REASONABLE WOMAN STANDARD OF CARE

by

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There are some situations where neither the reasonable person much less the reasonable man standard of care will suffice in measuring a defendant's blameworthiness in a civil cause of action.[1] Instead, in certain tort and discrimination actions brought by women, the issue of whether the defendant's conduct was culpable should be assessed in relation to how a reasonable woman (or the ordinarily prudent woman) would view such conduct under the circumstances.[2] This proposal is likely to be viewed with a lot of scepticism and perhaps a bit of snickering in some quarters. For some people the concept of a 'reasonable woman' is an oxymoron.[3]

Consider Sir Alan Herbert's famous parody, *Fardell v. Potts*: *The Reasonable Man*[4] in which the fictional appellate court reviewed the damages award against a woman who was found to have negligently navigated her

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1 The situations I will address all involve applying the reasonable woman standard to the (usually male) defendant in actions by women plaintiffs. I will not address situations where the person seeking to use the reasonable woman standard is a woman defendant. See, eg, *State v Wanrow*, 88 Wash 2d 221, 559 P 2d 548 (1977) (reasonable woman standard applied to a woman claiming self-defence in a criminal prosecution for murder).

2 There are many other legal issues where reasonableness may be the standard applied. For example in *Hall v Shieban* (1989) EOC sec 92-250 reversing (1988) EOC sec 92-222 the full Federal Court found that Justice Einfield had erred in measuring psychic injury damages resulting from sexual harassment "in light of such matters as 'reasonable community standards and expectation'; whatever they may be." (1989) EOC sec 92-250 at 77,412 (Wilcox, J.). The court said the appropriate standard was the psychic injury the sexually harassed woman actually suffered even if 'the effect of the conduct on the complainant is unusually severe (since) a sexual harasser takes his victim as he finds her.' *Ibid.*

In contrast the Federal Court in *Hall* emphasised that the standard for measuring whether section 28(3)(a) of the *Sex Discrimination Act* was violated is 'an objective one'. *Ibid* at 77,410. The section prohibits unwelcome sexual conduct by an employer towards an employee were the employee 'has reasonable ground for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage (her) in any way in connection with (her) employment or work ....' The Federal Court held that 'it was erroneous to judge the application of sec 28(3) by reference to the actual belief' of the three complainants. *Ibid.* The court specifically said that in measuring the significance of the disadvantage caused by the defendant's conduct, 'what may or may not constitute reasonable grounds will be a matter for determination by the relevant Tribunal of fact. It is unsafe and undesirable to expand upon it by the conjuration of such numinous entities as the "reasonable" or "sensible" woman.' *Ibid* at 77,431.

An open question remains under the Commonwealth's *Sex Discrimination Act* as to whether the standard to be applied in determining if a hostile work environment existed under section 28(1) will be objective or subjective and, if it is objective, whether it will be tested under the reasonable person, reasonable woman or reasonable victim standard of care. *Ibid* at 77,390.

3 I think that it's more likely a tautology.

4 A. P. Herbert, *Uncommon Law* at 645.

boat into the plaintiff's punt. The appellate court held that the trial court erred in finding her negligent. Since the law does not recognise such a thing as a reasonable woman, the woman defendant here couldn't be held negligent. Quoting from the case:

> (T)here exists a class of beings illogical, impulsive, careless, irresponsible, extravagant, prejudiced and vain, free for the most part from those worthy and repellent excellences which distinguish the Reasonable Man, and devoted to the irrational arts of pleasure and attraction .... (therefore) I find that at common law a reasonable woman does not exist.[5]

Well, you may be wondering, can't she take a joke? Doesn't she recognise parody for what it is? My answer is yes, I know this is parody; I get it. But you'd be surprised how many law students today both in my and my colleagues' classes in the United States don't get it and therefore do not find this to be at all humorous. And one of my Queensland colleagues stopped using *Fardell* in her torts classes because the students were no longer amused. Why are law students in places where women make up as much as fifty percent of the class not viewing Herbert's parody as humorous? Maybe because they think that there is a serious issue whether the law believes there is such a thing as a reasonable woman; a reasonable man, of course....a reasonable person as an abstract mythical being okay....but a reasonable woman as something to be seriously considered by the law?

The reasonable man standard has a prominent place in the history of the common law. Indeed, it is considered the very 'expression of the law's fairness and objectivity.'[6] It seeks to eliminate all differentiations between persons by the adoption of a fictional abstract standard which is neither the judge, nor jury themselves nor any other real life person. It is a mediating concept by which the competing interests of the individual defendant and those of the plaintiff and society are balanced.[7] In the United States it has often been viewed as a risk versus utility[8] or, in Posnerian economic terms, cost/benefit analysis.[9] The judge or jury are asked to dispassionately weigh the competing interests in a neutral and objective fashion. Through the reasonable man standard of care the law mediates between the liberty interests of the defendant and the security interests of the injured party.[10]

The reasonable man standard first appeared in print in the 1837 English case *Vaughan v. Menlove* [11] which described him as 'the man of ordinary prudence'. *Vaughan* specifically rejected the defendant's standard of subjective good faith in preference for the objective reasonable man standard. The idea was that there is a minimum standard that all persons are required to

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5 *Ibid* at 648.

