

## THE REASONABLE MAN: TWO CASE STUDIES

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One of the fundamental insights of feminist theory is the observation that where men and women as groups are observably different, the characteristics common to men are usually treated as central and normative, the traits associated with women treated as marginal and deviant. This article identifies the concept of "reasonableness" in tort law as a concept which is culturally coded masculine, and illustrates how such a masculine normative assumption disadvantages women in the areas of "nervous shock" and police liability for failure to protect victims of violent crime.

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## I. INTRODUCTION: POWER, RIGHTS, VALUES AND THE COMMON LAW

Law is seen by many scholars as simply one of many social institutions, and, as such, permeated with social values and conflicts.<sup>1</sup> In this view, law is not a source of truth, but a way of constructing a truth - a truth which will probably work in some people's interests and not in others'. In other words, law is an instrument whereby existing power structures are perpetuated, rather than a mechanism whereby power can be overcome by "right".

In light of these insights, it does not necessarily make sense to rely on the law to preserve our so-called natural rights, although this is indeed an argument which is often used, by both lawyers and non-lawyers, to support the need for law in our society. If these "natural rights" are not reflected in the existing power structure in society, it is very difficult, if not impossible, to have them recognised by the law. Indeed, to the extent that they are not reflected in the existing power structure, it could be said that they are not rights at all.

In this paper I will discuss one particular source of law: the common law. Common law is the law that is developed by judges on a case-by-case basis. It is part of our British heritage, having been "received" into the Australian colonies on the arrival of the British. Since it dates back to the middle ages, it covers most traditional areas of human activity, and forms a very important part of our legal tradition. Common law rules can be overridden by parliament, but if this has not occurred, it is possible to find parts of the common law that have not changed for hundreds of years.<sup>2</sup>

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<sup>1</sup> See eg M Foucault, *Discipline and Punish*, Vintage Books, New York, 1979 (tr. Alan Sheridan).

<sup>2</sup> See eg *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

It was traditionally thought that common law was an autonomous institution, where all judges had to do was apply the right kind of reasoning and they would find the right result. Recently, it has been recognised more and more that common law judges do not find results: they choose them.<sup>3</sup> Thus judges come under more and more scrutiny, both personally and professionally, as they are seen as active participants in the making of law.<sup>4</sup> People want to know about judges' backgrounds. It is not surprising that the vast majority of Australian judges are white, middle-class men.<sup>5</sup> Nor is it surprising that the suggestion has often been made that this position judges hold in society affects their viewpoint, their sympathies, their values and priorities and, ultimately, their decisions.<sup>6</sup>

In this paper I discuss one particular legal category which could be said to reflect judges' personal viewpoints: the standard of the reasonable man. First I will outline just what this standard means and where it is used. I will then go on to describe two examples of the application of the standard which suggest that perhaps judges' decisions and, indeed, their very reasoning, are affected by their position as men.

## II. TORT LAW

The general area of law where the reasonable man comes into play is tort law. A tort is a civil wrong, which does not arise out of a contract, and for which money damages can be awarded as a remedy to the wronged person. Examples include negligence, public and private nuisance, trespass to property, assault, battery, defamation, wrongful imprisonment and malicious

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<sup>3</sup> See generally the work of Professor Julius Stone.

<sup>4</sup> See M Kirby, *The Judges*, Sydney, 1983 at 17.

<sup>5</sup> See *id* pp 16-17. Of course, because all judges were once lawyers, they will reflect the socioeconomic makeup of the legal profession. On this, see D Weisbrot, *Australian Lawyers*, Longman Cheshire, Melbourne, 1989 pp 79-110. Judges tend to be an even more elite group than the legal profession at large, however, because of the class- and gender-based hierarchy of the legal profession and the practice of appointing as judges only those at the top of the hierarchy.

<sup>6</sup> See Kirby, above note 4 at 17.

prosecution. In every tort case there is a plaintiff, who is the wronged person, and a defendant, who is the person accused of committing the wrong.

