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MISUNDERSTANDING ABILITY, MISALLOCATING RESPONSIBILITY*

Jeffrey J. Rachlinski[†]

Allocating responsibility for accidents is one of the law's primary functions. An important default principle of tort law in the Anglo-American legal tradition is that harm must "lie where it falls."¹ When harm results from conduct that the law considers negligent, however, the law requires the negligent party to bear the costs of the harm. Defining negligent conduct and administering this definition properly is therefore critical to determining who bears the cost of accidents.

Although the courts have adopted numerous formulations of negligence, all revolve around the reasonableness of a party's behavior. As noted in the *Restatement (Second) of Torts*, "the standard of conduct to . . . avoid being negligent is that of a reasonable man under like circumstances."² Even though virtually all activities create a risk of injury to others, tort law is not meant to convert everyone into insurers whenever they undertake any action.³ So long as one's conduct conforms with the definition of reasonableness, harm ordinarily will not result in liability. But where the conduct is unreasonable, liability attaches.

In turn, the determination of reasonableness can only be made with reference to the underlying purposes of tort law. Scholars and courts disagree somewhat as to the primary purpose of tort law, but there is substantial agreement on a

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¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 144 (1949).

² *RESTATEMENT (SECOND) OF TORTS* § 283 (1965).

³ James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 *IND. L.J.*, 467, 524-25 (1976).

number of basic principles.⁴ The two purposes scholars and courts most commonly cite for tort law are to encourage efforts to minimize the cost of accidents (the deterrence function)⁵ and to make careless parties compensate their innocent victims (the corrective justice function).⁶ In general, when people do not account for the risk of harm to others that their activities pose, courts consider their conduct unreasonable. Holding people responsible for conduct that poses a substantial likelihood or degree of harm, or for harm that is easy to avoid, furthers the goal of deterring socially undesirable conduct by forcing people to pay for the harm caused by actions with excessive social costs.⁷ Liability also furthers corrective justice goals by forcing those who engage in destructive behavior to compensate the victims of their actions.⁸

In determining what constitutes reasonable conduct, however, courts might inadvertently set unattainable standards. On its face, the law demands nothing more than that people perform as well as their physical abilities allow. People are required only to apply such skill and care in avoiding accidents as a hypothetical reasonable person would under the circumstances.⁹ To determine whether an actor's conduct was reasonable, a factfinder inevitably must examine the circumstances surrounding an accident and judge whether a reasonable person could have avoided the accident. If the reasonable person, using her attention, memory and perceptual abilities, would have avoided an accident, then the fact that an accident occurred implies that the actor was engaged in unreasonable conduct. Thus, determining whether a reasonable person could have avoided an accident requires courts to endow the hypothetical reasonable person with cognitive abilities.

Recent research on intuitive understanding of cognitive abilities (known as "meta-cognition") suggests that the tort law's seemingly sensible reasonable person test holds people to an unobtainable standard. The law's hypothetical reasonable person possesses those mnemonic and perceptual abilities

⁴ DAN B. DOBBS, JR., *THE LAW OF TORTS* 12-13 (2001).

⁵ See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed. 1989).

⁶ See Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

⁷ W.M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

⁸ G.P. Fletcher, *Fairness and Utility In Tort Theory*, 85 HARV. L. REV. 537 (1972).

⁹ RESTATEMENT (SECOND) OF TORTS § 289 (1965).

consistent with the lay intuition of a judge or jury. If lay intuition suggests people can see things that most people actually fail to see, hear sounds that most people actually cannot hear, attend to stimuli that most people actually miss and remember events that most people actually forget, then the reasonable person is actually a superhero; ordinary people cannot conform their conduct to the entity endowed with these abilities. Consequently, factfinders relying on the reasonable person test will find people liable for accidents that they could not have avoided with the exercise of reasonable care. By comparing the conduct of ordinary people to that of an idealized superhero, the law allocates fault where none exists and labels reasonable conduct as unreasonable. Because recent research suggests that people commonly overestimate cognitive abilities, the application of the reasonable person test might undermine the deterrence function and produce results wholly inconsistent with ordinary notions of justice and fairness.

This Essay explores the question of whether the law's reliance on an intuitively based standard creates a kind of strict liability for accidents and the consequences of that system's approach. Unlike some other cognitive impediments to sound legal judgment,¹⁰ courts have never really considered the possibility that they systematically overestimate people's cognitive abilities. Consequently, it is difficult to place this cognitive difficulty into a legal analysis. Nevertheless, this Essay makes an attempt. Part I defines the reasonable person test in more detail, evaluates the standard in light of the purposes of tort theory and examines whether the research on meta-cognition indicates that this standard is excessive. Part II describes the consequences of an excessive reasonableness standard. This Essay concludes in Part III by noting that even though the standard appears too high, other factors suggest that perhaps an excessive, idealized standard is not so disastrous to the system as to warrant significant reform.

I. THE REASONABLE AND THE REAL PERSONS

It is well understood that tort law's reasonable person represents an idealized standard to which no one conforms all

¹⁰ Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (describing how the hindsight bias adversely affects legal judgments and how the courts have adjusted to account for this problem).

of the time.¹¹ People commonly take risky shortcuts, and attention often lapses in the face of monotonous tasks. Such is the stuff of negligence. Even though the law defines the reasonable person in idealized terms rather than in terms consistent with actual behavior, the reasonable person test is intended to describe an ideal to which all can, if they try, conform. If the hypothetical reasonable person possesses abilities that exceed those of most real people, however, then courts hold people liable for innocent conduct.

A. *Who is the Reasonable Person?*

The definition of the reasonable person necessarily incorporates the purposes underlying the tort system: deterring socially undesirable conduct and compensating the victims of such conduct. In an effort to further these purposes, however, the tort system has created a standard to which no one conforms all of the time. This is an acceptable aspect of the tort system, however, because tort law is intended to signal acceptable and unacceptable choices about how to behave. Everyone sometimes behaves in a socially unacceptable manner, and the obligation that the reasonable person test creates is simply to pay for the consequences of such conduct. The reasonable person test is meant simply to create an administratively workable scheme for identifying inappropriate choices that people make.

1. The Reasonable Person and the Purpose of Tort Law

The reasonable person is a fiction, a "creature of the law's imagination."¹² Courts and legal scholars have attempted to define the reasonable person precisely, but its meaning remains elusive. Inevitably, definitions of the reasonable person are intertwined with tort law's diverse and sometimes conflicting purposes. Many scholars agree that the purposes of the tort system are both to vindicate the rights of aggrieved parties and to deter people from engaging in excessively risky conduct.¹³ This view is, however, not universal. Many law and economics scholars contend that deterrence is the primary goal

¹¹ W.P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 174-75 (5th ed. 1984).

¹² F.V. HARPER & F. JAMES, THE LAW OF TORTS 902 (1956).

¹³ JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 31-33 (5th ed. 1999).

of tort law. They worry that without the prospect of tort liability, people will take little or no account of the harm that their activities can impose on others.¹⁴ For these scholars, tort law is a way of encouraging people to take cost-effective measures to reduce the number and cost of accidents. Other scholars deny that the tort system is meant to deter economically inefficient activity, arguing instead that it primarily serves to vindicate the rights of those who have been injured wrongfully.¹⁵ These scholars argue that people have a right to be free from carelessly caused injuries, and tort law is a way of vindicating that right. This latter notion requires some definition of the specific rights that tort law will vindicate, but there is general agreement that community standards of conduct determine which risks are unacceptable.¹⁶

Despite some conflicts, the two basic purposes of tort law coincide often enough that courts rarely find it necessary to delineate tort law's purposes with greater precision.¹⁷ To illustrate, consider a stylized example. Suppose a driver is running late for a business meeting and wants to speed to arrive on time. Assume that if he is late for the meeting, there is a one in ten chance that his client will be so angry at his tardiness that he will lose \$5,000 in lost sales. Also assume that if he drives fast, he will make the meeting, but if he drives at a normal speed, he will miss it. Further assume that at a normal speed, he incurs a one in 100,000 chance of hitting (and seriously injuring) a pedestrian, whereas if he drives fast that risk increases to one in 1,000. Suppose that the accident will impose \$1,000,000 in costs on the pedestrian for lost wages, hospitalization and some monetary quantification of pain and suffering. Under these circumstances, the social costs of driving fast are \$990 (\$1,000,000 (1/1,000) - 1/100,000)) and the social benefits are \$500 (\$5,000 (1/10)). Without liability for negligence, the driver faces incentives to drive fast, even though the net social costs outweigh the benefits, because he realizes only the benefits. A liability rule that imposes the full social costs of driving too fast on the driver, however, eliminates this incentive. Thus, under a deterrence-oriented

¹⁴ GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970); LANDES & POSNER, *supra* note 7, at 8.

