

GENDER MATTERS: TEACHING A REASONABLE WOMAN STANDARD IN PERSONAL INJURY LAW*

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“Reasonable care” is, of course, a concept central to any torts class. But what is it? One very standard doctrinal move is to conceptualize reasonable care as that care shown by a “reasonable person” under like circumstances. The next step, logically, is to visualize this reasonable person. Visualization requires some important choices. For example, is the reasonable person old or young? Disabled or not? These are two questions that all the casebooks I have consulted discuss.¹ But, oddly, no casebook of which I am aware deals with the trait that nearly invariably figures in our description of people: sex.

If the casebooks are silent, however, the cases and commentary are not. Judicial opinions frequently used to refer to the “reasonable man” rather than the reasonable person. As stated in the earliest, and one of the most frequently quoted, such articulation, “[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”² In a famous passage, in 1933, Lord Judge

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** Assistant Professor, Harvard Law School. I refer readers interested in a lengthier analysis of the subject discussed here, as well as two other sets of personal injury cases in which courts discussed gender-related expectations, to Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN’S L.J. 79 (1998). Many thanks to my colleagues Lani Guinier, Martha Minow, Robert Pritchard and (as always) Sam Bagenstos for helpful comments. Any errors are mine.

1. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 281-302 (2000); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 155-77 (7th ed. 2000); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 44-48 (6th ed. 1996); ROBERT E. KEETON ET AL., *TORT AND ACCIDENT LAW: CASES AND MATERIALS* 176-95 (3d ed. 1998).

2. *Blyth v. Birmingham Water Works*, 156 Eng. Rep. 1047, 1049 (Ex. 1856) (Alderson, B.). I do not mean to overstate this point, however. Judicial opinions often were phrased in gender-neutral language, even in the early days of tort law. In *Blyth* itself, the very case in which the precise expression “reasonable man” seems to have appeared for the first time, Baron Alderson also used the words “reasonable person,” stating that “[t]he defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.” *Id.* at 1049. Courts talked about “persons” both when women were involved, see, for example, *Bigelow*

Greer described as well as named the reasonable man in explicitly masculine phrases; he was “the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves.”³ Feminism has not let the masculine origin of the reasonable person go unremarked. Feminist scholars have argued that tort law used to evaluate care against a standard that was not just linguistically but substantively masculine—that the reasonable man is the mascot of tort law’s oppression and exclusion of women.⁴ The unremedied effects, some have argued, continue in place. For example, Leslie Bender writes:

It was originally believed that the “reasonable man” standard was gender neutral. “Man” was used in the generic sense to mean person or human being. But man is not generic except to other men. . . . As our social sensitivity to sexism developed, our legal institutions did the “gentlemanly” thing and substituted the neutral word “person” for “man.” . . . Although tort law protected itself from allegations of sexism, it did not change its content and character.⁵

In my torts class, I spend considerable time on gender issues in a variety of contexts. The interaction of gender norms and the law seems to me key to any adequate presentation of sexual harassment, negligent infliction of emotional distress,⁶ and damages;⁷ gender is relevant to other topics as well.⁸ The first and most sustained discussion of gender difference and what the law might do about it occurs quite early in the class, when I ask my students to consider

v. Rutland, 58 Mass. (4 Cush.) 247, 248 (1849), and when men were involved, see, for example, *Railroad Co. v. Jones*, 95 U.S. 439, 441-42 (1877).

3. *Hall v. Brooklands Auto Racing Club*, 1 K.B. 205, 224 (1933) (quoting unnamed “American author”).

4. For citations to works that make this point about the reasonable man standard, see Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN’S L.J. 79, 81, n.15 (1998) [hereinafter Schlanger, *Injured Women*].

5. Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22 (1988).

6. See Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. J. 391 (1996).

7. See, e.g., Lucinda M. Finley, *A Break in the Silence: Including Women’s Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 51-54 (1989); Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995).

8. For example, I teach a class on imputed negligence and marriage. For development of the topic, see Schlanger, *Injured Women*, *supra* note 4, at 87-102. (The class material is available at: http://www.law.harvard.edu/Academic_Affairs/coursepages/schlanger/husband_wife.pdf.) I also discuss gender when I teach assumption of the risk and risk aversion. See, e.g., Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion and Negligence Law*, 30 SUFFOLK U. L. REV. 629 (1997).

what tort law might look like if it treated a defendant's or plaintiff's gender as relevant to jury assessment of due care. What, that is, would it mean for the law to talk about reasonable women as well as men?⁹ To prepare, my students read a series of cases I have collected and edited that arose out of injuries to women.¹⁰ Each of these cases, which span the years 1860 to 1899, is premised on an express or implied assessment by one or both the parties, or by a judge, that men and women are often different in some way causally relevant to the accident at issue.