6 Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L J 1177, 1178 (1990).

7 See, eg, *Council of the Shire of Wyong v Shirt*, (1980) 146 CLR 40, 47-48 (High Ct of Aust).

8 See, eg, *United States v Carroll Towing Co*, 159 F 2d 169 (2d Cir 1947).

9 See, eg, Posner, *Conservative Feminism*, U of Chicago L Forum 191, 214 n 43 (1989).

meet whether they are actually capable of doing so or not.[12] Thus, from the start, the reasonable man standard of care was designed as a strict liability standard as far as those defendants who were morally faultless but incapable of meeting it. As Justice Oliver Wendell Holmes said in *The Common Law*:

> When 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 neighbours, no doubt his congenital defects will be allowed for in the courts in heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.[13]

Since the negligence standard is already a strict liability standard for some people, my proposal that some male defendants[14] be subjected to strict liability under a reasonable woman standard should not be seen as particularly radical.

In some quarters the reasonable person standard of care followed close on the heels of the reasonable man. As early as the late nineteenth century the reasonable person standard was showing up not infrequently in American cases. Nevertheless the reasonable man has been a hardy survivor. The influential American Law Institute's *Restatement (Second) of Torts* published in 1965 still referred to the negligence standard of care as the reasonable man[15] and my understanding is that although the reasonable man has not been sighted much recently in New South Wales and Victoria he still dominates the Queensland courts. For example, in 1988 the Supreme Court of Queensland in *Bradbury v. Honshall* said that for contributory negligence

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10 Ehrenreich, *supra*, note at 1191.

11 (1837) 3 Bing (NC) 467, 132 Eng Rep 490.

12 The classic formulation of the reasonable man standard comes from *Blyth v Birmingham Waterworks Co*, (1856) 11 Ex 781, 784, 156 Eng Rep 1047:

> Negligence is the omission to do something that a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

13 O. W. Holmes, *The Common Law* 108 (1881).

14 The defendant could conceivably be female. One incident recently described to me concerned a male-dominated workplace where one woman employee was constantly putting up sexist jokes and photographs on her bulletin board. The male employees were highly entertained by this but her women co-employees were deeply offended. Under the reasonable woman standard what she was doing was unreasonable and injurious to women in her workplace even though she, the perpetrator, was female. Conversation with Mandy Haynes, University of Tasmania School of Law, May 2, 1991.

15 Section 283.

the question is 'whether .... the conduct of the plaintiff was incompatible with the conduct of a prudent reasonable man.'[16]

Again, you say, can't she see that the law's use of reasonable man is meant to be the same as its use of reasonable person. That is, the 'man' in reasonable man is meant to represent mankind, that is, all personhood -- that the difference between reasonable man and reasonable person is purely semantics. My response is that maybe that's what it is supposed to mean today but back when all judges, juries, lawyers and law professors were men I do not think that's what it meant or was supposed to mean.[17] In the late nineteenth century and early twentieth century when women first unsuccessfully attempted to become lawyers, judges read the language of the statutes which described who could practice law as being 'any person', as meaning 'any man'.[18] Personally, I would not have trusted those judges to treat the reasonable man as in fact meaning the reasonable person.

Take a look at the examples given to describe the reasonable man/person standard. In the United States the example given is the man who mows the lawn in his shirtsleeves and who takes the magazines at home; in England it is the man who rides the Clapham omnibus.[19] And I've heard tell the Aussie translation of this is 'the man who rides the (now nonexistent) Bondi tram'. These symbols of the reasonable person explicitly set up middle class male values as the source of the objective neutral standard. They define reasonableness as what a member of that particular class and gender might think.[20]

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16 (1988) ALR 80 at 67,333 (S Ct of Queensland, Full Court).

17 See Allen, 'One Law for all Reasonable Persons?', 16 *Int'l J of the Soc of Law* 419, 422 (1988):

> At the point when the Reasonable Man Test was first becoming established, early in the 19th century, English law still treated femininity as an unquestioned legal disability, akin to infancy: women were not yet even constituted as legal persons.

18 See, eg, *Re Edith Hayes* (1904) 6 WALR 209, 213-14:

> (T)he words in the statute are 'every person'. That does not appear to me to be very forcible. The counsel representing the applicant said that there were lady doctors, why not lady lawyers? The *Medical Act* says, `Every person, male and female, may be a doctor.' Those are different words from what are used in the *Legal Practitioners Act*.