### III. NEGLIGENCE

The tort of negligence has been a very important instrument for the last 100 years or so in obtaining compensation for people who are injured by the actions of others. However, it does not provide compensation for everyone, only for those who were wrongfully injured. In order to establish what conduct is wrongful and what is not, the law must develop a standard by which to judge the actions of the defendant.

#### A. DUTY OF CARE

The standard of the reasonable man is applied at various different stages of negligence cases, but in this paper I will be alluding to only two. First, it is used to determine whether the defendant owed the plaintiff a duty of care, or whether the relationship between the two parties was such that a reasonable man in the defendant's position would have foreseen that his actions would affect the plaintiff and thus taken care not to injure him or her.

It should be noted, however, that the foresight of the reasonable man is not the only element in the calculation. Policy considerations may be taken into account to exclude a duty of care even where the effect of the defendant's actions on the plaintiff is reasonably foreseeable.<sup>7</sup>

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<sup>7</sup> There is a further consideration applied in Australia: proximity. This is not the place to discuss the meaning of this rather vague concept. For explanation by its original author, see *Jaensch v Coffey* (1984) 155 CLR 549 per Deane J. The proximity notion does not make any difference to the need to establish what the reasonable man would have foreseen.

## B. BREACH OF DUTY

Secondly, there is the question whether the defendant took enough care to prevent the plaintiff from being injured. The meaning of negligence is, in essence, that someone was not careful enough. If the standard of care observed by the defendant was up to, or above, the standard set by the law, the plaintiff (or injured person) cannot receive any compensation. If the defendant did not exercise the level of care required by the standard, his or her conduct is judged wrongful, and he or she must pay compensation.

The way the law has set this standard is by reference to the reasonable man, so the question becomes: did the defendant behave as the reasonable man would have in this situation? It is an "objective" standard, which means that generally speaking it does not matter if an individual defendant has some particular disability or for some other reason was unable to behave as the reasonable man would have done.<sup>8</sup> Nor does it matter, broadly speaking, if the defendant was usually an excessively careful person and did not exhibit that usual carefulness.<sup>9</sup> Such "subjective" elements are not taken into account; everyone is held to the same standard.

The way the reasonable man responds to an apprehended danger to another person is by weighing three factors: probability, gravity and practicability. Probability is the probability of injury occurring; if it is very unlikely, the reasonable man may do nothing at all. Thus a cricket club was excused, in a 1951 case, from negligence when a neighbour was hit by a ball. The likelihood of such an event was simply so slight that the club was justified in doing nothing to provide for the safety of the neighbours.<sup>10</sup> Gravity refers to

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<sup>8</sup> But see *Cook v Cook* (1986) 162 CLR 376.

<sup>9</sup> But see e.g. medical negligence cases such as *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, holding that the standard in such cases is that of "the ordinary skilled man exercising and professing to have that special skill".

<sup>10</sup> *Bolton v Stone* [1951] AC 850.

the seriousness of the injury that will or might result if nothing is done. The more serious, the more the reasonable man will do to remove the risk. Thus an employer was held liable, again in 1951, for not providing protective goggles for a one-eyed worker, though it did not have to provide goggles for two-eyed workers, as the gravity of injury to the worker's good eye was far greater than the gravity of injury to the eye of a two-eyed worker.<sup>11</sup> These two considerations must be balanced against practicability, which involves the expense and difficulty of the measures which could eliminate the risk. The more probable and serious the injury, the greater the trouble to which the reasonable man will go in order to avoid it. The less probable and serious, the less he will do.

#### IV. WHO IS THE REASONABLE MAN?

It is fairly clear that initially at least when the law said man, it meant man, or a person of the male gender. In Britain, the reasonable man was also known as "the man on the Clapham omnibus";<sup>12</sup> in Australia, as "the man on the Bondi tram."<sup>13</sup> In the United States, he has been referred to as "the man who takes the magazines at home and in the evening pushes the lawnmower in his shirtsleeves."<sup>14</sup> As one feminist legal scholar has noted:

These definitions refer to distinctly male prototypes--the man who works outside the home, legally governs the home, and participates in running the home only with regard to physical maintenance activities using machinery.<sup>15</sup>

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<sup>11</sup> *Paris v Stepney BC* [1951] AC 367.