I try to vary my pedagogical approach in Torts, to accommodate students' different learning styles.¹¹ My teaching plan for this class session is, as in many though not all classes, to engage the students in a participatory (though usually quite controlled) close analysis of the appellate cases, beginning with socratic questioning about the holdings and logic of the opinions. I then widen the frame of inquiry, for example encouraging the class to think about the social and political norms and institutions relevant to the legal question under discussion and about which institutional features matter.

Although I do not assign (or even explicitly discuss) theoretical analyses of equality, difference, and subordination, my own understanding of these cases grows out of the generative work by feminists and others. For many scholars and activists, a central question for legal feminist theory is whether women's equality and welfare is best fostered by insisting on adherence to universal legal standards or on recognition and even privileging of women's difference from men.¹² And Martha Minow has generalized the point persuasively, writing of the "dilemma of difference." As she explains, "[t]he stigma of difference may be recreated both by ignoring and by focusing on it. . . . The

9. Cf. Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUT.-CAM. L.J. 311, 315 (1977) ("[E]xhaustive research has unearthed no common-law reference to a 'reasonable woman.'"); ALAN PATRICK HERBERT, *Fardell v. Potts, in MISLEADING CASES IN THE COMMON LAW* 18-20 (1927) (satirical "case" premised on judicial finding that "[i]n all the mass of authorities which bears upon this branch of the law *there is no single mention of a reasonable woman* . . . for the simple reason that no such being is contemplated by the law; that legally at least *there is no reasonable woman*").

10. For anyone interested, the reading assignment is available at: http://www.law.harvard.edu/Academic_Affairs/coursepages/schlanger/reasonable_women.pdf.

11. Cf. Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 45-47 (1994) (discussing gendered variation in student response to traditional socratic first-year law teaching); *id.* at 93-98 (recommending diversity of instructional approaches).

12. See Joan W. Scott, *Deconstructing Equality-versus-Difference: Or, The Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 34 (1988) ("[O]ne of the hotly contested issues among contemporary (U.S.) feminists is the equality-versus-difference debate."). Joan Williams interestingly discusses the debate in her piece, *Do Women Need Special Treatment? Do Feminists Need Equality?* 9 J. CONTEMP. LEGAL ISSUES 279 (1998). See also FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (collecting many of the important articles on the subject).

problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently.”¹³ It is the dilemma of difference that makes these nineteenth-century personal injury cases difficult and interesting to talk about.

A. *Issue 1: Whether to make allowance for women’s bad driving.*

I will start here with a brief summary of one of the earlier cases, *Daniels v. Clegg*.¹⁴ While the plaintiff’s twenty-year-old daughter was driving his horse and buggy (“in great haste to find her father on account of the dangerous illness of a sister”¹⁵), she was involved in an accident with the defendant, who was driving a wagon on the left side of the road and failed to yield any portion of the road to her. The issue on appeal from a plaintiff’s verdict was the jury instruction about the daughter’s alleged contributory negligence. The Supreme Court of Michigan held that the trial court correctly charged the jury that

“in deciding whether the plaintiff’s daughter exercised ordinary care in driving the horse, or was guilty of [contributory] negligence, the jury should consider the age of the daughter, and the fact that she was a woman; . . .” [that is,] “she would not be guilty of negligence if she used that degree of care that a person of her age and sex would ordinarily use.”¹⁶

The trial court committed no error, the Supreme Court continued, in refusing to charge that “for the purpose of this case, the daughter should be held to the same degree of care and skill that would be required of the plaintiff himself, had he been driving at the time of the collision.”¹⁷

I join with the *Daniels* case another one with a similar posture, *Tucker v. Town of Henniker*,¹⁸ in which the plaintiff, accompanied by another woman, was driving a horse and carriage when, they alleged, tortious road conditions caused them to have an accident. The trial court instructed the jury that the plaintiff ““was bound to exercise . . . such care, skill and prudence as ordinary persons like herself were accustomed to exercise in managing their horses.””¹⁹ The New Hampshire Supreme Court found this instruction erroneous, commenting:

In a country where women are accustomed, as among us, to drive horses and carriages, there can be no doubt that the degree of care, skill and prudence required of a woman in managing her horse would be precisely that degree of

13. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

14. 28 Mich. 32 (1873).

