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LEGAL REVIEW

The Reasonable Person

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This article presents an overview of the legal concepts and characteristics of the ***reasonable*** person, including doctors, judges and jurors in cases of personal injury, medical negligence, informed consent and refusal of treatment.

The ***reasonable person*** is the legal standard for lawful behavior, a concept created by appellate courts whose decisions are memorialized as ***common law,*** or ***case law***. It is a fictional or hypothetical person who approaches any situation with the appropriate amount of caution, and then takes action sensibly.

- If the person's behavior is as good or better than a ***fictional, reasonable person*** in the same situation, his or her actions are not negligent.
- Conversely, if the person's conduct falls short of what a ***fictional, reasonable person*** would do under the same circumstances, his or her actions are negligent.
- At common law, if the negligence results in an injury when a person acts negligently, she or he is subject to legal liability.

Historically, in 1837, an English court of common pleas established in *Vaughn v. Menlove*, that at common law, the reasonable person standard is objective, as opposed to subjective. A farmer piled a haystack near his neighbor's cabin. Subsequently, the haystack caught fire and burned his neighbor's cabin down, and the neighbor sued. The farmer argued that he should not be liable because he genuinely did not consider that the haystack may cause his neighbor's cabin to burn down. The jury found that the farmer's actions were ***objectively unreasonable***. The court held the farmer to the standard of a reasonable person and found him liable.

The conduct of a ***reasonable person*** weighs heavily upon an injury case. To hold a person accountable for an injury caused by negligence, it must be determined whether or not the defendant acted as a ***reasonable person*** would have in a similar situation. Failure to behave with the degree of care that a reasonably prudent person would exercise represents negligence.

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UNREASONABLE CONDUCT

There are situations where the law considers a person's conduct as unreasonable.

1) ***Negligence per se***. This means negligence by or in itself. "An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect. In negligence cases, a defendant who violates a statute or regulation without an excuse is automatically considered to have breached his or her duty of care and is therefore negligent by law; the ***fictitious reasonable person*** would not violate a statute. For example, in the context of a motor vehicular accident, if one of the drivers is driving under the influence of drugs or alcohol, he or she will be found negligent *per se*. In medicine, there are certain disorders that must be reported by the provider to Public Health. Failure to do so is negligence *per se* again because it violates a statute or regulation.
2) ***Negligence as a matter of law.*** In negligence cases, where there is an undisputed fact or facts, that is clearly unreasonable and so conclusive of negligence in conduct or omission in violation of a standard of care, the Judge may declare that negligence is established as a matter of law. The judge decides the case because there is no question to be submitted to the jury.

For example, in 1974, the Supreme Court of Washington, ruled in *Helling v. Carey*, that the defendant ophthalmologists were negligent as a ***matter of law*** for failing to administer a diagnostic test for glaucoma to the plaintiff. Expert medical testimony was uncontroverted that the custom was not to administer the test to persons under 40, the age group of the plaintiff, because of the rarity with which the disease appears in that group. Nevertheless, the Judge characterized the facts of *Helling* as "unique and stated that liability was imposed "under the facts of this case."

3) ***Res Ipsa Loquitur.*** This means the thing speaks for itself and does not require expert medical testimony to explain the facts. It is "a doctrine or rule of evidence in tort law that permits an inference or presumption that a defendant was negligent in an accident injuring the plaintiff on the basis of circumstantial evidence if the accident was of a kind that does not ordinarily occur in the absence of negligence."

In 1863, *Byrne v. Boadle* was a leading English case that formulated the negligence doctrine of res ipsa loquitur. The plaintiff was walking along the public street when he was struck by a barrel of flour falling from a window above and evidently lost consciousness. He brought suit in negligence. The defendant had a shop adjacent to the road on which the plaintiff was walking, and the barrel appeared to have fallen, or was dropped from the shop. The plaintiff could testify nothing as to the accident. Two eye witnesses testified that they saw a barrel falling. There was no evidence of negligence. The court non-suited the plaintiff. But the appellate court thought that a barrel "could not roll out of a warehouse without some negligence, and to say that the plaintiff who is injured by it must call witnesses from the warehouse to prove negligence was preposterous." The facts of the case were so obvious that further proof was unnecessary. The thing spoke for itself.