<sup>12</sup> *Hall v Brooklands Auto Racing Club* [1933] 1 KB 204 at 205.

<sup>13</sup> See J Fleming, *The Law of Torts*: Law Book Company, 7th ed, Sydney, 1987 at 97.

<sup>14</sup> G Calabresi, *Ideals, Beliefs and Attitudes in the Law*, Syracuse University Press, 1985; quoted in L Finley, "A Break in the Silence: Including Women's Issues in a Torts Course" (1989) 1 *Yale J. Law & Feminism* 41 at 58.

<sup>15</sup> Finley, above note 14, at 58.

It could be added that they also refer to middle-class prototypes, notably through the assumption that the "reasonable man" has a yard, owns a lawnmower and wears a shirt and jacket to work.

Nor is this kind of bias limited to English-based legal systems. In France, the standard is that of "le bon père de famille," which translates literally as "the good father of the family" or, more idiomatically, as "the good family man."<sup>16</sup> This language suggests that the reasonable man is also assumed to be heterosexual, or at least not openly homosexual.

There is a final sense in which it must be concluded that the reasonable man really is a man, and that is by the use of the word "reasonable." Reasonableness is a quality which is commonly associated, in our society, with the male gender, as are "objectivity" and "rationality." Women, on the other hand, are generally thought to be, and trained and in some sense expected to be, everything that men are not: unreasonable, subjective, and irrational. (Adjectives with less negative connotations include emotional and intuitive.)

Yet, according to law, this is the standard by which we are all to be judged. If we do not behave as a reasonable man would have done, our behaviour is judged wrongful and we must pay for the damage it causes. Of course, it is possible for a middle class, heterosexual man to be negligent, or to exhibit less care than the reasonable man would have exhibited under the circumstances. Simply being male, middle class and heterosexual does not lead to a presumption that one has behaved reasonably. However, we must ask whether there is a significant bias in this standard: does the standard of the reasonable man make it more difficult for women, working class men and homosexual men to escape paying compensation in cases where they are accused of wrongdoing? There is a very strong possibility that it might. The

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<sup>16</sup> The same scholar comments: "This definition reminds me that good fathers had absolute rights over their female relatives. These women were deprived of legal personhood by being part of the family. If the good father did not live up to the paternalistic ideal, the law would rarely intervene." *Ibid.*

reasoning that might lead to this conclusion is suggested in a fictitious case called *Fardell v Potts*, which was invented by the British humorist A P Herbert and published in his book *Uncommon Law* in 1927:

[M]y own researches incline me to agree, that in all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman. It was ably insisted before us that such an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence; that among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex; that no such reference is found, for the simple reason that no such being is contemplated by law; that legally at least there is no reasonable woman...

It is probably no mere chance that in our legal text-books the problems relating to married women are usually considered immediately after the pages devoted to idiots and lunatics. Indeed, there is respectable authority for saying that at Common Law this was the status of a woman. ...It is no bad thing that the law of the land should here and there conform with the known facts of everyday experience. The view that there exists a class of beings illogical, impulsive, careless, irresponsible, extravagant, prejudiced, and vain, free for the most part from those worthy and repellent excellences which distinguish the Reasonable Man, and devoted to the irrational arts of pleasure and attraction, is one which should be as welcome and as well accepted in our Courts as it is in our drawing-rooms--and even in Parliament. ...I find that at Common Law a reasonable woman does not exist.<sup>17</sup>

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<sup>17</sup> A P Herbert, *Uncommon Law* 1, 8th ed, London, 1969, 5-6; quoted in L Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 *J Leg Ed* 3 at 21-22.