¹⁵ JULES L. COLEMAN, *RISKS AND WRONGS* (1992); Weinrib, *supra* note 6.

¹⁶ COLEMAN, *supra* note 15, at 334.

¹⁷ Richard A. Posner, *The Concept of Corrective Justice In Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

analysis, driving fast to make the meeting imposes unreasonable risks because the costs outweigh the benefits; driving fast is economically inefficient. An assessment under a corrective justice theory produces a similar result. Exposing unwitting strangers to great risks of bodily injury for the sake of a business relationship violates their rights to safety, and a reasonable member of the community would not engage in such conduct.

Both deterrence and corrective justice concerns place the degree of risk imposed as a critical factor in the negligence calculus.¹⁸ Under a deterrence theory, if driving fast only slightly increases the risk of hitting a pedestrian, say to one in 10,000, then the social costs of driving fast are relatively small (only \$99). In such a case, the decision to drive fast is reasonable, inasmuch as it averts a \$500 loss at a cost of only \$99. If a business loss seems too trivial to compare to a physical injury, one can change the hypothetical to suppose that the driver is a doctor or ambulance driver speeding to the aid of an injured person so as to make the type of injury consistent, but so long as we are willing to quantify physical injuries, this change is unimportant. Even though the decision to drive fast imposes costs on the pedestrian, the law would consider such costs a necessary part of ordinary life. Likewise, under a corrective justice theory, people are entitled to drive, even though doing so places others at risk. Pedestrians are entitled only to freedom from careless driving that needlessly places them at risk of injury. Walking the streets and driving necessarily entail some risks, but so long as those risks are not excessive, or not undertaken without regard to the pedestrian's interests, the risks lie where they fall. Thus, risk is the critical factor in the negligence calculus under both theories underlying tort law, which often complement rather than compete with each other.

In some instances, however, the principles underlying tort law and the specific circumstances of the behavior produce different outcomes. Scholars argue, for example, that in many circumstances, even if the private benefits of an activity outweigh the social costs, a reasonable person might refrain from engaging in the activity.¹⁹ To illustrate, consider the

¹⁸ *Id.* at 202-04.

¹⁹ Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

difference between the rush to a business meeting and the rush of a medic to an accident. A deterrence theorist might argue that a reasonable person does not rush to a business meeting, but does rush to a medical emergency, because the stakes in the latter case are higher. Under this analysis, a reasonable person would speed to a business meeting if the net benefits were high enough to justify the social costs associated with potential accidents that speeding would cause. In contrast, tort theories based on corrective justice might condemn certain activities, such as speeding, as inconsistent with social norms. Hence, a court might deem unreasonable any speeding to a business meeting, regardless of the stakes, while finding acceptable and reasonable a medic's rush to an accident.

Even with this mix of potentially competing concerns, courts have settled upon a generally accepted definition of the reasonable person. This definition includes corrective justice goals by referring to social norms: "The words 'reasonable man' denote a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others."²⁰ The definition also incorporates deterrence concerns by taking account of the value society places on the risk the reasonable person creates and the activity she undertakes.²¹

2. Conformity with the Reasonable Person Standard

Whatever the definition, the idealized nature of the reasonable person has long made it the subject of mockery. As one scholar observed, "this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example."²² According to this influential description, the reasonable person:

invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; . . .

²⁰ RESTATEMENT (SECOND) OF TORTS § 283 cmt. b (1965).

²¹ *Id.* § 283 cmt. e (stating that conduct is reasonable if the "magnitude of the risk outweighs the value which the law attaches to the conduct which involves it . . . [requiring the actor to] give an impartial consideration to the harm likely to be done [in] the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor . . . to prefer his own interests to those of others").

²² A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 12 (1930).

neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock; . . .

never mounts a moving omnibus and does not alight from any car while the train is in motion; . . .

will inform himself of the history and habits of a dog before administering a caress; . . .

never drives his ball until those in front of him have definitely vacated the putting-green; . . .

never swears, gambles, or loses his temper; [and] . . .

uses nothing except in moderation.²³

Obviously, this tongue-in-cheek description is intended to persuade the reader that everyone engages in conduct that falls short of the requirements of the reasonable person. Although each of the examples above arises from actual cases in which a court held some conduct to be unreasonable, we easily recognize ourselves in the failings of at least some of the people in these cases. Only the hypothetical reasonable person is free from negligence all of the time; the rest of us commit negligent acts.

Identifying the characteristics of the reasonable person also reveals the two common ways in which negligence occurs. First, people choose to undertake excessive risk in their activities. They take shortcuts, hurry along at an unreasonable pace or simply choose to engage in conduct that entails more risk than is socially sensible. Because the tort system forces people to bear the cost of such decisions, it removes any economic incentives for such conduct. Nevertheless, people might irrationally hope that their choices will not result in harm, or they might rationally recognize that in some circumstances an injured party is unlikely to bring a successful tort action against them. People often might not consider the risks that their actions impose on others, but tort law holds them responsible for failing to do so. Second, people's attention often lapses in the face of monotonous, albeit dangerous tasks. Despite tort law's requirement of reasonableness, it is difficult to maintain focus on a repetitive task. Failing to pay as much attention to a task as the reasonable person would may not be a conscious choice, but it is still negligence and doubtless a common source of accidents.

²³ *Id.* at 10-11.

The reasonable person, of course, never engages in either folly. She never makes choices that impose an excess of socially unacceptable risk, and she never lets her attention lapse when undertaking risky activities. This is not to say the reasonable person imposes no risks on others. She imposes those risks that are socially acceptable and pays as much attention as is needed to minimize the danger her activities pose.

3. Why Rely on the Reasonable Person Standard?

Of course, no one conforms to the reasonable person standard all the time. The attributes that courts ascribe to the reasonable actor are true of no one. All of us have, at one time or another, leapt before we looked. Consequently, some have called for the elimination of the reasonable person test: "[I]f [the reasonable person] is truly an inadequate, unrealistic, and unmanageable creation and cannot readily be transformed into something more satisfactory, perhaps we should admit failure in our attempts to make fault a requisite to negligence liability."²⁴

Why does the law rely on a standard to which not even saints conform? The use of a legal fiction to identify unreasonable conduct is a deliberate choice meant to solve the difficult problem of identifying negligent conduct.²⁵ Identifying when conduct imposes a socially inappropriate degree of risk is no easy task. Risk is an essential part of social life. At the same time, it is wrong to impose an excess of risk on the innocent or to impose it for no good reason. So long as the law attempts to sort reasonable from unreasonable risks, the law requires some means of distinguishing reasonable and unreasonable. Courts developed the hypothetical reasonable person in an effort to make the task tractable.

The administrative challenge of sorting reasonable from unreasonable conduct is complicated by the necessity of incorporating the underlying purposes of tort law into the sorting process. Simply describing the purposes of the system to the decision maker, without further elaboration, does not provide enough guidance. Identifying the deterrent goal of the system provides some indication as to what constitutes

²⁴ Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Heath Report on the "Odious Creature,"* 23 OKLA. L. REV. 410, 410-11 (1970).

²⁵ KEETON, *supra* note 11, § 32.

unreasonable conduct, but this is clearly inadequate on its own. Rarely will the full numeric estimates needed to impose the risk calculus be available.²⁶ Similarly, identifying the imposition of community norms as the standard is unhelpful without identifying what those norms or standards are or, at least, how to identify and ascertain them. The available cost-benefit calculus and the sense of community standards will be impressionistic at best.

The reasonable person test converts the esoteric and intractable distinction between reasonable and unreasonable risks into a comprehensible, intuitive inquiry. People commonly judge the conduct of others in their ordinary lives. Sorting people into those we would hire, befriend or date requires judging the conduct of potential employees, friends or lovers and assessing it as acceptable or unacceptable. In making such determinations, we inevitably judge the conduct of others against an idealized, hypothetical standard. An employee who performs below expectations might get fired; we might reduce contact with a friend who mistreats us; and a disappointing first date might easily be the last date. In all three examples, we judge the gap between what we expect out of an employee, friend or romantic interest and what we observe. It is only natural that the law should borrow the same judgmental skills for identifying unreasonable conduct. Rather than conduct a meaningless, open-ended inquiry or a detailed cost-benefit assessment requiring information that is unlikely to be available, tort law asks only that the factfinder assess the actor's conduct against an idealized norm, just as we tend to do for our acquaintances.