See also Mossman, 'Women Lawyers in Twentieth Century Canada: Rethinking the Image of Portia' in *Dissenting Opinions* edited by Regina Graycar at 84-85 (Allen & Unwin 1990).

19 *Hall v Brooklands Club* (1933) 1 KB 204, 224:

> The 'reasonable man' has been described by Greer, L.J. as 'the man in the street' or 'the man in the Clapham omnibus'; or as I recently read in an American author, 'the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirtsleeves.'

See also Parsons, 'Negligence, Contributory Negligence and the Man Who Does Not Ride the Bus to Clapham' 1 Melb L Rev 163 (1958) (refers to him as 'the Clapham gentleman').

20 Ehrenreich, *supra* note at 1213.

See also Estrich, 'Sex at Work', 43 Stanford L Rev 813, 846 (1991).

Even if the reasonable man/person standard is replaced by a reasonable woman standard a problem would remain as to who is the reasonable woman. Since this

Even when 'reasonable person' is the standard used, in fact the standard is a masculine one. I am willing to accept the use of this presently masculine standard when it comes to most negligence cases such as auto accidents, professional malpractice or products liability actions although a broadening of the scope of who is a reasonable person beyond middle class white males needs to be diligently pursued.[21] In such situations the evil which introducing a reasonable woman standard of care would create outweighs any symbolic or actual benefit it might produce. I believe that application of a reasonable woman standard of care to women defendants in ordinary negligence actions would lead to counterproductive stereotyping of women as mentally and morally weaker, more emotional, irrational and less dependable. Some women defendants might get off but women in general would not be well-served. The reasonable woman standard of care would be used not to treat women as just different from men but, also, as lesser than men.[22]

My proposal is more modest. It focuses on civil remedies for injuries which would be classified as dignitary or discriminatory harms and which, more often than not, involve intentional conduct. For example, I would apply the reasonable woman standard to assess a defendant's conduct in civil actions brought by women for sexual harassment, rape, offensive battery, intentional infliction of emotional distress and false imprisonment.

When what is involved is emotional or dignitary injury I believe that the differences in the socialisation processes and power relations that women and men experience make many of them perceive what is harmful quite differently. This is especially the case when the harm is sexual or involves disparities in physical strength. Much male conduct which women find

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standard is most likely to be applied by judges, it is likely to remain a white middle class standard. And if poor women or women of colour have different perceptions of what is harmful conduct than do white middle class women then the standard when applied to their claims of injury would fail to consider their views on what is reasonable. The risk involved in attempting to solve this by including more factors besides the gender of the injured party in the reasonableness equation would be that stereotyping rather than empathising would likely occur. This risk exists even with the reasonable woman standard, see *infra* notes 21 and 22 and accompanying text.

21 There may be some negligence and products liability cases which involve injuries that are uniquely limited to women where application of the reasonable woman standard of care to the defendant's conduct might be appropriate. Two possible situations are products liability cases against the manufacturers of such products as DES, see, for example, *Sindell v Abbott Laboratories*, 26 Cal 3d 588, 163 Cal Reptr 132, 607 P2d 924 (S Ct Ca 1980), or the Dalkon Shield, see, eg, *In re A. H. Robins Co*, 88 Bankr 742 (ED Va 1988); and medical malpractice cases against doctors who perform unnecessary hysterectomies, see, for example, *Guin v Sison*, 552 So 2d 60 (La App 1989), or unnecessary caesarean sections, see, eg, Berkman, 'A Discussion of Medical Malpractice in Caesarean Section', 70 Or L Rev (forthcoming 1991). See also Paul, 'The New Zealand Cervical Cancer Study: Could it Happen Again?', 297 British Med J 533 (1988).

22 See, for example, Finley, 'A Break in the Silence: Including Women's Issues in a Torts Course', 1 Yale J of L & Fem 41, 64 (1989); Allen, *supra* note at 430-31.

Professor Jean Love of the University of Iowa School of Law recently raised objection to the use of the reasonable woman standard of care because she believes it cannot adequately take into account the different expectations of lesbians. She believes a flexible reasonable person standard is more capable of taking into account the different expectations of reasonable people based on their sexual preference,

offensive is viewed by men and therefore the law, as harmless and innocent. This gap between male and female perceptions shows there is a lack of social consensus on appropriate standards of behaviour. It 'reflects the ambiguity of existing social norms'[23] that makes the reasonable person standard problematic.

I am looking at these kinds of injuries from a feminist perspective. I believe that male dominance permeates society in general and the workplace in particular. The general power imbalance between men and women 'is magnified by the superimposed power relationship between employer and employee.'[24] This *status quo* needs to be changed to accommodate women's feelings and perceptions of harm.

