberative value.

The law sometimes attributes actions and dispositions to the reasonable person, but a less often than you might expect (see

section 2 below). There is less material from which to build a picture of the reasonable person's personality, character, or temperament than there is in the case of Jesus. Besides, as we already know, the reasonable person is a different person for different purposes. She is reasonable in different respects, depending on what question the law is asking. A person who is always reasonable in all respects at once may be inconceivable. (A famous parody that makes this point among others is Herbert 1935: 1.). Be that as it may, however, the law's reasonable person is not such a person. So one would be ill-advised to think of the law's reasonable person as if (s)he were one and the same person throughout the law, with a continuity of character, personality, and temperament that could be relied upon in working out what (s)he would do now (Baron 2011: 17).

The first two responses to the redundancy objection fail. We are left, then, with the following (third) response, which (as we will see) turns out to be the best response. Maybe the main point of the reasonable person standard, or of other personified standards, is not to provide guidance, so that it is no objection to the law's resort to such standards that they do not help to guide anyone. That may seem like a paradoxical proposal. Where there is no guidance, there is surely no law. A purported law that just says 'do exactly as you should do apart from this law' is no law at all, for it does not add any normative content (sound or otherwise). If the reasonable person standard adds no normative content, can it really be a legal standard? This question brings us directly to our second sub-topic, the idea of reasonableness itself.

## 2. Reasonableness

### a. Interpretations of the reasonableness standard

Whether embodied in the reasonable person or otherwise, what is reasonableness in the eyes of the law? In *Blyth*, Baron Alderson says that it is negligent in law 'to omit to do something which a

reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do.' Does that not come down to saying that according to the law of negligence one should do whatever, quite apart from the law of negligence, one should do? In which case, can Baron Alderson really be regarded as setting a legal standard at all? What does the law add (Raz 2004: 16-7)? You may reply that, presumably, the law of negligence adds legal consequences. But it adds legal consequences to what? That is the issue on which there is no law. Or perhaps we should say: on that issue the only legal regulation is deregulation. The law of negligence remits regulation back to those considerations that would regulate the situation in the absence of a law of negligence.

A possible response is that this represents too literal-minded an interpretation of Baron Alderson's remark. The reasonableness standard in the law is more specific than Baron Alderson makes it sound. Arthur Ripstein argues that the standard of reasonableness found in the law is the same standard found in John Rawls' political liberalism (*see* RAWLS, JOHN). For the law's purposes, argues Ripstein, the 'considerations which ordinarily regulate the conduct of human affairs' means all and only those that regulate such conduct under 'fair terms of social co-operation', terms that 'all can accept' as 'free and equal' persons (Ripstein 1999: 7). The law does not help itself to a 'comprehensive' account of what people should do (12); reasonableness, in particular, does not entail rationality (*see* RATIONALITY). Indeed the law takes a dim view of those who 'substitute private rationality for public standards of reasonableness' (134). Contrast the claim of some economists of law (e.g. Posner 1972: 32) that the law's reasonableness standard, at any rate as used to define negligence, is none other than the standard of perfect private rationality. The reasonable person is someone who takes precautions against doing harm only where doing so would be less costly than paying for the harm itself with a discount for the improbability of its occurrence. This formula is usually credited to Judge Learned

Hand (*United States v Carroll Towing* 1947). Ripstein's quarrel with the Hand Formula closely tracks Rawls' quarrel with utilitarianism as a political doctrine (see UTILITARIANISM). The Hand Formula mistakenly 'extends to society as a whole the principle of rational choice for one man' (Rawls 1971: 26-7).