The example involving the driver who is late for a meeting illustrates this point. The law asks the factfinder to ascertain whether a reasonable person, under the same circumstances, would drive fast. A detailed cost-benefit calculation is not available, but an intuitive one is. The risks associated with speeding are well known (or can be identified and articulated during the trial), even though they cannot be quantified precisely. Likewise, most people understand the benefits of getting to a meeting on time. The court can judge, intuitively, whether driving fast is too risky by asking whether a reasonable person who weighs the risks and benefits and

²⁶ See *Moisan v. Loftus*, 178 F.2d 148 (2d Cir. 1949) (Hand, J.) (expressing doubt about the wisdom of using a precise formula for the negligence standard).

considers community standards would engage in the conduct. If not, then the conduct is unreasonable, negligent and creates the potential for liability.

The reasonable person test thus performs the basic task of tort law—assignment of responsibility—in a way that relies on familiar cognitive processes. Just as tort law attempts to attribute harm either to unavoidable risks that are not entitled to compensation or to blameworthy conduct by one or more legal actors, so too do ordinary people attribute conduct either to stable personality traits or to vagaries of a situation in which people find themselves. Just as friends, employees and romantic interests sometimes disappoint our expectations, people inevitably fall short of the reasonable person standard from time to time. Reliance on this idealized standard makes the law's inquiry intuitive and tractable.

The use of the reasonable person test has other virtues beyond the familiarity of its methodology. It is also intended to avoid blaming the actor for accidents attributable to inalterable physical limitations.²⁷ Ascribing liability to someone for physical deficiencies would be inconsistent with both the deterrence and corrective justice theories underlying tort law. The question for tort law is not whether a stronger, faster or taller person would have avoided the accident, but whether a person with the abilities of the actor facing the same situation could have avoided the accident. The reasonable person test easily incorporates these concerns by formulating its inquiry in terms of whether a reasonable person with the actor's physical characteristics could have avoided the harm.²⁸

Finally, the reasonable person test largely maintains an objective standard for liability.²⁹ The test is not whether someone felt that he did his best to avoid harm, given his own personality, concerns and interests, but whether a reasonable person would have been able to do so. As Justice Holmes noted:

[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for the

²⁷ KEETON, *supra* note 11, § 32.

²⁸ DOBBS, *supra* note 4, § 118.

²⁹ *Id.* §§ 117-18.

courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect.³⁰

The standard of care is that of society at large and not that of the individual. Thus, the standard easily can accommodate changes in community norms or even changes in the goals of tort law itself.³¹ Courts can also mold the reasonable person test to support the underlying purpose of tort law. Under a deterrence analysis, the reasonable person is expected to make choices that maximize social utility. Under a corrective justice analysis, the reasonable person conforms to a community standard of conduct. Should society change its goals or the value it places on certain activities, the reasonable person test changes with it. In effect, the reasonable person is aware of how the community views certain activities and certain risks and incorporates these views into his or her own decision making.

The reasonable person test is thus "a child of a certain social necessity."³² It is designed to provide a means of identifying when it is inappropriate to take a shortcut or allow oneself to get distracted. If a reasonable person would take the shortcut or get distracted, then doing so does not give rise to liability. If not, then doing so risks liability for any resulting harm. The exact contours and nature of the risks a reasonable person avoids are defined largely by a collective intuition about appropriate behavior. This makes the standard tractable; collective intuition properly focuses attention on choices that could have been made and evolves as community norms about behavior change.

Beyond these attributes, the persistence of the reasonable person test in tort law also arises from the mildly individualistic, almost libertarian flavor of the common law. In the American legal tradition, people are free to let their attentions wander or lapse, just as they are free to trespass or break contracts, so long as they pay for the consequences of their actions. Tort law sets a standard intended to guide people's conduct, to identify right and wrong. But the obligation tort law creates is merely to pay for the consequences of these lapses, not necessarily to avoid them at all costs. After all, this

³⁰ HOLMES, *supra* note 1, at 108.

³¹ DOBBS, *supra* note 4, § 118.

³² Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUTGERS-CAM. L.J. 311, 314 (1977).

is torts, not criminal law. People can avoid liability by paying more attention, avoiding shortcuts, making appropriate inquiry into their surroundings and generally behaving like the reasonable person.

In creating the hypothetical person, the law borrows heavily from the intuitive attribution process familiar to social psychologists. Social psychologists have argued that one of the fundamental cognitive tasks people face in social life is determining whether a person's conduct results from her personality or from the situation in which she finds herself.³³ Although errors can creep into this process, people generally rely on a set of rational heuristics to make such attributions. People attend to whether they observe the same behaviors in different situations and whether other people behave the same way in the same situation.³⁴ These observations allow people to assess whether a behavior is the product of a stable, internal characteristic of the actor or whether it is a transient behavior that is attributable to the features of a situation. The reasonable person test is meant to incorporate these well developed abilities into the assessment of negligence. If the conduct of even an idealized reasonable person would replicate the adverse outcome that the actor in question produced, then blame for the adverse outcome does not lie with the actor. In such a case, blame more sensibly is ascribed to other actors or to the unavoidable risks of living in a complex industrial society.

The goal of the reasonable person test is to harness the familiar process of social attribution to the task of identifying when a person should have behaved differently so as to avoid harm to others. The system is designed to avoid making people pay for harms that result from unavoidably risky situations and to avoid making people pay for their physical limitations. Unavoidable injuries cannot be deterred and are also unlikely to justify compensation. Thus, the focus of the reasonable person test is on choice and lapses, not on the circumstances or the physical or cognitive deficiencies of the actor.

³³ RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 30-32 (1980).

³⁴ See generally Harold H. Kelley, *Attribution Theory in Social Psychology*, in 15 NEBRASKA SYMPOSIUM ON MOTIVATION at 192 (David Levine ed., 1967).

B. *The Role of Human Abilities in Assessing Reasonableness*

The assessment of the reasonable person could end at this point in a neat rule: People are free to make choices about the risk their activities pose to others so long as they pay for any consequences. The reasonable person test is meant to allow the factfinder to distinguish between accidents attributable to lapses in attention or to bad decisions, and those accidents attributable to unfortunate, but unavoidable, situations or to a lack of physical ability. Nevertheless, if judges and juries endow the reasonable person with abilities greater than most people possess, then close attention and good judgment might be insufficient to avoid liability. If judges and juries overstate people's physical or cognitive abilities, then accidents that are unavoidable in spite of reasonable conduct will be attributed to negligence.

To see this, consider again the hypothetical in which a driver faces a choice to drive moderately (and potentially miss a meeting and suffer monetary loss) or quickly (and risk hitting a pedestrian). Suppose this driver hits a pedestrian and the pedestrian sues the driver. If negligent haste caused the accident, then the driver is liable; if the accident was the result of ordinary misfortune, then the driver is not liable. To defend himself, the driver must claim that he was proceeding at a reasonable speed. In some cases, the legal factfinder (judge or jury) may have an objective indication of this choice. The length of any skidmarks could indicate the driver's speed, or an eyewitness might provide information on the reasonableness of the driver's conduct. Commonly, however, direct indications are unavailable. Instead, the factfinder must make an inference about the driver's conduct from the circumstances. The question in many cases thus becomes whether a driver proceeding at a reasonable speed would have been able to avoid hitting the pedestrian. If so, then the only logical inference is that the driver was not proceeding at a reasonable speed.

This analysis reveals the important role that intuitions about cognitive abilities play in law. The inquiry requires that the factfinder mentally simulate the circumstances surrounding the accident with the hypothetical reasonable person at the wheel. The factfinder must assess the accident as if the driver were traveling at a reasonable speed and then determine whether this fictitious driver would have avoided

the accident. This hypothetical driver must have some cognitive abilities in order for the factfinder to ascertain whether the situation would result in an accident.

To make the example more specific, suppose that the driver strikes a pedestrian who darted out into an intersection. Further, suppose the pedestrian claims that a driver traveling at a reasonably safe speed should have been able to stop or swerve in time to avoid hitting her. The driver denies this claim and asserts that he was traveling at a reasonably safe speed. Unless the trial produces direct evidence of the driver's speed, the factfinder will have to infer his speed from the facts surrounding situation. In such a situation, the reaction time imputed to a hypothetical reasonable driver could determine the outcome of the case.