Unlike a philosopher who tries to prove her theory by tackling the hardest case first, I am not going to try to prove that the reasonable woman standard should be applied to ordinary negligence cases such as auto accidents. As I said earlier, I don't think it should. Instead I am going to start with the easiest case, hostile work environment sexual harassment. I will show that at least for this type of harm, it matters whether you apply a reasonable man, reasonable person or reasonable woman standard of care to a defendant's conduct and, that the reasonable woman standard of care is the appropriate one. By arguing that sexual harassment defendants should be held to a reasonable woman standard of care I am challenging the way male and female work relationships are presently constructed.

First a little bit about sexual harassment law. Sexual harassment was only first legally recognised as a specific kind of harm in 1976 when a U.S. federal district court[25] held that a supervisor who fired an employee for refusing his sexual advances was guilty of sex discrimination in violation of Title VII of the 1964 *Civil Rights Act*.[26] Until then although women had been sexually harassed since time immemorial such conduct was not actionable sex discrimination. As far as the law was concerned no harm had occurred.[27] The first Australian case to recognise sexual harassment as a specific injury was decided only eight years ago in 1983.[28]

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sex, race and class. Comment made at University of Texas School of Law's Women, Law and Literature Conference, Austin, Texas, March 1, 1991.

23 Note, 'Sexual Harassment Claims of Abusive Work Environment under Title VII', 97 Harv L Rev 1449, 1451 (year).

24 *Ibid* at 1452.

25 *Williams v Saxbe*, 413 F Supp. 654 (DDC 1976).

26 42 USC sec 2000e *et seq*.

27 Some women have been compensated for the injury caused by sexual harassment through tort law's theories of intentional infliction of emotional distress, battery and assault. More frequently, however, sexual harassment is not viewed as tortious. See, for example, *Andrews v City of Philadelphia*, 895 F 2d 1469, 1486-87 (3d Cir 1990); *Paroline v Unisys Corp*, 879 F 2d 100, 112 (4th Cir 1989).

28 *O'Callaghan v Loder* (1983) 3 NSWLR 89.

In 1979 Professor Catherine MacKinnon published her influential book *Sexual Harassment of Working Women.*[29] Since its publication legislatures and courts throughout the world have adopted MacKinnon's views. For example the Federal Court of Australia cited MacKinnon with approval in the 1989 sexual harassment case, *Hall v. Sheiban,*[30] in support of its conclusion that then President of the Human Rights and Equal Opportunity Commission, Justice Marcus Einfeld's failure to find any harm suffered although he found sexual harassment had occurred was in error. The Federal Court said:

> The Commission's robust view of women's level of tolerance for harassment is not supported by the academic literature, which points to common responses of anger, upset, confusion or sense of isolation following experiences of sexual harassment.[31]

Two types of sexual harassment actions have been allowed in both the United States and Australia. The first, described as *quid pro quo*, occurs where a woman employee is threatened with the loss of her job or other tangible job benefits unless she submits to the sexual advances of her employer.[32]

The second type is abusive or hostile work environment sexual harassment. One Australian hostile work environment case, the New South Wales case, *Hill v. Water Resources Commission,*[33] found a woman had been discriminated against on the basis of her sex when male employees subjected her to a series of unwelcome incidents and comments at her workplace which increased in intensity over time. These included placing a picture from a magazine, showing a naked woman with a boa constrictor wrapped around her on the work notice board with one of Ms. Hill's equal employment opportunity 'Girls can do anything' stickers attached to it.[34]

The United States Supreme Court recognised that hostile work environment sexual harassment was a form of sex discrimination in the 1986 decision *Meritor v. Vinson.*[35] It noted that unwelcome sexualization of the

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29 (Yale U Press, New Haven 1979).

30 (1989) EOC 92-250.

31 *Ibid* at 77,398.

See also *ibid* at 77,433.

32 See, for example, *Aldridge v Booth* (1988) 80 ALR 1.

33 (1985) EOC sec 92-127 at 76,277-8, 76,282-90. The *Hill* court calls this sex-based harassment as opposed to sexual harassment. See J. Scutt, *Women and the Law* 152 (The Law Book Co Ltd 1990).

See also *Ex Parte Burns* (1984) EOC 92-112 at 76,109-11; *Freestone v Kozma* (1989) EOC 92-249 at 77,377; *Hall v Sheiban* (1988) EOC sec 92-227 at 77,147-148.

34 *Hill* at 76-277-8.