15. *Id.* at 34.

16. *Id.* at 40 (quoting the trial court).

17. *Id.*

18. 41 N.H. 317 (1860).

19. *Id.* at 319 (quoting the trial court).

care, skill and prudence which persons of common prudence, or mankind in general, usually exercise, or are accustomed to exert, in the management of the horses driven by them. Now the language of the charge in the court below might be construed as making the average care, skill and prudence of women in managing horses, instead of the average care, skill and prudence of mankind generally, including all those accustomed to manage horses, whether men or women, boys or girls, the standard by which to determine whether or not the plaintiff had been guilty of any unskillfulness or want of care in the management of her horse at the time of the accident. As it may be doubtful whether this average would be higher or lower than that of mankind in general, and as it is not the precise standard prescribed by the law, and the jury may possibly have been misled by it, the instructions must be held to have been erroneous on this point.²⁰

The *Daniels* and *Tucker* cases introduce concretely the idea of gendered standards of care, highlighting that reference to a person's sex in defining the care required of her necessarily rests on some presumption of sex difference—here, that women are typically worse wagon drivers than men are. I ask the students to accept for the sake of argument that, on average but not for all people, this difference was, in the mid-nineteenth century, real. I also ask them to assume that equality of men and women is an important (if not necessarily trumping) value. This last assumption is important for teaching purposes, because I am trying to focus the conversation on the complex conceptual and implementation problems raised by a norm of equality—not on the issue of whether sex equality is politically appropriate on its own merits. I then lead the students to set out several doctrinal options available within tort law to deal with perceived sex difference: women could be held to the masculine (and higher) standard, as the defendant requested in *Daniels*; women and men alike could be held to some kind of universalized standard (as the court requires in *Tucker*); women could be held to a (lower) feminine standard.²¹

The idea is for the class discussion to develop the implications of each option. I elicit from some students the point that holding women to a masculine standard seems unfairly punitive. Others counter that perhaps the higher standard pushes women to eliminate their driving deficit. If, however, the difference is not something easily eliminated—because, for example, wagon-driving skill depends on hand or upper body strength—the result of a masculine standard is a disincentive for women to drive. Applying a masculine standard, then, would quite literally enforce women's confinement

20. *Id.* at 321-22.

21. Another analytic option that was, however, not taken seriously by courts and is not otherwise discussed here, is that it could be contributory negligence as a matter of law (or rebuttable presumption, or permissive inference) for women to drive. See *Cobb v. Standish*, 14 Me. 198 (1837) (rejecting such an approach).

to a non-public domestic sphere.²² With some guidance, the topic then opens up into debate about the potential for either tort judgments or judicial reasoning to influence behavior. I encourage the students to move from speculation about the possible incentive effects of tort judgments to normative discussion of whether law should simply reflect, or rather mold, a community's ideological commitments.

Those students who think it appropriate for common law rules to shape society typically argue that holding men and women alike to a universalized standard has the advantage of not reifying gender inequality and perhaps even of making perceived feminine driving inadequacies less salient to observers of court cases. But they are forced by others to concede that the "universal" standard on which the *Tucker* court insists has a disparate impact on women, and is at least problematic for this reason. I further challenge those who are moved by economic arguments, asking whether it is socially optimal for the law to require women to live up to a masculine standard, given that achieving a certain level of safety is typically more "costly" (if not monetarily than in terms of effort) for women than for men.²³

Other students advocate for the result in *Daniels*, arguing that holding women to an expressly feminine standard serves women's interests by allowing women to win more tort cases and (putting aside special pleading) by refusing to "blame the victims" of the unfortunate social fact of gendered limitations.

Tucker raises another topic as well—the complex interaction of substance and language. As I have noted in an earlier article, the *Tucker* court easily could have construed the word "person" in the jury instruction to communicate gender neutrality and the irrelevance of the plaintiff's sex. Instead, the opinion concludes that the phrase "ordinary persons like herself" erroneously called upon the jury consider the sex of the plaintiff. It is hard to imagine a

22. See, e.g., MARY P. RYAN, WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 113-19, 252 (3d ed. 1983) (discussing the "separate spheres" construct in its initial, antebellum flowering, and in the early twentieth century); Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988).