Suppose that 25 miles per hour ("mph") is the speed limit and would be considered a reasonable speed. Further suppose that expert testimony reveals that after the brakes were applied the driver's car would travel 37.5 feet if the driver was traveling at 25 mph.³⁵ The factfinder must also impute to the driver a perception time (time needed to see the pedestrian and identify her as a hazard requiring full braking) and a reaction time (time needed to get the foot to brake). If the factfinder assesses both at 0.5 seconds, the factfinder will believe the total braking distance for the car to be 74.5 feet if the driver was traveling at 25 mph (37 feet per second plus 37.5 feet of braking). If the factfinder can then determine that the pedestrian entered the intersection when the driver was greater than 74.5 feet away, then the factfinder can conclude that the driver was driving too fast. The comparison of the outcome to that which a reasonable actor would have obtained facilitates the assessment of the actor's conduct as reasonable or unreasonable.

But what if the factfinder overestimates the reasonable person's reaction time? Suppose the reaction time of most people under these circumstances is actually 0.75 seconds to perceive and process the pedestrian and 0.75 seconds to react. The total stopping distance for the true reasonable actor would therefore be 93 feet at 25 mph (55.5 feet for the reaction time

³⁵ These numbers are just fabricated, but it might be important to consider that the stopping distance upon braking will increase exponentially rather than linearly with the speed of the car. The same is not true of the distance the car will travel between the time when the driver sees the obstacle and when the driver applies the brake, which will increase as a linear function of speed.

plus 37.5 feet for the stopping distance). Thus, if the driver was actually driving at the reasonably safe speed of 25 mph and the factfinder believes that the driver was roughly 80 feet from the pedestrian when the pedestrian entered the intersection, then the factfinder using the 0.5 second reaction time will mistakenly deem the driver negligent.

The problem gets worse as conditions that might impair cognitive ability become part of the circumstances. Even if the factfinder has an accurate appreciation of the abilities of the average person under good conditions, the factfinder might fail to appreciate the effects of darkness, unexpected situations or distractions. In effect, a court cannot cure misperception simply by adopting a uniform standard for human reaction times—reaction times depend too much on external circumstances. So long as a factfinder overestimates people's abilities or underestimates the effect of adverse conditions on abilities, he will infer that people are negligent when their behavior, in fact, was reasonable.

A similar analysis applies to lapses of attention. For example, suppose a woman is walking along a sidewalk that is under repair. Suppose at the same time she approaches a break in the sidewalk that sensibly should be circumvented, she hears screeching brakes and a car sounding its horn in a nearby intersection. Although distracted, she continues walking and catches her heel on the broken sidewalk. She falls and is seriously injured. Is she negligent?³⁶ The answer turns on whether a reasonable person would have been so distracted under the circumstances that she would have failed to notice a gap in the sidewalk. If not, then the factfinder must attribute the accident to a negligent lapse in attention. The court must conclude that a reasonable person would not have allowed the distraction to affect her behavior.

Thus, although the legal system's goal is to encourage people to make reasonable decisions, the assessment of their conduct commonly turns on an assessment of human abilities. Because of the importance of human abilities, the courts have tried to define the cognitive abilities of the reasonable person.³⁷ Indeed, defining the reasonable person's abilities plays an important role in the *Restatement (Second) of Torts's* definition

³⁶ Note that if she is, she may be unable to recover compensation for her injury from the municipality for failing to repair the sidewalk; but if she is not, then it is possible that she could recover.

³⁷ DOBBS, *supra* note 4, § 120.

of negligence, which requires that people use "such attention, perception of the circumstances, memory, knowledge of pertinent matters, intelligence, and judgment as a reasonable man would have."³⁸ Hence, the focus on reasonable behavior quickly turns to an assessment of whether the actor, if she had behaved reasonably, would have avoided causing harm.

At this point, the law provides little further guidance. Courts rely heavily on intuition to define human ability. Courts assume only that people remember things a reasonable person would remember, attend to things a reasonable person would attend to and see things a reasonable person would see. The law assumes that judges and juries have accurate knowledge about human mnemonic and perceptual ability. This assumption, however, may be deeply flawed.

C. *The Abilities of the Real Person*

Recent cognitive psychological research indicates that people's beliefs about cognitive processes are indeed inaccurate. Although people underestimate some cognitive abilities, such as the ability to recognize pictures,³⁹ overestimation of cognitive abilities presents a greater problem for the legal system. Cognitive psychologists have documented two important circumstances in which people overestimate cognitive abilities: inattention blindness and change blindness blindness.⁴⁰ Both are critical to the kinds of tasks that jurors and judges must perform and can contribute to misidentification of reasonable behavior as negligent.

First, people show a marked inattention blindness.⁴¹ That is, people overestimate their ability to detect peripheral stimuli when concentrating on a particular task. In one compelling demonstration, subjects were asked to concentrate on the complex cognitive task of tracking the movements of three basketballs among six people. Fifty percent of the subjects failed to notice the appearance of a person dressed in a gorilla suit among the basketball players, even though all of the subjects predicted that they would notice the appearance of

³⁸ RESTATEMENT (SECOND) OF TORTS § 289 (1965).

³⁹ Daniel T. Levin & Melissa R. Beck, *Thinking About Seeing: Spanning the Difference Between Metacognitive Failure and Success*, in VISUAL METACOGNITION: THINKING ABOUT SEEING (Daniel Levin, ed., forthcoming 2003).

⁴⁰ *Id.*

⁴¹ ARIEN MACK & IRVIN ROCK, INATTENTIONAL BLINDNESS (1998).

such an unusual stimulus.⁴² This finding, along with the results of several similar studies, suggest that people underestimate the dramatic effects that concentrating on a particular task can have on one's ability to attend to peripheral events.⁴³

Second, people also fail to appreciate the difficulty of detecting changes in the perceptual environment: so-called change blindness blindness.⁴⁴ For example, in one study, subjects failed to notice changes in the environment that occurred between cuts of a video portraying a conversation between two women, even though the subjects predicted that people would notice such changes.⁴⁵ In the study, although 76% of the subjects predicted that they would notice a change in the color of dinner plates in the video, no subject actually watching the video noticed such a change. Other studies reveal that when two scenes that differ only slightly are presented in succession to subjects, those looking for the change take much longer to identify the change than subjects who are aware of the change predicted that they would take.⁴⁶ People's intuition about vision and attention tells them that they would notice changes right before their eyes, but studies show that people discount how cognitively difficult it is to recognize many changes.

Both inattention blindness and change blindness blindness have the potential to mislead courts as to the reasonableness of an actor's conduct. Drivers who fail to notice a stop sign, bicyclist or construction worker might not be acting unreasonably. A factfinder might infer that the failure to detect hazards was the result of excess speed or failure to pay adequate attention to the task, even if the appropriate inference is that the hazard presented a particularly difficult detection profile. Similarly, underestimating the length of time that detecting a change in the visual environment takes in an ordinary person can distort the inferences people make about the circumstances surrounding an accident. As noted above, a factfinder who underestimates the length of time perception

⁴² Daniel J. Simons & Christopher F. Chabris, *Gorilla in Our Midst: Sustained Inattention Blindness for Dynamic Events*, 28 PERCEPTION 1059 (1999).

⁴³ See generally LEVIN & BECK, *supra* note 39.

⁴⁴ Daniel T. Levin et al., *Change Blindness Blindness: The Metacognitive Error of Over-Estimating Change-detection Ability*, 7 VISUAL COGNITION 397 (2000).

⁴⁵ *Id.*

⁴⁶ Ronald A. Resnick et al., *To See or Not to See: The Need for Attention to Perceive Changes in Scenes*, 8 PSYCHOL. SCI. 368 (1997).

takes will infer that a driver was traveling faster than was actually the case. These two phenomena suggest that reliance on intuition about cognitive processes leads courts astray.