Lawyers, including feminist lawyers, find this passage very amusing, even hilarious. We must ask why this is: could the humour of the decision be found in its plausibility?<sup>18</sup> What is plausible about it is not that it treats a female defendant more leniently on the basis that she is incapable of being reasonable; it is the use of a judge's perception of the "known facts of everyday experience" to arrive at the conclusion that women are incapable of being reasonable. That conclusion being reached, the more likely result is that, since the law rewards and requires reasonableness, women will always be regarded as deviants by the law and suffer the attendant disadvantages.

In recent years, some judges have taken to referring to the standard of the reasonable person, rather than the reasonable man, presumably in an attempt to eliminate overt gender bias from the law. However, we must not take that as the end of the story. There is still a serious possibility that the use of gender-neutral language merely serves to mask the maleness of the standard—to turn an explicit male norm into an implicit male norm. This possibility is particularly serious if the picture of a "person" in the judge's mind is one of a man, which is very likely when the judge is a man and when our society in any event treats maleness as the standard or normal state for a human being, and femaleness as a variation, an aberration. If judges automatically and unconsciously think of a "person" as male, the image is also likely to be infected by all the stereotypes that make men male in our society. To the extent that women do not live up to those stereotypes, they cannot help but be disadvantaged. This argument becomes even stronger when we remember that the prime quality of the reasonable "person" is reasonableness, a quality which in our society is gendered male.

I will now discuss two concrete examples to show the kind of impact that the maleness of the reasonable man standard can have. They do not relate to women as defendants, but to situations where plaintiffs are (or are more

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<sup>18</sup> See Littleton, "Feminist Jurisprudence: The Difference Method Makes" (1989) 41 *Stan L Rev* at 751, 767.

likely to be) women, and to the reaction that the law expects the reasonable man to have to those situations. In each case, the answer to this question is crucial to the conclusion as to whether the (usually female) plaintiff receives any damages.

#### V. NERVOUS SHOCK

The first is the law of nervous shock, or the situation where a person witnesses another person being injured by the defendant and suffers shock resulting in a psychiatric disorder, sometimes combined with physical manifestations. In the majority of cases, the plaintiff and the physically injured person had some kind of pre-existing relationship, and an especially common one is the relationship of mother and child. This situation is treated by the law as raising a question of duty of care, and in order to establish whether the defendant owed a duty of care to the plaintiff, the law asks whether it would have been foreseeable to the reasonable man that his actions would affect this person.

Now, the effect on this person is very foreseeable indeed if one sees society as a complex web of connection and interdependence. The impact on the mother of seeing the child injured is something which would occur to anyone who sees the world this way, and it just so happens that women are trained to see the world this way. It is a peculiarly "feminine" vision.<sup>19</sup> But does the reasonable man see the world this way? Does he think about the fundamental connectedness of all human beings as he pushes the lawnmower? He may or may not, but one thing is fairly sure: he is less likely than his wife, his mother or his sister. When he is driving down the road, does he think about the mothers of the children he might injure if he drives carelessly? Again, he is less likely than a woman in the same situation.

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<sup>19</sup> I draw here on the work of C Gilligan, *In a Different Voice*, Harvard UP, Cambridge MA, 1982. I do so without necessarily endorsing her theory to the extent that it may have normative force, that is, to the extent that it might lead to the conclusion that concern with connection is good. I merely use it to support the observation that in our society, the fact that women tend to value connection is an observable phenomenon.

Thus the reasonable man standard means that we are likely to reach the legal conclusion that nervous shock victims are simply unforeseeable, and are therefore owed no duty and cannot recover damages for their injury. This is indeed the legal conclusion reached by the High Court of Australia in a 1939 case, where a mother had seen her young son dragged from a ditch, drowned, after some council workers had negligently failed to put a fence around the ditch.<sup>20</sup> Latham CJ said:

It is...not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even close relatives who see the body after death has taken place.<sup>21</sup>

In 1984, this view was decisively refuted by the High Court.<sup>22</sup> It is interesting to note, however, that it had already been seriously eroded by a 1970 case where the plaintiff was a man who had witnessed the immediate aftermath of a horrific accident involving some co-workers.<sup>23</sup> This might lead us to speculate on whether the earlier court's distrust of the plaintiff-mother was conditioned on her gender and/or its lack of understanding of a mother's position. This proposition cannot be conclusively proved to be true, if only because of changes in High Court personnel between the two cases, but it would be consistent with the attitude the law has traditionally taken of women in other areas, notably its attitude towards rape victims.