Ripstein's and Posner's are just two of many attempts to give content to the reasonableness standard used by the law, such that it can qualify as a legal standard. A different view (Gardner 2015) is that the reasonableness standard is used by the law mainly to put certain questions beyond legal standardization. That Baron Alderson's words tell against the existence of any law of reasonableness is no surprise, on this view, for that is the point. The question of whether the defendant acted reasonably (or had reasonable beliefs or feelings etc.) is largely treated in law as a 'question of fact' and not a 'question of law'. Where the court comprises a judge and a jury (see ADVERSARIAL SYSTEM OF JUSTICE), the question of reasonableness is decided by the jury. To the extent that the answer turns on anything other than the jury's own untutored judgment, it mainly depends on evidence presented at trial, which may include expert evidence on the usual practices of surgeons, engineers, referees, etc. A ruling of (un)reasonableness in a particular case leaves no legally binding precedent behind. Barring the occasional evidential presumption, the question of reasonableness is approached in each case from scratch, or 'on the facts' as lawyers say. You will gather from all of this that 'question of fact', as used by lawyers, is a technical expression. Any question that is not a question of law is a question of fact. So moral questions, aesthetic questions, medical questions, mathematical questions, questions of ordinary linguistic usage, etc., are all questions of fact inasmuch as there are no legal rules (or purported legal rules) that determine (or purport to determine) how they are to be answered. On the view under discussion, the question of reasonableness belongs, for the most part, to the same list of non-legal questions.

The qualification ‘for the most part’ shows that this view need not be entirely at odds with those that give specifically legal content to the reasonableness standard. Judges do sometimes steer juries with guidance as to how the question of reasonableness is to be approached. Arguably, Learned Hand was laying out some such guidance in the ‘Hand Formula’. The word ‘arguably’ needs to be added because when he formulated his formula, Hand was sitting in an appellate court without a jury. Like many appellate judges, as well as trial judges who sit without juries, he had to think about questions of fact as well as questions of law. Was he suggesting that the ‘Hand Formula’ be treated as a legal rule, such that future juries be directed to think about reasonableness in his special formulaic way, and not in their own way? Maybe not. On one interpretation, Hand was merely using the formula to bring out why there could be ‘no general rule’ (his words) regarding how much care counts as reasonable care. In doing so he was hinting at the classic rationale for the question of reasonableness to be treated as a question of fact and not a question of law. The classic rationale is that, if justice is to be done according to law, the law needs to save some space within its own rules for sensitivity to the particular facts of particular cases. It needs to make some provision for the fact that (as Aristotle puts it) ‘all law is universal but about some things it is not possible to make a universal statement which will be correct’ (*Nicomachean Ethics* v.10; see ARISTOTLE). The law does this in various ways. Resort to the reasonableness standard is just one of them.

This Aristotelian rationale for resort to the reasonableness standard is of course compatible with there being some legal rules that regulate how the jury (or other fact-finder) is to approach the question of reasonableness, while leaving the determination of reasonableness to them. Whether Learned Hand intended his Formula to be such a legal rule is unclear. Be that as it may, and perhaps more importantly, the Hand Formula has not had much judicial uptake as a rule for guiding and constraining finders of

fact on the question of reasonableness (Wright 2003, 148). More often finders of fact are invited to use their own judgment not only in deciding whether a defendant was reasonable, but also in deciding *how to think about* whether a defendant was reasonable.

We spoke of the law's 'saving some space within its own rules'. As this suggests, unreasonableness by itself does not attract legal consequences. There is no crime or tort of acting unreasonably. In particular, not all unreasonable action qualifies as negligent action. To be negligent, in the modern law, is to fail to take reasonable care in what one does to protect others whom one can reasonably foresee will be put at risk by what one does. (This is the 'neighbor' principle enunciated by Lord Atkin in *Donoghue v Stevenson* 1932: 580). So negligence is not exactly as Baron Alderson described it. What is held up to the reasonableness standard, in the hunt for negligence, is not the action but the care taken in performing it. Even then, the law does not forbid negligence *per se*. It forbids the negligent performance of certain actions (mostly causing certain losses or harms). In spite of the role of the reasonableness standard in devolving judgment to the finder of fact, then, there is usually a lot of law in the interstices of which that devolution occurs.

It is perhaps surprising that no mention has been made in all this of the connection between reasonableness and *ordinariness*. The reasonable person has often been characterized as ordinary in the law. He (at that time he was only ever a 'he') was at one time identified by some English judges, for some purposes, with the 'man on the Clapham Omnibus'. It is hard to know what to make of such ideas. True, they tend to spin the reasonableness standard in a relatively conservative direction: reasonable people don't stand out from the crowd. More on that kind of concern below. But there are other possible explanations, apart from judicial conservatism, for the reasonable and the ordinary to be brought together in many judicial remarks. First, such remarks may help to reassure the jury that the standard of reasonableness is to be set, not by lawyers, but by 'ordinary' folk like themselves.