The studies of inattention blindness and change blindness arguably fail to reflect natural conditions. People in gorilla suits do not commonly pop unexpectedly into basketball games, nor are they often the cause of accidents. Likewise, the kinds of changes in the change blindness studies often involve unlikely or even impossible changes in the environment. Plates do not magically change color outside the psychologist's laboratory. By using exotic or outlandish changes, researchers may be exaggerating the existence of change blindness in two ways.⁴⁷ First, an impossible change in the environment is necessarily an unexpected change. If people's expectations influence the ease with which they can detect changes, then impossible changes should be among the hardest to detect because they fail to track people's lifetime of experience with the real world. Second, impossible changes seem so outrageous and exotic that once identified, it becomes harder to see how they were missed than more ordinary or mundane changes. To be sure, some of the studies involve changes in meaningless symbols in which no expectations can be said to be present,⁴⁸ and others involve impossible, but fairly mundane, changes.⁴⁹ Nevertheless, the magnitude of the effects seen in the studies so far might greatly exceed the effects present in the real world. The underlying processes that produce inattention blindness and change blindness might not be a generic overstatement of cognitive abilities, but rather a failure to appreciate how sensitive the perceptual system is to distractions and expectations. If so, then the research thus far might be exaggerating the effect.

The subject matter of lawsuits, however, does not consist of a random sample of the experiences people encounter in the real world. Tort suits only arise from those accidents that might be attributable to the carelessness of someone other than the injured party. If many accidents occur precisely because of unusual or unexpected circumstances, then the

⁴⁷ Rachel A. Diana & Lynne M. Reder, *Visual vs. Verbal Metacognition: Are They Really Different?*, in *VISUAL METACOGNITION: THINKING ABOUT SEEING* (Daniel Levin, ed., forthcoming 2003); Daniel T. Levin, *Change Blindness Blindness as Visual Metacognition*, *J. CONSCIOUSNESS STUD.*, May-June, 2002, at 111.

⁴⁸ See generally MACK & ROCK, *supra* note 41.

⁴⁹ See generally Levin et al., *supra* note 44.

psychological experiments might have more external validity for tort lawsuits than it would otherwise seem. People's sense of their own cognitive abilities usually keeps them safe. Drivers understand that a complex visual horizon filled with cars, bicycles, pedestrians, construction workers and intricate traffic signs requires them to slow down to process potential hazards properly. If people fail to appreciate the importance of certain kinds of less familiar distractions, however, then they will fail to take precautions against instances of change blindness and inattention that lead to accidents. Likewise, the same failure to appreciate change blindness and inattention that caused the accident will influence the factfinder. Thus, courts will necessarily review behavior in those settings in which inattention blindness and change blindness have the biggest effects. Even if the psychological studies seem a bit artificial, they might mimic the circumstances in which the effects are the most important both to identifying the causes of accidents and to assigning responsibility for accidents.

One final link is also missing to connect the erroneous intuitions about cognitive abilities to the process of assigning blame in the courtroom: No direct empirical evidence exists on the issue. Although psychologists have conducted numerous experiments to identify misperceptions about cognitive abilities, no one has yet clearly demonstrated that these misperceptions lead to mistaken assignments of blame. It may be that the legal context adds safeguards that prevent the kinds of mistaken attributions that might arise from misperception of cognitive ability. A reluctance to assign blame to individuals who otherwise seem to have tried their best to avoid accidents might make factfinders skeptical enough to overcome their misunderstanding of cognitive abilities. Nevertheless, in the context of eyewitness identification, psychologists have convincingly demonstrated that mistaken beliefs about cognition can and do lead to wrongful criminal convictions.⁵⁰ Assignment of blame in a tort suit is much less serious than in a criminal case; hence, the influences cognitive abilities misperceptions on blame might be even more pronounced in this setting. All available evidence and some intuition indicate that overestimation of cognitive abilities has

⁵⁰ Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002).

enormous potential for affecting judgments in tort suits, even without the final link in the empirical chain.

II. CONSEQUENCES OF THE MISMATCH BETWEEN THE REASONABLE AND REAL PERSONS

A mismatch between people's actual abilities and those of the law's reasonable person seems, at least superficially, to be a legal disaster. The magnitude of this effect is circumstance-specific, but overstating people's ability to avoid accidents generally leads judges and juries to brand as negligent conduct that was reasonable. Reliance on this misunderstanding of cognitive abilities might be unjust and create inefficient incentives. It is easy to overstate the adverse effects of this problem, however. A closer analysis suggests that courts do not completely trust the somewhat ad hoc reasonable person test. Several legal doctrines have evolved that reduce the influence of the reasonable person test and thereby ameliorate, to some extent, the impact of the mismatch. These doctrines, however, are not the product of judicial recognition of the intuitive misunderstanding of cognitive ability. Rather, they have resulted from efforts to address other concerns or from a sense that the reasonable person test is too vague to be reliable. Consequently, these doctrines are likely to provide only inadequate mechanisms to address the consequences of overstating people's cognitive abilities.

A. *Strict Liability in the Guise of Negligence*

If judges and juries persistently overstate the cognitive abilities of legal actors, then the system of negligence, in practice, might more closely resemble a system of strict liability. When a legal factfinder mistakenly assumes that a reasonable person could have avoided an accident, the factfinder might mistakenly attribute the accident to some unreasonable conduct, rather than to misfortune. Thus, people who are acting reasonably will seem unreasonable when judged under a standard that misstates human abilities. In practice, the system finds people liable even though their behavior conformed to that of the reasonable person. In effect, the system consists of liability without fault, that is, a system of strict liability. The conversion of de jure negligence into de facto strict liability has some adverse effects on the incentives tort law creates and its ability to promote corrective justice.

1. Adverse Incentives

Although it intuitively seems that the unwitting conversion of a negligence system into a strict liability system would profoundly influence the incentive structure tort law creates, the effects are apt to be much more subtle. It is well understood in the legal literature that strict liability does not create undesirable incentives with respect to the level of care actors might take.⁵¹ That is, whether legal actors face a negligence regime or a strict liability regime, they face incentives to take reasonable precautions against causing harm. Under a negligence regime, someone who takes all reasonable precautions against causing injury saves money by avoiding liability. Any extra safety measures beyond reasonable care simply impose costs on the actor without conferring any benefits to him. Under a strict liability regime, an actor is responsible for all harm his activities cause, whether he takes reasonable precautions or not. Under such a regime, a person minimizes his total costs by taking all reasonable precautions and taking no further precautions. Safety precautions above and beyond reasonableness would reduce the number (or cost) of accidents for which someone is strictly liable, but the costs to the actor would exceed the savings. So long as courts define reasonableness as minimizing total social costs, then both negligence and strict liability create the same incentives as to the degree of care to take when engaging in an activity. Both schemes encourage people to behave as would the reasonable person.⁵²

Strict liability, however, has several advantages. Strict liability is a cheaper system to administer because it does not create complicated and expensive litigation over what constitutes reasonable behavior under the circumstances.⁵³ Although litigation over whether the actor has actually caused the harm may still occur, a negligence system incurs the same litigation expenses for proving causation. Strict liability simply removes the fault issue from the litigation process. Inasmuch as this issue is frequently contentious and costly to resolve, strict liability will make the system more cost effective. Furthermore, relieving the court of the burden of determining

⁵¹ See Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

⁵² *Id.*

⁵³ LANDES & POSNER, *supra* note 7, at 65.

whether conduct was negligent might improve decision making. The actor might well know more about the costs and benefits of the available precautions than a court would and might thereby make a better choice. Strict liability gives actors the incentive to make the best choice with no need for a court to judge their conduct afterwards. As a related issue, because of the uncertainty associated with the reasonableness test, a negligence rule creates incentives to take an excess of care.⁵⁴ This occurs because potential tort defendants may recognize that if they are slightly more careful, they might avoid liability, thereby significantly reducing their likely costs.

Strict liability has its problems, however, particularly when it is unintended. Most notably, it raises the cost of the underlying activity.⁵⁵ As the driving example shows, it is more expensive to drive under a strict liability system than under a negligence system. By "taxing" an activity, strict liability might inefficiently shift people's behavior from one activity to another. More people might walk if driving were governed by strict liability.⁵⁶ Therein lies the economic danger of administering a negligence system in a way that converts it into a system of strict liability. Limiting liability to negligent conduct is meant to keep down the cost of activities. We want people to be free to drive or walk without facing the costs associated with strict liability. Only in rare instances is strict liability thought to be more sensible.⁵⁷

Furthermore, strict liability that results from a bias in the negligence determination has other undesirable effects. Inasmuch as the scheme is not straightforward strict liability, it still requires that a court assess reasonableness. Thus, a biased negligence system produces results similar to strict liability, but without saving litigation costs. More troublesome, however, is that a negligence system biased in favor of liability also is likely to produce incentives to take an excess of care beyond that required by reasonableness alone.⁵⁸ Because the

⁵⁴ John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Rachlinski, *supra* note 10, at 596-600.