In the 1984 case, the plaintiff had seen her husband seriously injured in a road accident, and entertained for some weeks the belief that he was going to die. One of the judges said:

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<sup>20</sup> *Chester v Waverley Corporation* (1939) 62 CLR 1.

<sup>21</sup> At 10.

<sup>22</sup> *Jaensch v Coffey* (1984) 155 CLR 549.

<sup>23</sup> *Mt Isa Mines v Pusey* (1970) 125 CLR 383.

It is simply out of accord with medical knowledge and human experience to deny that it is reasonably foreseeable that the shock suffered by a mother on seeing the body of her infant child, whom she was seeking, raised from the bottom of a water-filled trench might well be such as to cause psychoneurosis or mental illness.<sup>24</sup>

Note that here, however, the courts' willingness to recognise the foreseeability of the injury is based in part on "medical knowledge". This reveals the interplay between law and other institutions, especially medical science. It could suggest that law is willing to believe science (in this case, psychiatry) where it is unwilling to believe a woman, or a mother.

In answering the question whether there is a duty of care in a nervous shock case, the law holds all people to the same standard, but men benefit, because the standard prescribes behaviour and attitudes which are likely to be descriptively accurate in the case of men, but not in the case of women. In this particular case, on the other hand, it could be said that women defendants benefit because they are held to a lower standard (or required to have less foresight) than they would if a feminine standard were applied. However, this perception would be the result of a fairly common habit in our society of implicitly or explicitly using men as the norm and comparing women. Men are the referent, women the comparator. If we took women as our referent, instead of men, we would find that everyone should be treated as having more foresight, which would lead to the conclusion that men receive an unfair advantage under the present standard. The standard is unfair in the sense that we would likely find that women more often conformed to the higher standard in any event: far from being a question of women being excused from having to show their usual foresight, it would be a question of men being excused from showing any more foresight than they do because of the power they hold as men.

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<sup>24</sup> *Jaensch v Coffey* (1984) 155 CLR 549 at 590.

Furthermore, it should be noted that, because nervous shock is a peculiarly feminine injury, the plaintiffs who are disadvantaged by the application of the male standard are more likely to be women than men.

## VI. POLICE "NEGLIGENCE"

The second example I will discuss is that where police fail to respond to a call for help from a victim of violent crime, or fail in some other way to protect such a person. Can the victim (once again, more likely to be a woman than a man) sue the police for failing to prevent an attack?

Generally speaking, the answer is no, because the courts hold for policy reasons that the police owe no duty to individual members of the community. Their duty is to the community as a whole.<sup>25</sup> But imagining for a moment that those policy reasons are not present, and a duty is owed (as indeed it is in certain circumstances):<sup>26</sup> the question is how the reasonable man would react to the danger the plaintiff was facing.

This is another situation where one's reaction and behaviour are likely to be dictated by one's gender. Women live in constant fear of violent attacks on their bodies; men, generally speaking, do not. (The reasonable man, being middle-class, heterosexual and probably white, is in fact the safest member of society.) Thus violence means something different to women from what it means to men. I suggest that it is more serious to women than to men, because to a woman who is attacked, the attack is the culmination of a lifetime of fear and vulnerability, and all the more distressing for the fact that it takes on the character of an inevitable concomitant of one's gender. To a white middle class heterosexual man, by contrast, it is regrettable, even infuriating, but more a matter of rotten luck than of one's destiny, and thus unlikely to have any severe long-term psychological effects.

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<sup>25</sup> See eg *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (House of Lords).