23. Cf. STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 74 (1987) (arguing that efficiency requires that "where it is simple for courts to determine differences in the cost of taking care among parties, levels of due care should be individualized. If courts can distinguish the young and able-bodied person who can readily clear a sidewalk of ice from the elderly person who cannot, the first but not the second should be found negligent for failing to clear ice."); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 124-31 (1987) (making a similar point, and arguing with reference to age and disability that tort law in large part conforms with this economic insight). Of course, to the extent that the law requires less risk-taking (or more care) than is efficient, informed persons optimize their own welfare by taking a risk (or failing to take a precaution) notwithstanding that they will be uncompensated if harm materializes. Cf. SHAVELL, *supra*, at 5-32 (comparing strict liability and negligence); LANDES & POSNER, *supra*, at 54-82 (same).

analogous cavil with an instruction referring to “ordinary persons like *himself*”—the point being that the interpretation of the language of gender is necessarily molded by gender ideology. If femaleness is the “marked,” abnormal state, then any reference to femaleness is likely to connote gender specificity. Since maleness is the “unmarked,” normal state, reference to maleness does not necessarily have the symmetrical effect.²⁴ I develop these concepts throughout the class.

B. Issue 2: Whether to require women to exercise extra care in light of their fragility.

In *Daniels* and *Tucker* it was the injured woman plaintiff who purportedly benefited from the jury’s consideration of her sex. But the valence of the request for a “reasonable woman” instruction is reversed in two other cases I teach. In the first, *Eichhorn v. Missouri, K. & T. Railway Co.*,²⁵ the plaintiff (“a strong, healthy Norwegian woman”²⁶) was injured attempting to board one of defendant’s trains, which required passengers to step up two-and-a-half or three feet. The plaintiff alleged, and the jury agreed, that the defendant was negligent for failing to provide a platform or stepstool. The trial court instructed the jury regarding the definition of both negligence and contributory negligence ““that the words “carelessly,” “negligently,” and “negligence,” used in the instruction, mean the lack of such care and caution as *reasonable and prudent men* would exercise under like circumstances.””²⁷ In addition, at the request of the defendant, the court described contributory negligence as ““the plaintiff’s failure or neglect to exercise such care, caution, and foresight as a woman of ordinary care, caution, and foresight would have exercised under the circumstances surrounding the plaintiff at the time. . . .””²⁸ The Missouri Supreme Court upheld the verdict, affirming both the jury finding of negligence and of no contributory negligence. With respect to contributory negligence, it dismissed the defendants’ claim of error nearly out of hand:

As to the criticism of the court’s instructions because it defined negligence [including contributory negligence] to mean the lack of such care and caution as reasonable and prudent “men” would exercise under like circumstances, instead of “women,” it is only necessary to say the defendant’s own instruction

24. See Schlanger, *Injured Women*, *supra* note 4, at 110-11 n.114; *id.* at 139; Scott, *supra* note 12, at 33 (critiquing “long traditions of (Western) philosophy that have systematically and repeatedly construed the world hierarchically in terms of masculine universals and feminine specificities”).

25. 32 S.W. 993 (Mo. 1895). Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 L. & SOC. INQUIRY 369, 383-86 (1994), presents interesting information about this case gathered from the trial record.

26. *Eichhorn*, 32 S.W. at 995.

27. *Id.* at 995 (quoting the trial court) (emphasis added).

28. *Id.* at 996 (quoting the trial court).

cured this defect, if any; but the jury would have been utterly unfit to try any case if they did not understand that “men,” in this instruction, was generic, and embraced “women.”²⁹

Another similar case raises the same issue. In *Asbury v. Charlotte Electric Railway, Light & Power Co.*³⁰ the plaintiff was injured attempting to get off a streetcar. The trial court charged the jury that “due care” meant “such care as an ordinarily prudent man, placed in circumstances like or similar to those in which the person whose conduct is in question was placed, would use.”³¹ The defendant objected that

the care to be exercised by a woman, when she is placed in a dangerous position, would be greater than that required of a man surrounded by the same circumstances; that she is supposed to be less able to take care of herself than is a man, and the danger to her will therefore be greater; that, when this is the case (that is, when the danger is greater), the law requires a greater degree of care to be exercised in avoiding it.³²

