Can the Reasonable Person Navigate the Technological Storm?

Nicole D. Milos is a partner with the Chicago law firm, Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC. She focuses her practice on risk management and defending liability claims. Ms. Milos is a graduate of John Marshall Law School (J.D., 2001), and a LL.M candidate in the Information Technology and Privacy Law program at John Marshall Law School.

Nicole D. Milos

IF THE LAW WERE a movie, then the reasonable person would be the Bacon number, with no cause of action being more than six degrees of separation.1 In fact, the reasonable person makes an appearance in tort law, contract claims and criminal actions;2 to name a few. The reasonable person is faceless and nameless; with no consistency applied to demographic, ethnicity, sex or education.

The reasonableness of the reasonable person has been challenged on numerous fronts for centuries. Whether considering gender neutrality or mental capacity, the reasonable person standard has been consistently embroiled in controversy. The controversies surrounding the reasonable person standard are unlikely to stop as societal norms shift and change like ocean currents in a storm. However, the source of future attacks will likely involve a source that is already causing chaos in all aspects of society, technology. This article will analyze how technology impacts the reasonable person standard.

To challenge any standard, one must first consider background information sufficient to explain how the application came to be and how it has endured over time.

1 A game based on the six degrees of separation concept, which posits that any two people on Earth are six or fewer acquaintance links apart. The “Bacon number” began after Kevin Bacon commented that he had worked with everybody in Hollywood or someone who worked with them during a 1994 magazine interview. https://oracleofbacon.org/.

The historical challenges will be demonstrated by the evolution of the reasonable person. Specific technologies impacting today’s legal system will be discussed to exemplify how technology is and will challenge the reasonable person standard. Finally, a new instruction will be proposed that affords discretion, incorporating the technological prowess of the individual at issue, into the reasonable person standard depending upon the facts of a specific case.

BACKGROUND • At the most basic level, the definition of the reasonable person is as follows: “a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others’ interests.”3 This definition is widely used and commonly accepted, but, the reasonable person standard is not without flaws.

The reasonable person has been described as a hypothetical person, exercising average care, skill and judgment who behaves in a way that is legally appropriate.4 “The reasonable person is a mythical character who was conceived by the judicial mind in an attempt to bring some semblance of perfection to a far too imperfect world fraught with all human faults and frailties.”5 The common view is that the reasonable man resembles “ordinary mortals” and does not maintain “the courage of Achilles, the wisdom of Ulysses or the strength of Hercules.”6

However, the reasonable person has never been born nor died. The reasonable person has never lived in this world, or any other. The reasonable person has never suffered prejudice or been bullied.7 The reasonable person has never suffered financial stress, felt love or loss. Although “[T]he reasonable man” does have a twitter handle,8 the reasonable person has never maintained an online image nor navigated the internet. The reasonable person exists purely in the legal realm to offer an objective solution to a problem. In short, the reasonable person is a work of legal fiction.

The History of the Reasonable Person

The reasonable person is commonly believed to have made his (or her) first appearance in the landmark case of Vaughn v. Menlove.8 In this case, Menlove’s hay rack caught fire and destroyed a neighbor’s building.9 Although Menlove had been warned of the potential danger, he argued that because he did not possess high intelligence, the standard by which he should be held accountable should not exceed his best judgment.10 In order to avoid inconsistencies in legal application, the court rejected this proposed application and utilized a standard that upheld the objectivity of the law’s values and protected interpersonal equality. 11 Therein, the reasonable man was born.

The reasonable person has played a central role in the law of negligence because he (or she) provides the standard by which litigants are judged.12 The reasonable person is central to the law of negligence not merely because he (or she) embodies the fault element of negligence but because he does so in a way that ensures interpersonal equality.13 Therefore, this standard is central to the administration of justice. It is commonly accepted that the reasonable person

---


4 Id.


7 https://twitter.com/ThPrudentPerson.


9 Id.

10 Id.

11 Id.

12 Moran, supra, 14 Lewis & Clark L. Rev. at 1238.

13 Id.
the reasonable person standard should be altered as opposed to being completely eliminated. The reasonable person was intended to provide an objective standard that would be applicable in different causes of action. Therefore, as societal norms change and alternative lifestyles are embraced as mainstream, the reasonable person should be prepared for change, as society navigates the evolving tide and storms that technology brings.

History proves that the reasonable person is a seasoned sailor who has stayed the course and navigated troubled waters over the years. However, there is a new super storm looming on the horizon. This storm, much like climate change itself, is occurring faster than expected with unforeseen consequences. This is a storm that will pit the digital native against the digital immigrant. This is a storm of technology. Technology could be described as the storm of the century for the reasonable person.

This impending storm does not necessarily mean the doomsday for the reasonable person. However, this challenge should not be taken lightly as the reasonable person must continue to evolve and respond to the changing tide of societal norms. We must modify the reasonable person standard in context-specific situations to take into account the specific technological issues relevant to the claim.

### Technology Is A Rogue Wave Headed Toward the Legal Landscape

There is no debate that the legal system is lagging behind technological advances. It is all too common to re-purpose decades old, if not century old, laws to try and address the challenges posed by technology. It is a common strategy to try and bootstrap a technological claim to a law that was created before the technology existed. New technology is challenging all aspects of the legal landscape.

In Fairfax County Virginia, two doctors and their practices were sued for medical malpractice and defamation after a patient, while being prepared for his colonoscopy, used his smartphone to capture post-procedure instructions given by the doctors. In reality, the patient recorded more than just instructions, capturing the physicians mocking and insulting him, and instructing their staff to lie and chart false information. The jury awarded the patient $500,000. The case forced the court to consider whether communications between doctors were subject to privilege and whether the method, by which the communications were recorded (smartphone), was proper.

Turning from the civil to criminal context, consider John Large. Mr. Large’s disabled daughter was receiving care in a nursing home. Large met with an administrator for the nursing home while wearing a recording device concealed in a pair of glasses, akin to Google glass. The meeting occurred in the office of the administrator, with her door open. According to the administrator, she kept the door open because she was afraid of Large.

After recording their conversation, Large forwarded the recording to the FBI who viewed

---

30 Id. supra, 33 L. Legal Prof. at 98.
31 Id.

---

*Illness*, 68 Ohio St. L.J. 1733.

33 Id.
34 Id.
35 Id.
37 Id.
38 Id.
39 Id.