In 1994, *Ybarra v. Spanard* is the classic res ipsa loquitor case in medical malpractice in the U.S.. The plaintiff had appendicitis and underwent surgery. After induction of anesthesia, and in the course of preparation for surgery, members of the surgical team adjusted the plaintiff on the surgery table, so that his back rested against two hard objects. Postoperatively, the plaintiff had neck and back pain, which he never had prior to surgery. His symptoms worsened, and eventually he had paralysis. The evidence established that his condition was the result of trauma. He brought a personal injury suit. The Superior Court of Los Angeles County (California) entered judgments of nonsuit as to all Defendants. The plaintiff appealed. The Supreme Court of California reversed the lower court's ruling because the *res ipsa loquitur* doctrine applied to the defendants, because they had control over Plaintiff's body and instrumentalities that might have caused the injuries which plaintiff sustained.

The plaintiff must prove three things: (a) The incident was of a type that does not generally happen without negligence. (b) It was caused by an instrumentality solely in defendant's control. (c) The plaintiff did not contribute to the cause of the injury. A plaintiff who establishes the elements of *res ipsa loquitur* can withstand a motion for summary judgment and reach the jury without direct proof of negligence.

A surgeon performs an open laparotomy on a hospitalized patient. At the conclusion of the surgery, the nurse informs the surgeon that the instrument and sponge counts are correct. The abdomen is closed. The patient recovers and is discharged home. A couple of weeks later, she develops abdominal pain and the surgeon discovers a clamp in her abdomen, and she is re-operated. In this case, the jury looks at the behavior of every member of the surgical team based on what a reasonable person would do.

A reasonable person conducts an accurate sponge and instrument count correctly. A reasonable person does not leave a sponge in a patient's abdomen. The jury decides the case by looking at each person's actions compared to what the fictional, reasonable person would have done if confronted with the same circumstances.

Because a reasonable person would not leave a clamp in the patient's abdomen, the provider(s) that left the clamp in the abdomen is negligent. The jury decides the case in favor of the injured plaintiff based on the finding of negligence against the providers that left the clamp behind, including the surgeon, the person that made the instrument count and the hospital that employed the surgical assistant.

THE "REASONABLE PERSON" STANDARD IN NEGLIGENCE

The "reasonable person" standard has been created to provide courts and juries with an objective test that can be used in deciding whether a person's actions constitute negligence.

The reasonable person standard is the amount of care and caution that an ordinary person would use in a given situation. The standard depends on the situation. It is a fictitious legal standard that applies to evaluate the behavior of each person involved in an accident or injury. The trier of fact, usually the jury and at times only the judge, looks at what each person did to determine if the actions were at least as careful as a reasonable person.

The burden of proof in a tort lawsuit is preponderance of evidence, more likely or more probable that not, that is 50.1 % or more.

If it is proven that the defendant acted negligently and that the negligence itself resulted in an accident or injury, compensation is due to the victims for their damages, including medical expenses and pain and suffering (economic and noneconomic damages).

EXCEPTIONS TO THE GENERAL REASONABLE PERSON STANDARD

- The general reasonable person standard does not apply to blind people. In Fletcher v. Aberdeen, the Supreme Court of Washington held that a blind person should be held to the objective reasonable standard of a blind person, not to a sighted person.
- Children are not expected to act similarly to how an adult would. Courts hold children to a modified standard. Their conduct is compared to that of other children who are the same age and alike in their amount of experience and knowledge. For example, a landlord tried to file a lawsuit against a tenant for property damages to a dwelling unit he had rented out. The landlord sued a 2-year-old child who started the fire by playing with a cigarette lighter. A child is just not held to the same standard as a reasonable adult. In Robert v. Ring, the Minnesota Supreme Court

held a seven-year-old boy to the standard of an objective seven-year-old boy, not to that of an adult.