35 477 US 57 (1986). One of the reasons given for many Americans choosing now to believe United States Supreme Court Justice Clarence Thomas instead of Professor Anita Hill on the issue of whether he sexually harassed her while she was working for him at the Equal Employment Opportunity Commission in 1982-83 was the fact that she did not bring an action against him when the harassment occurred. It should be noted that the hostile work environment form of sexual harassment was not clearly recognised as an actionable form of sex discrimination in the United States until

work environment so long as it was 'sufficiently severe or pervasive "to alter the conditions of (the victim's) employment and create an abusive working environment" is actionable sex discrimination'[36] under Title VII of the 1964 *Civil Rights Act* even though the act does not specifically address sexual harassment.[37] The conduct must have 'the *purpose* or *effect* of *unreasonably* interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'[38]

Meritor left open the issue of from whose perspective the question of 'unreasonably .... creating an intimidating, hostile, or offensive working environment' would be considered. The American federal courts have divided on this matter as have the courts in Australia. New South Wales looks at the perpetrator's knowledge or constructive knowledge[39] while the Commonwealth applies a more victim-orientated reasonableness test.[40] Queensland is only now considering statutory protection against sex discrimination.

Turning to the two cases which I wish to focus on, *Rabidue*[41] and *Ellison*.[42] To me, *Rabidue* is the more obviously appropriate case for a reasonable woman standard of care. There, the plaintiff, Vivien Rabidue, the only woman in a supervisory position, alleged she was subjected to hostile work environment sexual harassment. The majority opinion which concluded that no sexual harassment had occurred said the following concerning Rabidue's co-employee Douglas Henry:

Meritor was decided four years after the harassment of Hill by Thomas allegedly occurred.

36 *Ibid* at 67.

37 Similarly the NSW act does not specifically refer to sexual harassment but has been interpreted to cover it in *O'Callaghan*. In contrast the Commonwealth and Victoria have statutes that expressly prohibit sexual harassment.

38 *Ibid* at 65 (quoting from EEOC sec 1604.11 (a) (3)).

39 *O'Callaghan v Loder* (1984) 3 NSWLR 89, 103.

40 Commonwealth *Sex Discrimination Act* sec. 28(3) says that the victim "must believe on reasonable grounds that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage him or her ... or ... must actually be disadvantaged ... by rejecting the advance, refusing the request or taking objection to the conduct."

See *Hall v Sheiban Pty Ltd* (1989) EOC sec 92-250, Lockhart J at 77,397-8; Wilcox J at 77,412-3; French J at 77,431 where the judges reject the reasonable woman standard and yet insist that 'the existence of reasonable grounds of belief had to be determined in each case by reference to the circumstances in which the particular employee was placed at the time.' *Ibid* at 77,410. 'All the circumstances relating to the individual must be considered, including that person's work position and personal characteristics ...' *Ibid* at 77,402.

41 *Rabidue v Osceola Refining Co*, 805 F 2d 611 (6th Cir 1986).

42 *Ellison v Brady*, 924 F 2d 872 (9th Cir 1991).

> Henry was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff. Management was aware of Henry's vulgarity, but had been unsuccessful in curbing his offensive personality traits during the time encompassed by this controversy. The plaintiff and Henry, on the occasions when their duties exposed them to each other, were constantly in confrontation posture. The plaintiff, as well as other female employees, were annoyed by Henry's vulgarity.[43]

It isn't until one reads the dissent that one is made aware of the kinds of things Henry was saying to women that 'annoyed' them such as 'cunt', 'whore' and directly to Rabidue: 'All that bitch needs is a good lay' and 'fat ass'.[44]

The majority noted that 'other male employees from time to time displayed pictures of nude or scantily clad women' in areas to which the plaintiff and other women were exposed.[45] Again it took the dissent to give examples of the kinds of pictures. They were clearly not erotic art; instead they depicted women as sex objects and were intended to demean them.[46] For example one photo depicted a man with a golf club shouting 'fore' as he stood straddled over a naked woman with a golf ball between her breasts.

The majority in *Rabidue* focused on the plaintiff's personality describing her as 'capable, independent, ambitious, aggressive, intractable, and opinionated'.[47] Somehow, her personality made her complaints less serious and less genuine. The majority then went on to apply the following standard of care:

> the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Thus in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges .... regardless of whether the plaintiff was actually offended by the defendant's conduct.[48]

In concluding that a reasonable person would not find Osceola's work environment to be hostile and to amount to sexual harassment the court said the following:

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43 805 F 2d 611, 615.

44 805 F 2d 611, 624 (Keith, J., dissenting).

45 805 F 2d 611, 615.

46 805 F 2d 611, 624 (Keith, J., dissenting).

47 805 F 2d 611, 615.

48 805 F 2d 611, 620.

> (I)t cannot seriously be disputed that in some work environments, humour and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. *Title VII was not meant to - or can - change this ....*[49]

The court then concluded:

> In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee's vulgarity substantially affected the totality of the workplace. The sexually orientated poster displays had *de minimus* effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica (I call it pornography) at the news stands, on prime-time television, at the cinema, and in other public places.[50]

Basically, Rabidue and the other women workers assumed the risk; Rabidue was oversensitive and intolerant; and anyway society by consensus condoned these kinds of language and pictorial displays.