⁵⁵ See POLINSKY, *supra* note 5.

⁵⁶ *Id.*

⁵⁷ For example, manufacturers are strictly liable for manufacturing defects in products liability cases. See James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931-39 (1981) (discussing the virtues of strict liability for manufacturing defects in products liability cases).

⁵⁸ Rachlinski, *supra* note 10, at 611.

system is not true strict liability, the possibility exists that an actor can undertake an excess of care so that when accidents happen, even under a biased inquiry, the court will not find the actor's conduct unreasonable. The savings that the actor realizes from avoiding liability encourages the actor to take excessive precautions. This incentive does not occur with true strict liability because no degree of precaution will protect the actor from liability in the event that harm results.

Consider how this might work, using the running example involving an accident between a driver and a pedestrian.⁵⁹ In the example, the factfinder would find the driver liable because of a mistaken belief that the reaction time of the reasonable person is one second, even though a reasonable person would take 1.5 seconds. If the driver understood that he would be judged as if his reaction time were quicker than is actually the case, the driver could simply drive slower so as to avoid any accident for which he could be held negligent. Suppose that the driver drives at 20 mph. If so, then the braking distance is 45 feet during the 1.5 second reaction time, plus 24 feet traveled after the driver applies the brake for a total of 69 feet. This means that for an accident to occur the pedestrian would have to have appeared in front of the driver at 69 feet or less (otherwise the driver would have stopped in time). With its bias about a one-second reaction time, the jury would assume that a reasonable person traveling at 25 mph or less would have been able to stop within 74.5 feet. Thus, any accident that could occur would necessarily lead a factfinder to determine that the driver was traveling at less than 25 mph. By overcomplying with the requirements of reasonable person test, the driver would avoid liability. This excess compliance would cost the driver in terms of lost time, but avoiding the risk of liability would likely offset that loss. The excess of caution might be worth the price to the driver, even though it is inefficient overall.

Although it might seem perfectly sensible for the system to produce incentives to undertake a slight excess of safety, excess safety has hidden costs.⁶⁰ Often, safety precautions can be so cumbersome that they make the underlying activity worthless. Consider, for example, police safety vests; they can be made with open sides or completely wrap around the user.

⁵⁹ See *supra* note 35 and accompanying text.

⁶⁰ Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996).

The latter type are safer, but they make it so difficult for the user to move that they create other risks. Similarly, if drivers drive too slowly, they might reduce the overall speed of traffic, thereby costing other drivers time or creating traffic jams that cause pollution. Thus, excess safety might undermine its perceived benefits.

2. Corrective Justice

Whatever the economics, strict liability seems unjust. Branding someone's conduct as negligent when it was reasonable smacks of inherent unfairness. As a matter of justice, if the courts deliberately have adopted a system of liability for negligence, then finding people negligent when they actually took due care is wrong. The wrongful finding of negligence mislabels an innocent party as a wrongdoer and compensates a party that is not entitled to compensation.

Furthermore, where the actor only seems negligent because of a biased negligence calculus, the injured party does not deserve compensation for the harm because the actor was not, in fact, negligent. The victim of the accident did nothing to deserve the injury, but if the actor who caused the injury behaved reasonably, then the actor is not at fault. After all, the actor obeyed society's command to behave reasonably. The law's basic maxim to let the harm lie where it falls trumps any desire to compensate the injured victim. Shifting the cost onto the actor when the actor was indeed reasonable is costly and unfairly brands the actor a wrongdoer. Unless the actor actually failed to conform to social norms, the cost and the label are not justifiable. Biased negligence processes thereby undermine the very morality of the tort system.

On the other hand, whatever the label, this misbranding is perhaps not such a serious injustice. Most drivers, for example, recognize that the act of driving exposes them to liability. They know that even if they are careful, they might find themselves the target of a lawsuit, which they might even lose. Most people insure against serious loss and live with the consequences of a system that might occasionally mislabel one's conduct. Furthermore, after an accident occurs, the defendant can review his own conduct only in light of the meta-cognitive biases that psychologists have identified. If the driver is uncertain about what speed he was traveling, he might make the same inferences about reaction time, reasonableness and speed that the legal factfinder might make. Oddly enough, even

if the process is unjust, the actor himself, suffering from the same cognitive biases as the factfinder, might fail to notice the injustice.⁶¹

Furthermore, there is a global sense that some of the biases in cognitive meta-cognition are intuitive. A lifetime of experience teaches people that when they focus their attention on one task, they often fail to notice peripheral events.⁶² The ability to avoid processing distractions is the essence of concentration, and people learn that when their attention is so focused, they likely will fail to process stimuli outside of their attentional focus. In the driving example, the fact that the driver was traveling too fast is not what makes him a negligent danger to pedestrians. Rather, it is the attentional focus that being late creates. The pressure of having to drive quickly can lead the driver to miss important aspects of the environment and thus fail to respond to them within an appropriate time. The mistake lies in failing to arrange one's time properly so as to avoid driving while in a hurry. Arguably, inasmuch as everyone seems to suffer from meta-cognitive biases, this mistake is not negligent—it is a byproduct of how reasonable people think about their cognitive abilities. Nevertheless, it is a mistake. In the end, people might get roughly what they deserve; people put others at risk because they overestimate their abilities, yet they are found liable because a factfinder also overestimates their abilities.

3. The Effect of Conflicting Cognitive Biases

The influence of these meta-cognitive biases also likely has an effect beyond the courtroom. If people overstate cognitive abilities, then they also might overestimate their own ability to perform various skilled tasks, such as driving, safely. For example, if drivers overestimate their ability to perceive and react to hazards, they might drive faster than they would if their understanding of their cognitive abilities was accurate. In fact, overestimating cognitive abilities might underlie the common finding that people are overconfident about their abilities. For example, in one study, 86% of automobile drivers stated that they drive more safely than the average driver.⁶³ If

⁶¹ Rachlinski, *supra* note 10, at 600-02.

⁶² See *supra* notes 41-43 and accompanying text.

⁶³ Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143 (1981).

people constantly see other drivers failing to react as quickly as they predict they would be able to react, people experience a world filled with unreasonable drivers who are less safe than they are.

Legal scholars have noted that such overconfidence in ability might lead people to engage in conduct that seems safe to them but that is, in fact, negligent or even reckless.⁶⁴ People who believe that they can easily avoid an accident might not worry much about their risk of causing an accident or the legal liability they might face if they do cause an accident. Overconfidence can thus undermine the ability of the legal system to induce people to undertake reasonable care. People who engage in unreasonable conduct while believing their conduct to be reasonable cannot easily be deterred by the prospects of tort liability.

In the only thorough assessment of the effects of excess optimism on efforts to avoid accidents, however, Eric Posner has argued that, although an excess of optimism can induce people to undertake excessively risky activities, it also can induce people to take an excess of precautions under some circumstances.⁶⁵ Posner contends that optimism can produce an excess of care if people overestimate the benefits of precautions that they consider taking. For example, if drivers believe that undertaking a single precaution (perhaps driving 5 mph under the speed limit) would reduce the possibility of an accident to zero, then they will undertake that precaution, even if doing so is not cost-effective. It is unclear whether an excess of optimism arising from misperception of cognitive abilities would operate the way Posner describes. Overestimating one's cognitive abilities seems intuitively like a prescription for inducing dangerous conduct. In particular, overestimation of one's abilities might keep drivers from slowing down when they face a complicated or distracting array of stimuli. If such overestimation also produces a tendency to overestimate one's ability to avoid an accident with just a little excess of care, however, it might produce an excess of care.

⁶⁴ Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

⁶⁵ Eric A. Posner, *Probability Errors: Some Positive and Normative Implications for Tort and Contract Law* (Univ. Chicago Law School, John M. Olin Law & Economics Working Paper No. 161, 2d series, 2002).

If overestimation of cognitive abilities produces excessively risky conduct, then it has a doubly pernicious effect on the legal system. It may be that we have a system in which people unwittingly drive negligently (i.e., they drive in a manner they mistakenly feel is safe), while at the same time they are held to a standard that they cannot meet (i.e., legal factfinders assume the reasonable person can drive more safely than people really drive). Even though the legal system is actually creating incentives for drivers to drive too slowly, drivers, overconfident in their abilities, disregard or fail to recognize these incentives and go on driving in a dangerous fashion.