THE REASONABLE PERSON TEST

The **reasonable person test** is an ***objective*** standard, and not subjective. Its purpose is to give the jury a concrete, uniform standard when they are looking at the actions of each party in a case. The test applies to everyone in society. For example,

In 1931, a New York case, *The T. J. Hooper,* involved two barges that were transporting cargo. The weather got bad and the cargo sank at sea. The cargo owner sued for the value of the cargo lost. The plaintiff contended that:

- The tug boat owners were required to use reasonable care and skill in the service they undertake.
- They are bound to respect barometer readings and weather indications;
- Because they failed to do that, they were liable for the resulting damage, that is the loss of the cargo.
- The plaintiff also contended that the tug owners were negligent in not anticipating the storm or taking refuge at Delaware breakwater; and
- The tug boat was unseaworthy, because the owners did not have effective radio sets, capable of receiving the forecasts of unfavorable weather broadcast along the coast.

The defendant argued that the **reasonableness** of the decision not to install a reliable radio safety device should be determined by **common practice**.

Was the defendant tug boat owner negligent when it failed to equip its tug boats with radio sets to pick up weather reports?

- The judge held that "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."
- The Judge also stated that, in "most cases **reasonable prudence** is in fact **common prudence**; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices."

The court held that the owners of the two tugs were negligent in not anticipating the storm that sank the barges. The court also concluded that the tugs were not seaworthy in failing to have effective radio sets capable of receiving weather reports.

The tug owner had a duty to supply effective receiving radio sets since such radios were part of the reasonable care and skill in the service that the tugs provided.

A successful negligence-based claim hinges on the plaintiff's ability to prove a defendant did not act reasonably. ***The plaintiff must show that the risk of harm was foreseeable, and that the defendant was aware that his or her actions were wrong and unreasonable. And the plaintiff must establish the alternative action which a reasonable person would have taken.*** The jury will objectively consider the individual's conduct based on the person's knowledge, awareness, and mental capacity to behave similarly to a reasonable person. The law will not make unique allowances for beginners, learners, or trainees in a special skill. They are held to the same level of care or conduct that a person who is reasonably skilled would exercise.

THE REASONABLE DOCTOR

In *Davis v.* Armacos, the Court of Special Appeals in Maryland ruled that doctors are not held to the "reasonable person" standard. Because of their specialized knowledge, education, training and skills, doctors must be held to the standard of a "*reasonably competent health care provider engaged in similar practice and acting in similar circumstances*."

Dr. Davis is a neurosurgeon who performed an anterior cervical discectomy and fusion surgery, which was complicated by a pinpoint opening at the end of the incision. The patient, Armacost, eventually developed an MRSA abscess. The patient plaintiff alleged that surgery was neither medically necessary nor appropriate, that there was no proper informed consent, and that the diagnosis of his postoperative infection was delayed.

The trial county judge in Baltimore instructed the jury that it could consider what a layperson would deem reasonable standard of care. The doctor-defendant objected and asked that the standard of care be measured by the expectations for a neurosurgeon. The judge refused to modify the jury instructions. The jury returned a verdict in favor of the plaintiff in the amount of $329,000.

On appeal, the Court of Special Appeals of Maryland ruled that the jury instructions were improper and therefore ordered a new trial. It held: "Medical malpractice claims are not general negligence claims, and so jury instructions on general negligence, although correct statements of Maryland law, are not supported by the facts of a case centered on the allegedly negligent conduct of a physician. Accordingly, we hold that the trial court erred in giving general negligence instructions in a medical malpractice case."

The Maryland's Court of Appeals, which is the highest court in the State (commonly called the Supreme Court in other states and at the federal level), reversed the Court of Special Appeals and affirmed the trial court's decision in favor of the plaintiff. It held that the trial court's instructions did not mislead the jury as to the applicable law. The Court has characterized "any... medical malpractice tort" as a "traditional negligence claim." Thus, "the general principles which ordinarily govern in negligence cases also apply in medical malpractice claims."