Secondly, such remarks may sometimes help to differentiate the standard of a reasonable engineer, surgeon, referee, etc. (on which expert evidence may be needed) from that of the the 'ordinary' non-specialist. Thirdly, and perhaps most importantly, such remarks may help to steer finders of fact away from setting impossibly high standards of reasonableness. Reasonableness is understood by the law to be a matter of degree and what is called for by the law is not the highest degree of reasonableness imaginable but only 'ordinary' reasonableness. What degree of reasonableness counts as 'ordinary'? On that point, once again, the law defers to the finder of fact.

b. Criticisms of the reasonableness standard

Some lawyers worry that the reasonableness standard is *always* impossibly high for some people, because it is what they call an 'objective' standard. It does not bend to the limitations of the particular person who is held up to it. Philosophically, this is an odd worry. It is in the nature of any standard that it does not bend to the limitations of whatever is held up to it. That is the sense in which those limitations are limitations. All standards are in that sense 'objective'. So what is the worry? The lawyers who worry about the 'objectivity' of the standard worry most about the failure of the standard to bend to the limited *capacities* of those who are subject to it (Hart 1968: 152). They accept that some people will fall short according to the reasonableness standard, but they think that the standard should be such that everyone is capable of living up to it. This view holds particular sway among criminal lawyers (*see* CRIMINAL LAW). Its power is such that, in criminal law, the reasonable person is sometimes modified to exhibit some of the limitations, especially incapacities, of the defendant (Westen 2008). This can lead to absurdity. If the defendant is mentally ill, suffering a loss of capacity to respond to reasons, should the jury really be asked to imagine the responses of an unreasonable reasonable person? (Christopher 2002: 900).

Lawyers thinking about tort and contract law have typically worried less about the ‘objectivity’ of the reasonableness standard. They worry more about the parity of defendants and plaintiffs, and of the wider class of wrongdoers and victims that they represent (Weinrib 1995: 177–8). So they give less weight to what is sometimes known as the ‘legality principle’, according to which everyone ought to be able to rely on legal rules to avoid violating them. When the legality principle is applied in tort or contract law to protect the less capable defendant, that only adds to the vulnerability of the plaintiff.

The legality principle also underlies a second critique of the reasonableness standard, which is that, never mind the capacities of the defendant, it just gives too little guidance. If the space of reasonableness throws us back on ‘those considerations which ordinarily regulate the conduct of human affairs’, then ‘too little guidance’ is an understatement. The reasonableness standard gives *no* guidance. The worry that this is too flagrant a violation of the legality principle explains why judges are sometimes tempted to move aspects of the determination of reasonableness over the line from ‘questions of fact’ to ‘questions of law’. We already know that there may be a price to pay for this shift: that, by establishing general rules, the law will sacrifice some ability to do justice in particular cases. This is the eternal predicament of law noted by Aristotle: for gains in legality we pay a price in justice. The story of the law of provocation in England in the twentieth century illustrates it well. The judges slowly built up a body of legal rules concerning what the reasonable man would do when provoked, and thereby usurped much of the role of the jury in fixing the reasonableness standard for provocation. A statutory intervention in 1957 was needed to restore that role to the jury (Macklem 1987). The whole cycle was then repeated over the following 50 years. Usually, criminal lawyers set less store by the legality principle when they are thinking about the definitions of defenses than when they are thinking about the definitions of offences. The legality principle is there to help

people avoid falling into the clutches of the law. Once they are in those clutches, the reasonableness standard can give them a welcome law-free space in which to explain themselves and maybe extricate themselves. Yet, as the story of the provocation defense shows, the temptation to fill that space with law remains.