<sup>26</sup> See *Doe v Board of Commissioners of Police for Metropolitan Toronto* (1989) 58 DLR (4th) 396 (Supreme Court of Ontario, Canada).

I have already explained that in order to ascertain whether there has been a breach of duty, the law takes the view that the more serious the situation the defendant is asked to prevent, the more the defendant should do to prevent it. A male perception of violence leads to the conclusion that a certain amount must be done; the female perception leads to the conclusion that more must be done, for the situation appears a lot more serious. Once again, it might be said that all this means is that the reasonable man standard leads to a situation where the law requires less of women than women would otherwise require of themselves. However, it must be borne in mind that the majority of police officers are men, and the majority of victims of violent crime are women. Thus the perspective of the victim is excluded and the perspective of the defendant is dominant. The system, in other words, is skewed in favour of defendants (who happen to be mostly men) and against plaintiffs (who happen to be mostly women).

#### **VII. AN EMPATHETIC APPROACH?**

Is this how the reasonable man would want the system to be? Is it a reasonable system? Or, putting it another way, would it be unreasonable to require a defendant to look at the situation from the victim's point of view to decide how much damage is going to be done and hence how much should be done to prevent that damage?

What I have just suggested is an empathetic approach. We judge the defendant's actions on the basis of the extent to which he or she thought about the plaintiff's position, rather than allowing the defendant to see all victims as the same (which would usually mean he or she sees them as like him or her). It would probably mean that more would be required from a defendant where a woman was in physical danger than where a man was in the same physical danger, for the same physical danger will ultimately lead to more harm in the case of a woman than in the case of a man.

### VIII. THE MEANING OF REASONABLENESS

Is this approach unreasonable? Is it unreasonable to be empathetic, or to require or expect empathy from others? This depends very much on one's perspective, and particularly on one's view of human nature. There are three possibilities I would like to mention.

The first is the view of human nature as fundamentally separate and self-interested, which corresponds roughly to the traditional liberal view, the view on which capitalism is in a rough sense based. It therefore corresponds to what in our society we would think of as "conservative" politics. This is just the view that we would expect judges, given their position in society, to take. If one took this view, one would say yes, it is unreasonable to require or expect empathy, and moreover, it is unreasonable to be empathetic. This more or less describes the position of the common law. It does not require defendants to take into account a plaintiff's gender, class or any other social variable; it does not require empathy before a defendant can be said to have exercised reasonable care.

The second is the view of people as essentially interconnected and responsible for each other, which corresponds roughly to what might be called the "feminine" view;<sup>27</sup> it would also be the view that most people of various socialist persuasions would take. From such a standpoint, empathy is not unreasonable at all.

The third possibility is that one rejects the idea that there is such a thing as human nature in the first place. Even under such a view, one might still conclude that it is not unreasonable to set up a norm or standard which requires people to think about and feel for each other's situations, if only because one thinks that such an attitude is desirable and worth encouraging.

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<sup>27</sup> See above note 19 and accompanying text.

In other words, one might still have criteria for what is reasonable even without a position on what is essentially human.

Still, it is difficult to escape the conclusion that the law embodies certain assumptions about human nature, and that those assumptions draw from the experience of the authors of the law as male. Empathy is a trait which in our society is gendered feminine; it goes with and is probably required by the mothering, nurturant role assigned to women in this society, and as such it is encouraged in women. The reasonable man, on the other hand, is not empathetic. He does not see the power differentials in society which make encounters with violence more distressing for women than for men. Therefore no-one else is required to see them.

All of this raises questions about the meaning of "reasonableness" in our society. I suggested before that it is a trait which is gendered male, being based on reason, rationality, and objectivity, but to the extent that we see it as a generically good frame of mind, we could gender it female, and call male assumptions themselves unreasonable. If we take a certain view of what is good and what is truly and fully human, we can say that empathy, for example, is good and therefore reasonable; if we take another view of what is good and what is truly and fully human, we can say that self-interest and lack of active care and concern for others are good and therefore reasonable. It seems fairly clear that the law takes the latter approach.