The standard of care applicable to a physician in a negligence action is derivative of the general standard of care in negligence actions. The conduct of a doctor with special training and expertise is measured against the standard of a hypothetical reasonable person with similar training and expertise. The doctor owes a special duty of care to a patient that is beyond the duty that would be owed by a general member of the public. The plaintiff may also be required to meet certain threshold requirements, such as providing a certificate of a qualified expert supporting the plaintiff's claim. And, at trial, expert testimony may be necessary to assist a lay jury in understanding the extent of the enhanced duty created by that expertise and whether that duty was breached in particular circumstances.

THE REASONABLE JUROR

The jurors that hear a case become the "reasonable person". They decide what a reasonable person would do or not do to avoid injuries in a given situation. When deciding a negligence case, jurors may assess the evidence under the following theories.

1. **Prescriptive method.** This means that some right or obligation has become legally established or accepted by long usage or the passage of time. Under this theory, reasonableness may be understood as to what is good, welfare maximization, community values, virtue, respect for freedom or rights, an ethic of care, or justification.
2. **Statistical method.** Under the purely statistical notion, reasonableness may be understood as what is average or common. It describes a certain average of conduct that is necessary to the general welfare. It looks to the way in which actual people are in the habit of acting.
3. **Hybrid method. Here,** reasonableness has two different types of components performing essentially the same function, like a hybrid car. This method posits that reasonableness is neither purely prescriptive nor purely statistical. Instead, reasonableness is partly prescriptive and partly statistical, as is normality. This hybrid concept may offer the best general theory of reasonableness, which should be understood as a judgment that is informed by both prescriptive and statistical considerations.

Judgments of reasonableness by jurors are best predicted by the relevant average and the ideal together, rather than by either the average or ideal alone. Judgments are systematically intermediate between judgments of the relevant average and the ideal.

REASONABLE INFORMED CONSENT

The legal concept of informed consent arose in the late 1800s in connection with moral considerations concerning involuntary and highly unethical human 'science' experimentation. This has been rectified in part by the post-World War II Nuremberg Code. In *U.S.A. v. Karl Brandt et al*, (also known as the Doctors' Trial), 23 doctors and administrators were prosecuted in 1946-47 for organizing and participating in war crimes and crimes against humanity in the form of medical experiments and medical procedures inflicted on prisoners and civilians. The Doctors' Trial stated that "humane experimentation is justified only if its results benefit society and it is carried out in accord with basic principles that 'satisfy moral, ethical and legal concepts." The Nuremberg Code set forth ethical research principles and standards used to judge physicians and scientists who conducted biomedical experiments on concentration camp prisoners. In 1979, The Belmont Report identified basic ethical principles for conducting research that involve human subjects, and set forth guidelines to assure these principles are followed throughout the research process.

Legally, based on the principle that a person of the age of majority and sound mind has a legal right to determine what may be done to his or her body. Informed consent means that healthcare providers must disclose information to their patients that will allow them to make intelligent choices regarding their own medical care.

In the landmark case, *Canterbury v. Spence*, a young man was advised by his physician to undergo a laminectomy in an effort to alleviate back pain. The physician did not advise the patient of the risk that 1 percent of laminectomies resulted in paralysis, which the physician was aware of. He believed that the patient might reject the useful treatment. Following the surgery, the patient fell from his hospital bed and became paralyzed. The cause of the paralysis was either the laminectomy procedure or the patient's fall but remained uncertain. The patient sued and alleged that the physician failed to inform him of the risks associated with the procedure. The court held that "the standard measuring [physician] performance...is conduct which is ***reasonable*** under the circumstances". Instead of adhering to the community disclosure standard, *physicians are now required to disclose information if it is* ***reasonable*** to do so.