Judge Keith in dissent argued that the court's application of the reasonable person standard was actually an application of a male standard. He said: 'In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men....'[51] Well, is he right? Because unless he is right the reasonable person standard should suffice.

In another very recent American hostile work environment sexual harassment case, *Robinson v. Jacksonville Shipyards, Inc.*[52] the court described the testimony of the plaintiff's expert[53] in the case as follows:

> The general principle .... is 'when sex comes into the workplace, women are profoundly affected .... in their job performance and in their ability to do their jobs without being bothered by it.' The effects encompass emotional upset, reduced job satisfaction, the deterrence of women seeking jobs or promotions and an increase of women quitting jobs, getting transferred, or being fired because of the sexualization of the workplace. By contrast, the effect of the sexualization of the workplace is 'vanishingly small' for men.

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49 805 F 2d 611, 622 (quoting from the trial judge's opinion, 584 F Supp at 430).

50 805 F 2d 611, 623.

51 805 F 2d 611, 626 (Keith, J., dissenting).

52 760 F Supp 1486 (MD Fla 1991).

53 Dr. Susan Fiske, Professor of Psychology, University of Massachusetts.

> Men and women respond to sex issues in the workplace to a degree that exceeds the normal differences in other perceptual reactions between them. For example research reveals a near flip-flop of attitudes when both men and women are asked what their response would be to being sexually approached in the workplace. Approximately two-thirds of men said they would be flattered; only fifteen percent would feel insulted. For the women the proportions are reversed. (citations omitted)[54]

In *Robinson* the trial judge applied a reasonable woman standard of care[55] and concluded a woman welder who worked in the shipyards with six other female and 846 male craftworkers[56] was sexually harassed by being exposed daily to pornography at the workplace. The pornography included such photos as a picture of a woman's pubic area with a meat spatula pressed on it pinned to the wall next to the sheetmetal shop;[57] a picture left on the plaintiff's tool box depicting a naked woman with her legs spread apart, knees bent up toward her chest, exposing her breasts and genitals; and a dart board with a drawing of a woman's breast with her nipple as the bull's eye.[58] *Playboy* - and *Penthouse* - style pictures of naked women were openly displayed in management offices.[59]

Even top management had such pictures in their offices. Were they all unreasonable persons? As men, was their wanting to look at such pictures at their workplace unreasonable? If the reasonable person standard were applied would their values be considered or would the values of the incredibly few women who survived in that environment be considered? Do you think these men and the women with whom they worked had the same reactions to this pornography? If not, how are judges to know whose values to treat as those of the reasonable person?

Because on matters of sexuality many men and women do not see eye to eye as to what is unwelcome or offensive whose perspective should govern? I agree with the dissent in *Rabidue* that the perspective of the reasonable woman should apply.[60] I also agree with the dissent's statement

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54 760 F Supp at 1505.

See also Barbara A. Gutek, *Sex and the Workplace* 96 (1985).

Note that the defendant's experts testified to the contrary. Dr. Donald Mosher, Professor of Psychology, University of Connecticut said that 'those pictures do not create a serious or probable harm to the average woman.' *Ibid* at 1508. Doctor Joseph Scott, Associate Professor of Sociology, Ohio State University testified: '(T)he average female would not be substantially effective (*sic*) in a negative manner' by such materials. He also said 'that women in the workforce would be slightly more offended by such materials than men.' *Ibid* at 1509. The court said that it did not find the defendants' experts' testimony to be 'useful to the determination of the issues in this case.' *Ibid* at 1509.

55 *Ibid* at 1524.

56 *Ibid* at 1493.

57 *Ibid* at 1495.

58 *Ibid* at 1497. The level of pornography increased after she started complaining. *Ibid* at 1500.

59 *Ibid* at 1494.

60 At one point Judge Keith uses 'reasonable victim' instead of 'reasonable woman'. 805 F 2d 611, 626. Reasonable victim and reasonable woman should not be used

that 'unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behaviour fashioned by the offenders, in this case men.'[61] I believe that sexual harassment law should attempt to change work environments in order to make them more hospitable to women employees and that this can only be done if the perspectives of women are considered.

Hostile work environment cases like *Rabidue* and *Robinson* which involve sexually explicit language and photographs which permeate the workplace and which are condoned by the employer are the clearest cases for applying a reasonable woman standard of care. If the reasonable person standard were to be applied it is likely that the *Rabidue* majority's view that women workers assume the risk and that societal norms condone objectification of women would prevail. The *status quo* would remain unchanged even though the women as a group would find such a workplace to be hostile and harmful to them as human beings.