Overestimation of cognitive abilities by both potential tortfeasors and legal factfinders thus combine to produce an odd system. Potential tortfeasors overestimate their abilities and thereby fail to undertake reasonable precautions against causing harm. At the same time, the system, overestimating peoples' abilities, holds potential tortfeasors accountable for failing to use the abilities the system mistakenly ascribes to them. In effect, people behave as if they possess heroic cognitive abilities and are held accountable as if they had such abilities. Although it is possible that tortfeasors recognize that they will be held to a high standard if they are found liable and adjust their behavior accordingly, it does not seem likely that this doubly biased system is altogether a sensible arrangement.

B. *Legal Doctrines that Blunt the Effect of Misjudgment*

Several developments in the common law over the past century have blunted the effect of mistaken beliefs about cognitive abilities on judgments of liability. Indeed, if the effects of these mistaken beliefs are widespread, it would be surprising if centuries of common-law development had not, in some way, accounted for these misperceptions. Judges, as intuitive psychologists, are unlikely to have uncovered the same phenomenon that required careful research to document, but judges might have observed difficulties with the reasonable person test as it evolved. Biased application of the reasonable person test might have produced undesirable or unreliable sets of verdicts that astute courts or legislatures might, over time, have noticed and attempted to correct. Identification of such problems might be one reason that courts developed alternative means of identifying negligence.

1. Bright Line Rules

In fact, courts avoid the ad hoc implementation of the reasonable person test whenever possible. To combat the undesirable effects of the reasonable person test, several bright line rules of conduct have emerged as a means of making negligence judgments more reliable. Most notably, for accident law, the violation of a safety rule or regulation provides per se evidence of negligence.⁶⁶ For example, driving at a speed in excess of the speed limit is, without excuse or justification (as might be the case for a life-threatening emergency), sufficient evidence to support a determination that the driver was negligent. In effect, drivers are not entitled to rely on their own judgment about what would constitute a safe speed, nor may a judge or jury substitute their judgment. The law provides a safe maximum speed, and exceeding it is negligence, even if one believes a reasonable person would do so.

To be sure, bright line rules are incomplete. Bright line rules tend to be asymmetric. Although exceeding the speed limit provides conclusive evidence that the driver was traveling at a negligent speed, driving within the posted speed limit does not provide per se evidence that the driver was driving at a reasonable speed.⁶⁷ This leaves plenty of room for judges and juries to determine the safety of a driver who does not cross a bright line but who nevertheless might be negligent.

2. Comparative Negligence

Perhaps the most dramatic shift in negligence law in the last half-century has been the nearly universal adoption of shared liability systems.⁶⁸ The common law developed under a fairly absolute system in which the courts attributed liability completely to the plaintiff or the defendant. Defendants found to be negligent could expect to pay for the full extent of harm their negligence caused unless they could show that the plaintiff was also negligent, in which case they would pay nothing. This system, known as contributory negligence, however, survives only in a handful of American jurisdictions.⁶⁹

⁶⁶ DOBBS, *supra* note 4, at 315-16.

⁶⁷ KEETON, *supra* note 11, at 233.

⁶⁸ DOBBS, *supra* note 4, at 503-04.

⁶⁹ *Id.* at 504.

Comparative negligence regimes, in which the two negligent parties share liability, are now the dominant norm.

Comparative negligence can blunt the effects of meta-cognitive biases on the assessment of negligence. The same biases that would lead a factfinder to overestimate the defendant's abilities would also lead the factfinder to overestimate the plaintiff's abilities. For example, the jury that believes that a defendant who was driving reasonably would have seen a pedestrian in time to avoid him might just as likely think that a reasonable pedestrian would have seen the driver in time to leap out of the way. Even if neither the driver nor the pedestrian are at fault, both will be held responsible. To be sure, if the defendant was not really at fault, the defendant should have to pay nothing. The comparative negligence scheme, however, reduces what the defendant would have to (wrongfully) pay under a biases assessment of liability. Likewise, even though the plaintiff might be blameless (and hence should be entitled to a full recovery), the jury might find him negligent. His recovery will be reduced because of meta-cognitive biases, but not eliminated, as it would be under a contributory scheme. A comparative scheme might lead to a balancing of biases.

Misperceptions of cognitive abilities help explain the attraction of a comparative negligence system. Although the attraction of comparative negligence might seem obvious—in that it apportions liability between the parties in a way that is commensurate with their relative fault—the comparative fault system also entails a significant downside. Economic analysis suggests that comparative fault does nothing to make incentives more efficient, but it does make the system more expensive because it is a complicated determination that entails significant litigation costs.⁷⁰ Thus, an economic efficiency analysis finds little or no use for comparative negligence. Aside from economics, the scheme also seems to blunt many of the useful, sharp distinctions the law makes between degrees and types of misconduct. Some misconduct is so pernicious that the liability it creates should not be reduced by the good fortune of directing it at someone who may have been only slightly negligent. The overall advantage of a comparative system becomes more apparent once the courts recognize that the negligence analysis they have created

⁷⁰ LANDES & POSNER, *supra* note 7, at 82.

contains significant potential for inaccuracy. If the reasonable person test is truly unreliable, then it makes little sense to rely on it as if it were a perfect indicator of reasonable and unreasonable conduct. In effect, the comparative scheme is a less confident approach to liability that softens the unnaturally sharp divisions the law otherwise might make. The courts' lack of confidence in the reasonable person test can be justified in many different ways, but clearly if factfinders lack an accurate understanding of human cognitive abilities, their assessments of reasonableness commonly will be inaccurate.

3. The Adverse Consequences of Comparative Negligence

Even though the switch to comparative negligence blunted the rough edges that contributory negligence creates, thereby reducing the adverse impact of mistaken beliefs about law, it also might have undermined the development of some bright line rules that could have further reduced the effect of meta-cognitive biases on the courts. For example, the courts were at one time developing a "legal distraction" doctrine.⁷¹ That is, some courts determined, as a matter of law, that certain distractions common to modern life were so prevalent, uncontrollable and pernicious as to constitute a complete defense to a claim of negligence. For example, in one case, a woman tripped on a recently repaired sidewalk while being distracted by the sound of a nearby car horn.⁷² She claimed that she failed to notice the danger because of the distraction. The court found that such a distraction would have diverted any reasonable person's attention, and deemed her momentary inattention reasonable.⁷³

The legal distraction doctrine developed in response to a comment in the *Restatement (Second) of Torts* defining the skills and abilities of the reasonable person.⁷⁴ The *Restatement* contends that distractions that cannot be avoided might undo a finding of negligence that would otherwise attach to a lapse in attention. It also identifies examples of distractions that do not have such an effect. For example, driving while also trying to quiet a screaming child might be considered a legal distraction,

⁷¹ KEETON, *supra* note 11, § 67.

⁷² Knapp v. City of Bradford, 247 A.2d 575, 575-76 (1968).

⁷³ *Id.* at 577.

⁷⁴ RESTATEMENT (SECOND) OF TORTS § 289 cmt. b (1965).

inasmuch as any reasonable parent might find driving to be more difficult under the circumstances. At the same time, however, the reasonable driver arguably should consider pulling over to console the child. Sudden distractions outside of the actors control might divert most people's attention and should preclude a finding of negligence for inattention. Had the doctrine developed more thoroughly, it would have had to identify whether the decision to press on in the face of distractions would be considered negligent.

In developing this legal distraction doctrine, of course, the courts relied on their own intuition about what a reasonable person would find distracting. In effect, they substituted their own judgment about the effect of distractions on attention for that of a jury. Perhaps such judgments are no better informed than a jury's ad hoc judgments about cognitive abilities applied in every case. Nevertheless, the development of such a doctrine reflects an attempt to reach a consensus on human ability that at least has a chance to be informed by empirical findings and expert analysis.

The doctrine has not flourished, arguably because of the shift to comparative negligence. Courts, in effect, took the easy way out by forcing legal factfinders to weigh the relative fault of each party in a case-by-case fashion. Courts began to proliferate the legal distraction doctrine (much like its more influential cousin, "last clear chance") as a means of softening the apparent harshness of contributory negligence.⁷⁵ Under a contributory negligence scheme, a plaintiff-driver who would otherwise recover from a clearly negligent driver could lose entirely if his attention had lapsed somewhat. This seemed to courts an unjust result if the lapse in attention was not really the plaintiff's fault. The courts developed the legal distraction doctrine to address such circumstances. By contrast, under a comparative negligence regime, courts simply place the conduct of each party into evidence and let the factfinder compare fault under the circumstances.