The Supreme Court of North Carolina rejected the argument: “There is nothing in [the precedent defendant cites] which even squints toward a holding that a woman is not bound by the rule of ‘the prudent man,’ but ordinarily by a stricter rule.”³³

Thus in *Eichhorn* and *Asbury* it is the defendant rather than the plaintiff who wants a “reasonable woman” instruction.³⁴ The theory is simple. Where *Daniels* and *Tucker* are about “care” as “skill,” *Eichhorn* and *Asbury* are about “care” as “caution”; the railways’ thinking is that women, less mobile, athletic, etc.³⁵ than men, should be more careful to compensate—and that the (male) jury will, if signaled by reference to feminine language that it should, impose this extra burden as a requirement of reasonable care. The cases’ posture is actually a fairly common one in this fairly common kind of accident. That is, far from *privileging* (though in a potentially double-edged way) women’s position or perspective, a “reasonable woman” standard, notwithstanding its

29. *Id.* at 997.

30. 34 S.E. 654 (N.C. 1899).

31. *Id.* at 657 (quoting the trial court).

32. *Id.*

33. *Id.*

34. It is this position-swap that makes these “reasonable woman” cases more interesting to teach, for me, than the oft-made argument that sexual harassment law, for example, should direct juries to use a feminized standard to decide if a given course of conduct amounts to actionable harassment. See, e.g., CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* (2000).

35. In these boarding and disembarking cases, female gender increased the risk of accidental injury because of women’s clothing (long skirts, corsets, and, often, high heels) and frequent pregnancy. A strong sense of the fragility of female reproductive health probably contributed, as well. See Schlanger, *Injured Women*, *supra* note 4, at 114-15 and sources cited.

rhetorical appeal, frequently enforces as well as reflects a masculine vision of female dependence and fragility. *Eichhorn* and *Asbury* lead some students to flip-flop from their earlier position: where some had argued that the *Daniels* court was correct to make allowances for women's lesser driving skill, they are far less happy with court-enforced super-caution. We explore whether these positions are compatible in a principled way.

C. *Bad driving, again: noble horses, men of ordinary prudence, and timid women.*

I will end this brief essay with my favorite case in this series, *Fox v. Town of Glastenbury*.³⁶ The plaintiff's decedent was drowned when, accompanied by another woman, she drove her wagon over a bridge onto a (tortiously dangerous) causeway that was submerged. The Supreme Court of Connecticut vacated a jury verdict for the plaintiff, finding contributory negligence as a matter of law:

[W]hen, after they had entered the water west of the bridge, their horse, true to the instincts of his noble nature, faltered, and stood still, they should have heeded his kindly admonition, and there waited for assistance and deliverance, instead of forcing the animal forward to his fate. The boat, by means of which one of them was rescued, with two boys in it, was sailing close at hand; a wagon, with two men in it, was approaching the causeway from the west. . . . Their outcry would have brought almost immediate relief. . . . We are not unmindful of the fact urged upon our attention by the plaintiff's counsel, that these travelers were females. And in that fact, and in the timidity, inexperience, and want of skill which it implies, we can find an explanation of their injudicious and fatal attempt to turn around in the water, but no reason or excuse for the recklessness of their conduct in driving into it. . . . [I]f men of ordinary prudence and discretion would regard the ability of the party inadequate for the purpose, without hazard or danger, the risk should not be assumed. . . .³⁷

The *Fox* opinion is good fodder for continuing conversation about the language of judicial opinions: I assign it because its rhetoric and its announced standard line up so well. The noble horse, the nearby boys, and the jury all share the masculine ability to assess and cope with risk. And, says the court, if masculine discretion deems feminine ability "inadequate" for some purpose, that assessment packs the power of law.

My class on "reasonable women" gives students a chance to explore the interaction of law and social norms in a doctrinal context that grips them more directly than many. It reveals that doctrinal implementation of an ideal of equality between the sexes is more complicated than most of them would have

36. 29 Conn. 204 (1860).

37. *Id.* at 208-09.

thought. I hope that it helps to counter the alienation some law students report is caused by law school classes' facade of "perspectivelessness,"³⁸ by authorizing students to attend to both male and female perspectives, for the day and thereafter. And it reinforces the value of close attention to judicial language. All in all a worthwhile day, I think.

38. Cf. Kimberle Williams Crenshaw, *Foreword: Toward a Race Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989).