The story of the provocation defense also foregrounds another set of perennial doubts about the reasonable person standard, most thoroughly explored in feminist writings (*see* FEMINIST POLITICAL THEORY). The reasonable man may have been rebranded as the reasonable person but for many purposes the standard is still gendered. This manifests itself in at least two ways. Sometimes women's reactions are treated as unreasonable because not typically masculine, e.g. where the typically masculine reaction would be premised on typically greater height or upper body strength (Handsley 1996: 61). Sometimes, on the other hand, women are not allowed to rely on the same standards of reasonableness that are used to give extra latitude to their male counterparts, e.g. girls are expected to be more sensible than boys, and are cast as unreasonable when they are not (Moran 2003: 101-2). Either way the problem lies in mistaken generalizations (one overinclusive, the other underinclusive). Surely mistakes made in setting or applying a standard are not to be laid at the door of the standard itself? That is too quick (Baron 2011: 14). A standard may invite error. The problem identified by feminists can be generalized. All sorts of epistemic faults (prejudice, gullibility, bias, superstition) may compromise the law's use of the reasonableness standard. That is true whether what counts as reasonableness is a question of law or whether it is a question of fact. In the one case, you get mainly the errors of judges; in the other, mainly the errors of juries. Does the reasonable person standard invite these errors more than alternative standards? That is hard to say without knowing what alternative standards might be on offer, and how they might be immunized against the same faults. Maybe the problems identified by feminists would still hold even if the reasonableness

standard were replaced. For maybe the problem is not with the standard so much as with the standard-setters.

*See also:* ADVERSARIAL SYSTEM OF JUSTICE; ARISTOTLE; COERCION; CRIMINAL LAW; FEMINIST POLITICAL THEORY; HOMICIDE; JUSTICE; NEGLIGENCE; RATIONALITY; RAWLS, JOHN; TORTS; UTILITARIANISM; VIRTUE ETHICS

### References

Adams, Robert Merrihew 2006. *A Theory of Virtue: Excellence in Being for the Good*. Oxford: Oxford University Press.

Baron, Marcia 2011. 'The Standard of the Reasonable Person in the Criminal Law,' in R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo, Victor Tadros (eds.), *The Structures of The Criminal Law*. Oxford: Oxford University Press.

*Blyth v Birmingham Waterworks* 1856. Case reported at (1856) 11 Ex 781.

Christopher, Russell 2002. 'Justification: Self-Defense,' in Joshua Dressler (ed), *The Encyclopedia of Crime and Justice Volume 2*. 2nd edition, New York: MacMillan.

*Director of Public Prosecutions for Northern Ireland v Lynch* 1975. Case reported at [1975] AC 653.

*Donoghue v Stevenson* 1932. Case reported at [1932] AC 562.

Gardner, John 2015. 'The Many Faces of the Reasonable Person,' *Law Quarterly Review* vol. 131, p. 563

Handsley, Elizabeth 1996. 'The Reasonable Man: Two Case Studies,' *Sister in Law* vol. 1, p. 58.

- Hart, H.L.A. 1968. *Punishment and Responsibility*. Oxford: Clarendon Press.
- Herbert, A.P. 1935. *Uncommon Law: Being 66 Misleading Cases*. Methuen & Co.
- Horder, Jeremy 1992. *Provocation and Responsibility*. Oxford: Clarendon Press.
- King, Matt 2017. 'Against Personifying the Reasonable Person,' *Criminal Law and Philosophy* vol. 11, p. 725
- Macklem, Timothy 1987. 'Provocation and the Ordinary Person,' *Dalhousie Law Journal* vol. 11, p. 126.
- Moran, Mayo 2003. *Rethinking the Reasonable Person*. Oxford: Oxford University Press.
- Posner, Richard 1972. 'A Theory of Negligence,' *Journal of Legal Studies* vol. 1, p. 29.
- Raz, Joseph 2004. 'Incorporation by Law,' *Legal Theory* vol. 10, p. 1
- Rawls, John 1971. *A Theory of Justice*. Cambridge MA: Belknap Press.
- United States v Carroll Towing* 1947. Case reported at (1947) 159 F.2d 169.
- Weinrib, Ernest 1995. *The Idea of Private Law*. Cambridge MA: Harvard University Press.
- Westen, Peter 2008. 'Individualizing the Reasonable Person in Criminal Law,' *Criminal Law and Philosophy* vol. 2, p. 137.
- Wright, Richard 2003. 'Hand, Posner, and the Myth of the 'Hand Formula',' *Theoretical Inquiries in Law* vol. 4, p. 145.
- Zagzebski, Linda 2010. 'Exemplarist Virtue Theory,' *Metaphilosophy* vol. 41, p. 41.