A physician must explain any benefits or risks that may be significant to the particular patient who may be a singer, piano player or athlete. The information should be personalized about how the treatment might reasonably affect the particular patient.

In *Gates v. Jenson,* physicians are required to disclose personal or economic interests that may influence their judgment. In *Jandre v. Physicians Insurance Co of Wisconsin*, physicians should disclose all diagnostic tests that may rule out a possible condition.

In *Nixdorf v. Hicken,* a doctor left a surgical needle in his patient. The court held that the physician has a duty to disclose any information pertinent to the patient's treatment, including the patient's physical condition following treatment. The physician must disclose information that a reasonable person in the patient's position would find important.

Finally, in *Truman v. Thomas*, a woman had refused a pap smear. Subsequently, she developed cancer of the cervix and died. The court held that a physician had a duty to disclose to her the possibility that precancerous cells might develop, uncaught, into cervical cancer if she declined to undergo the procedure. The refusal requires disclosure of potential risks associated with not seeking treatment and must be an informed refusal.

EXCEPTIONS TO INFORMED CONSENT

The exceptions to informed consent include:

1. The incapacitated patient;
2. Life-threatening emergencies with inadequate time to obtain consent, and
3. Voluntary waived consent.

Children (typically under 17) cannot provide informed consent, with the following exceptions:

1. Children under 18 years of age and married;
2. Mothers of children (married or not),
3. Those under 18 who are serving in the military; and
4. Those who are able to prove financial independence.

States have one of the following standards for informed consent.

1. ***Subjective standard***: What the patient herself or himself would need to know and understand in order to make an

informed decision. Very few states, such as Oklahoma, follow this standard.

2. ***Reasonable patient (materiality) standard:*** What the average patient would need to know to be an informed participant in the decision. This standard has been adopted in the states of: Alaska, Arkansas, Hawaii, Indiana, Louisiana, Massachusetts, Ohio, Oregon, Pennsylvania, Texas, Utah, Washington, and West Virginia. These states have designed a framework of informed consent that underscores and protects the reasonable patients' choice. Lack of informed consent is established in court when a reasonable person in the position of the patient would have decided against the treatment.
3. ***Reasonable (prudent) physician standard:*** What a typical physician would say about this procedure. This is followed in: California, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Missouri, Nebraska, New Hampshire, New York, North Carolina, Tennessee, and Vermont. These states have crafted a framework of informed consent by underscoring the notion that "doctors know best." Lack of informed consent is established when the patient shows that the treating physician failed to inform the patient what a reasonable physician would have told him or her under the same circumstances.

Regardless of which standard is applicable to any given case, or what state definition applies, informed consent should involve elements of both the patient and physician standards, thereby bringing together concepts of shared decision making. Patients and their healthcare providers should collaborate and communicate with one another in clear, transparent, and honest fashion. This ensures providers are given their best chance to provide the best care possible and their patients are given the best chance to overcome their fears and ailments.

A most reasonable approach to informed consent and informed refusal is to view the process as a collaborative one which allows patients and healthcare providers to make decisions together especially when more than one reasonable alternative exists. The process must also account for the patient's unique values, beliefs, preferences and priorities and the best available evidence-based medicine.

CONCLUSION

The legal standard for lawful behavior is the ***reasonable person***, a fictional or hypothetical person who approaches any situation with the appropriate amount of caution, and then takes action sensibly.

The law considers a person's conduct as unreasonable in situations such as:

1) Negligence per se where an individual violates a statute;
2) Negligence as a matter of law where is an undisputed fact or facts, that is clearly unreasonable and so conclusive of negligence in conduct or omission in violation of a standard of care.
3) *Res Ipsa Loquitur*, where the negligence speaks for itself;

The reasonable person standard is the amount of care and caution that an ordinary person would use in a given situation. The reasonable person test is an objective standard, and not subjective.

Finally, informed consent and its exceptions have been discussed in the context of reasonableness.

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CONFLICT OF INTEREST AND FINANCIAL DISCLOSURES

The author has no relevant financial relationships to disclose.

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