I want to now look at a somewhat harder case as far as employer responsibility, one where the work environment on the whole was not sexualized but where, because of the conduct of one co-employee towards the plaintiff, the environment was hostile for her. In *Ellison v. Brady*[62] the plaintiff and her harasser Sterling Gray were both revenue agents for the federal Internal Revenue Service (IRS) at the San Mateo, California office. Revenue agents often lunched together in groups. In June 1986 when no one else was in the office, the plaintiff Ellison accepted Gray's invitation to lunch. In the days following the lunch Gray started hanging around Ellison's desk asking her unnecessary questions. A few months later Gray asked her out for a drink which she declined and the next week he asked her to lunch which she also declined. On October 22, 1986 Gray handed Ellison a note which said:

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interchangeably. Reasonable woman is preferable where the woman is the injured party because the harms for which I believe this standard is appropriate are ones where men and women's assessment of what is reasonable are not necessarily the same. 'Victim' has a negative connotation to it and has been used to describe women all too frequently. 'Reasonable woman' looks at the conduct from neither a victim's nor a perpetrator's perspective. The victim's perspective is relevant to whether any damages were suffered, and if so, how serious they were. See *Hall v Shieban* (1989) EOC sec 92-222.

The reasonable woman standard retains the objective reasonableness test but tailors to a specific group's objective view of the world. It still requires the decisionmaker to consider what a hypothetical person would do, that is, a hypothetical reasonable woman. One can compare this to what is done for child defendants who are held to the standard of the child of like age, intelligence and experience, *McHale v Watson* (1966) 115 CLR 199, 205; or physicians, who are held to the standard of the reasonable medical practitioner, *Sidaway v Board of Governors of the Bethlem Royal Hospital* (1985) AC 871. Neither of these standards is subjective. They do not focus on the person at issue's good faith or what he or she actually felt or believed but instead on what a reasonable person with certain similar attributes would have done under the circumstances.

61 805 F 2d 611, 626 (Keith, J., dissenting).

62 974 F 2d 874 (9th Cir 1991).

> I cried over you last night and I'm totally drained today. I have never been in such constant term oil (*sic*). Thank you for talking with me. I could not stand to feel your hatred for another day.[63]

The note shocked and frightened Ellison. When she left the room Gray followed her and tried to talk to her but she left the building.

Ellison did not see Gray again because she started training out-of-state. While she was away she received a three-page single spaced letter from Gray which Ellison described as 'twenty times, a hundred times weirder' than the other note. Gray wrote in part:

> I know that you are worth knowing with or without sex .... Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experience you from O so far away. Admiring your style and elan .... Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks .... I will write another letter in the near future.[64]

As soon as she received this note Ellison phoned her supervisor and told her she was afraid of Gray. Ellison asked that either she or Gray be transferred from San Mateo. Her supervisor talked to Gray and told him to leave Ellison alone. Before Ellison returned from her training Gray transferred to the San Francisco office.

After being at the San Francisco office a short time, Gray filed a union grievance seeking to transfer back to San Mateo. The union and IRS agreed to allow him to return in four months so long as he promised to leave Ellison alone. When Ellison learned of this decision she was frantic. She filed a sexual harassment claim with the IRS and was given permission to transfer temporarily to San Francisco when Gray returned. Gray tried to have joint counselling with Ellison and wrote her another note which still suggested that they had a special relationship.

The Treasury Department found that Ellison did not have a valid sexual harassment claim and this was affirmed by the Equal Opportunity Commission on appeal. Ellison then sued in the federal district court which found that she had failed to state a *prima facie* case of sexual harassment. The ninth circuit reversed on appeal and remanded the case to the district court.

In finding that Ellison had stated a valid claim for sexual harassment the appellate court said that a reasonable woman standard of care must be applied. The majority believed that a reasonable person standard would not adequately consider the *unique* experiences of women workers. It said that 'a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.'[65]

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63 *Ibid* at 874.

64 *Ibid* at 874.

65 *Ibid* at 879.

In a situation like the one in *Ellison* was the plaintiff's injury especially severe because she as a female perceived the defendant's conduct differently? What if the tables had been reversed and the person with the sexual fantasies and unrequited ardour was female? Could a man who was subjected to the kinds of unwanted and unwelcome attention experienced here, also argue that it created a hostile work environment? Would a reasonable man feel differently when subjected to such unwanted attentions than would a reasonable woman?

I think a man could genuinely feel he was sexually harassed if the tables were reversed here but I believe his reasons and perceptions would be different. For women in Ellison's position there is a very real concern that the unwelcome attentions could escalate and she could be physically and sexually injured. There is genuine fear that the man will physically hurt her.[66] In contrast I think that a man subjected to such attentions is more likely to be annoyed and fearful that despite his rejections of the woman he may be viewed as the aggressor and that she may turn the tables on him and wrongfully accuse him if he rejects her. (*Fatal Attraction* is Hollywood *not* real life). I therefore believe that the reasonable person standard doesn't adequately capture what needs to be captured for either situation.