In a comparative negligence regime, the effects of biases in meta-cognition are uncertain. Both parties will seem more culpable than is the case. In practice, the effects of such biases on each party is that they are unlikely to cancel out each other. Instead, depending on the role that cognitive abilities play in the assessment of each party, one of the two parties may gain

⁷⁵ See Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691 (1953).

some unwarranted advantage. Under a comparative negligence system, however, it is difficult to determine whether overestimation of human abilities generally benefits plaintiffs or defendants more; and further research may be necessary before one can make any clear statements about legal policy.

4. The Plaintiff in Products Liability Cases

One area of law where the courts do seem concerned with the overstatement of human ability is the law governing products liability. If courts overstate people's ability to avoid injuries, then the users of many products might find themselves unable to recover from manufacturers and others in the distributive chain who sell products that fail to protect users against foreseeable lapses in attention or ability. That is, users often erroneously will seem to be negligent in failing to pay enough attention while using a product or in otherwise using the product in an unreasonable fashion. If such findings exonerated manufacturers, they would fail to safeguard against such avoidable injuries. To avoid this problem, courts charge manufacturers with saving plaintiffs from their own negligence, so long as such negligence is foreseeable.⁷⁶

Again consider the example of the driver who is traveling at a reasonable speed, but whose actions are deemed unreasonable because the factfinder overestimates human ability to react to road hazards.⁷⁷ Suppose that instead of hitting a pedestrian the driver hits a large rock in the road, causing him to lose control of the vehicle.⁷⁸ Should the factfinder determine that a reasonable person could have seen the rock sooner than was actually the case, or determine that the driver should have been able to react to the hazard more quickly than actually was possible, the factfinder will identify the driver's negligence as a primary cause of his injuries. If products liability recognizes driver negligence as a defense to any claim by the driver that the automobile manufacturer failed to install available, cost-effective safety devices into the car, then the manufacturer will face fewer incentives to install such precautionary devices. Misperception of plaintiffs' cognitive abilities might make negligence determinations so

⁷⁶ DOBBS, *supra* note 4, at 1027.

⁷⁷ See *supra* note 35 and accompanying text.

⁷⁸ The example is based loosely on *Heaton v. Ford Motor Co.*, 248 Or. 467 (1967).

common and so erroneous that the manufacturer's ability to hide behind a phony negligence defense would dramatically undermine the manufacturer's incentives to make a car crashworthy. Recognizing this, the courts limit the use of a negligence defense when such negligence is foreseeable.

This analysis is even more compelling for lapses in attention. A plaintiff who sliced off a finger while using a meat grinder can still recover from the grinder's manufacturer, even if he was negligently distracted while using the product.⁷⁹ The logic underlying this outcome is that manufacturers of such devices know that, at one time or another, users will get distracted or use the product in a way that is, given human ability, unsafe. If, in the face of such knowledge, a manufacturer fails to install cost-effective safeguards to protect the user from his own negligence, then the manufacturer will be liable.⁸⁰

In developing modern products liability law, courts have recognized the inevitability that users occasionally will take shortcuts or get distracted. By adopting this position in products liability cases, courts effectively avoid ad hoc, case-by-case judgments about users' abilities. The manufacturer, with a host of knowledge about the product and the likely consequences of the users' lapses in attention or ability, is much better positioned to prevent harm.⁸¹ Furthermore, manufacturers effectively control the circumstances that determine the product's use: whether it will invite distraction, present an overly complicated array of stimuli or encourage haste. Manufacturers' design choices are closely analogous to drivers' decisions about when and under what conditions to drive. Like drivers, manufacturers might also suffer from misunderstandings of cognitive abilities. But unlike drivers, manufacturers have the capacity to employ human factors experts and rely on aggregate data on the effects of product design to guide their choices. Ignorance of human ability might constitute a viable defense for an automobile driver, but not for an automobile manufacturer.

Hence, the manufacturer remains accountable, even though it may appear that users were negligent. Even though courts will discuss plaintiffs' apparent negligence in such cases,

⁷⁹ DOBBS, *supra* 4, at 1024.

⁸⁰ *Id.*

⁸¹ *Id.* at 985-86.

plaintiff negligence does not preclude recovery. In effect, courts do not trust their own judgments about a user's negligence, instead they force manufacturers to guard against foreseeable misuse by the consumer. Thus, even if courts overstate users' abilities, this overstatement does not adversely affect liability and recovery in the products liability system.

C. *Expert Testimony on Human Performance and Perception of Human Performance*

Perhaps the most straightforward means of correcting erroneous beliefs about cognitive abilities is with expert testimony. Under prevailing standards for admissibility of expert testimony in the federal courts (which are also followed in many states), expert testimony is admissible if it is reliable and would prove helpful to the jury.⁸² Reliability requires courts to delve into the scientific process, but the standard that courts use clearly favors admissibility of the psychological research on both cognitive ability and on meta-cognition. Virtually all of the psychological research is published in peer-reviewed journals, which courts view as an important element of reliability. Moreover, none of it was prepared specifically for litigation, which has been a problem for some types of testimony. Such testimony faces other obstacles, however.

Courts might determine that expert testimony on human abilities is not helpful to the factfinder. To the extent that judges believe that intuition about human abilities is reasonably accurate, they will see no need for expert testimony. Such reasoning clearly treats psychology as a second-class science, but scholars have identified such treatment in other contexts.⁸³ A serious review of the research on cognitive beliefs should convince an objective observer that there is much that is not intuitive about human cognitive ability. The recent research on meta-cognition should pave the way for admissibility of research on cognitive ability.

A more serious obstacle to admitting expert testimony on meta-cognitive processes is that such testimony might sound to judicial ears more like testimony about the law than testimony about helpful facts. The meta-cognitive research goes well beyond identifying gaps in ordinary understanding of

⁸² *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

⁸³ *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* (Michael J. Saks & Charles H. Baron eds., 1980).

cognitive abilities. Indeed, the meta-cognitive research undermines reliance on the reasonable person test altogether. To date the literature includes no evidence that erroneous beliefs about human cognitive abilities can be corrected sufficiently to make the system workable. Consequently, testimony indicating that lay intuition overstates cognitive abilities is more of a general legal issue than a factual or contextual issue that might dispose of a specific case. As such, it is best addressed toward broad legal reform rather than case-specific inquiries. Courts will therefore be reluctant to admit it because expert testimony is supposed to help the factfinder determine what happened, not help the court determine what rules to apply.

CONCLUSION

The conclusions of cognitive psychologists who study what people believe about cognitive abilities identify a deeply troubling aspect of the reasonable person test. The reasonable person must be endowed with cognitive abilities in order to aid the factfinder in identifying reasonable and unreasonable conduct. If these hypothetical abilities exceed those of most people, then the system improperly will identify reasonable conduct as being unreasonable and the standard to which litigants are held will be unfair. Although some legal doctrines soften the effects of this error somewhat, these doctrines were not intended to remedy meta-cognitive biases and cannot be expected to correct perfectly for them. Neither is expert testimony necessarily going to correct the problem in any meaningful way.

Realistically, the research on visual meta-cognition is unlikely to affect the widespread reliance on the reasonable person test as it now exists and is implemented. First, the test has a long history behind it. Adherence to such a long history of precedent is generally advisable, inasmuch as departures from it might have many unintended consequences. Second, the intuitive aspects of the test are at the heart of its virtues. The intuitively based aspect of the test is designed precisely to make the negligence inquiry tractable. Tractability at the expense of accuracy is hard to tolerate, but the degree of inaccuracy would have to outweigh the virtues of tractability. Third, as the research now stands, the influence of meta-cognitive biases on real behavior and real negligence determinations is uncertain. In the real world, other aspects of

cognitive processes might allow people to muddle through well enough.⁸⁴ Meta-cognitive errors may lead us astray only in unusual or novel circumstances.⁸⁵

Despite these limitations, the research on meta-cognitive biases has serious implications for the legal system that should not be ignored. Even a venerable judicial institution should not be exempt from progress in the social sciences. To the extent that the heavy reliance on mistaken intuitive beliefs about cognitive biases creates mistakes, the courts should entertain some remedy.

⁸⁴ See John H. Flavell, *Development of Knowledge About Vision*, in VISUAL METACOGNITION: THINKING ABOUT SEEING (Daniel Levin ed., forthcoming 2003).

⁸⁵ See LEVIN & BECK, *supra* note 39.