#### IX. CONCLUSION: THE DIFFERENCE IT MAKES AND THE PARTIALITY OF THE LAW

In closing I will consider what kind of standard the law might put in place of the reasonable man, if it were decided to take seriously the need to accommodate all perspectives. Clearly it would not help simply to substitute the empathetic woman for the reasonable man. This would replace a male norm with a female norm, and be just as discriminatory. However, we do need to ask ourselves: to what extent should the law enforce or encourage attitudes? (This is a separate question, of course, from the question of the



extent to which the law can enforce or encourage attitudes.) If empathy is a good thing, because it prevents more injury and can lead to healthier society, perhaps the law should embrace it as a norm.

Many people would be horrified by this suggestion, and I would like to suggest the reason for that horror. One usually thinks of the law as an institution which is primarily responsible for visiting on people unpleasant sanctions such as imprisonment. Many people while reading this article have no doubt had at the back of their mind an image of such an unpleasant sanction. However, leaving aside the damage to a person's reputation when sued in a professional capacity, the sanctions visited on tort defendants are not especially unpleasant because of one very important factor: insurance. It generally goes without saying that in any negligence case, the defendant is insured against liability (third party insurance) and it is the insurance company which is conducting the litigation, using the "defendant's" name under the right of subrogation. For this reason, most negligence litigation is somewhat farcical, because it is enforcing standards against someone who has no stake in the outcome of the proceedings. To the extent that insurance is compulsory (as in the case of motor accidents) or something which no person or company in its right mind would be without, a finding of negligence is not likely to make much of a difference to the defendant's future behaviour. Similarly, the threat of future liability is unlikely to affect the defendant's behaviour before the fact. The most difference liability can make to the defendant's interests is to increase its insurance premium, hardly a reason to take seriously the law's exhortations to change one's attitude. Thus the horror people might feel at my earlier suggestion should be mitigated by the realisation that the norms embraced by the law of negligence do not necessarily dictate people's behaviour, and the sanctions applied for deviation from the norms of negligence are only very slight. Something would have to go drastically wrong, under the present system, before a defendant would be imprisoned.

So what is the role of negligence? Should its norms be shaped around the needs of the insurance industry, since they are the ones who pay? Courts

would deny that possibility most vehemently; in fact, they regard the defendant's status of being insured or otherwise as completely irrelevant to the issues in a negligence case.

Perhaps there is something to be said for the proposition that the law should develop in such a way as to protect the insurance industry, but another role can be suggested for law in this context: it can be an effective way of transmitting messages to the members of society about what kind of behaviour is acceptable and what is not acceptable. The law's choice of message is just as important when it is consciously addressed to society as a whole as it would be if the message were being sent to an individual in order to change that person's behaviour. The role of the law in transmitting such messages may only be a symbolic one, but just think about the importance of that symbol: law is the repository of state power in our society. It is, in some sense, a metaphor for power and for the dominant ideology. Taking women's concerns and interests seriously would convey the message that finally men are not the only ones who are pulling the strings, and to receive that message would be empowering in itself.

Therefore, a strong argument can be made against the law's systematic exclusion of all points of view but one. The standard of the reasonable man clearly excludes the point of view of women, and probably those of working-class, non-white and homosexual men as well. Modifying the standard to include the views of women, or the voice which in our society is gendered feminine, could be an important step towards inclusion of "minority" points of view.

The main message with which I have been concerned in this paper is the way that institutions and standards which appear to be neutral in fact do have a standpoint, a point of view, which is reflected in the practices of the institutions and the content of standards. The reasonable man, to the extent that he does not foresee the mothers of the children he might injure if he is negligent, and does not take into account the drastic effect that violence is likely to have on a woman, is a man and not a person. This is not to say that

he is necessarily wrong, though arguments can be made that he is, depending on how we construct the idea of reasonableness. It is simply to say that he is partial, biased, and can only tell us part of the story. In this paper, I have made some suggestions as to what the rest of the story might be.