But is all this much ado about nothing? Isn't *who* is applying whatever standard *really* what matters instead of whether the standard is reasonable man/person or woman? It's hard to know whether *Rabidue's* majority would have reached the same result had they been required to apply a reasonable woman standard. I believe it would have been harder for them to do so. And furthermore, it's been men judges who have been saying in a number of recent cases that the reasonable woman standard would make a difference. At least some male judges think it matters which standard is applied.

Undoubtedly, there is some risk to this. In the recent Australian case I mentioned earlier, *Hall v. Sheiban*, Justice Einfeld said the following concerning a complaint by a nineteen year old woman against her sixty-five year old physician employer:

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66 I remember feeling quite apprehensive when I received a number of lengthy and intensely personal letters from a man I had dated while in college but whom I had not been in contact with for many years after he learned that I was no longer married. He lived in another state but, nevertheless, these letters, which suggested we had had a different kind of relationship than we'd actually had and that we continued to have a special kindred spirit-like relationship, made me not just annoyed but actually fearful for my personal safety.

> I cannot believe that the respondent was serious or that the complainant would have taken him seriously or given the remarks more than the most fleeting attention. Clearly, a reasonable woman would, as Ms. Reid should, not have done so. It is certainly impossible to accept her supposed reaction of traumatic distress and upset to them. Women with the normal experiences of their own and others' personal relationships and social lives involving considerable exchanges with other men and women, know very well the various ways in which men occasionally behave. A suggestion to a woman by a man over 45 years her senior whom she hardly knew, of supposedly genuine love and that a future intimate relationship between them was available and seriously desired, is simply absurd, and would be treated by any sensible woman as such. If the statements were made, I cannot imagine that the complainant's reaction would have been other than humour or pity, or both. If they worried her, she could have enlisted the aid of her boyfriend or a parent or friend .... In the circumstances, the statements clearly do not amount to sexual harassment.[67]

On appeal the higher court disagreed with Justice Einfeld's assessment of what the reasonable women would feel but Einfeld's personal interpretation of how a reasonable woman would react is sobering. For some triers of fact the standard of care applied would not change the outcome they reached.

Nevertheless I believe that the reasonable woman standard of care should be used in sexual harassment cases and other cases involving dignity and offensiveness issues because it emphasises to all concerned that women do suffer from different harms than men in certain circumstances and that their feelings as women ought to be considered and are worthy of protection. And I believe that most male judges would be capable of empathising with how a woman might feel and therefore give the appropriate content to the reasonable woman standard.[68]

Other areas where I would apply this standard include tort actions for rape[69] where the issue is whose view of what happened should be considered. In cases where a woman has said 'no' to intercourse but has nevertheless submitted I believe that there are often two different truths. The man may sincerely believe that he did not rape her despite her protests. Nevertheless,

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67 *Hall v Shieban* (1988) EOC sec 92-222.

See also *Ministry of Defence v Jeremiah* (1980) QB 87, (1979) 2 All Eng Rep 833.

68 All they'd have to do is ask themselves how their mothers, sisters or daughters would feel. At least this would be progress but it still retains the problems that a middle class white standard presents for poor women and women of colour.

69 Tort actions for rape have rarely been reported. But see *Chesterman v Barmon*, 305 Or 439, 753 P2d 404 (1988).

See also Lemieux, 'Whatever Made You Think I Was Consenting: A Proposal to Silence Patriarchal Influence in Civil Sexual Assault Cases', 2 Hastings Women's L J 33 (1990) (describing the trial in civil rape case, *Questos v. Birgers*, No 573185 (Santa Clara County Super Ct filed April 23, 1985); R. Graycar and J. Morgan, *The Hidden Gender of Law* 347 (Federation Press 1990) describing an English case reported in the press where a woman successfully sued for rape. Note that in Australia criminal compensation schemes in all states allow for money damages against defendants who are convicted. *Ibid* at 300.

the experience for the woman may definitely be that intercourse was against her will; that she was raped.[70] If the reasonable woman standard of care is applied and if under such a standard 'no' means 'no' then liability should result.[71] Another situation is where a man's touching of a woman would be viewed by her and a reasonable woman as offensive even though a reasonable man might find it to be harmless.[72]

A final example is when a woman alleges she was falsely imprisoned. Does she have to try to escape or can her fear of her confiner's physical strength or just her own socialisation as a woman be enough even though a reasonable man in the same situation would not have felt imprisoned. The two cases that bring this to mind are the only two reported American cases where nursing homes were sued for false imprisonment. *Pounders*[73] involved a frail 75 year old woman who was confined against her will to a nursing home but who never tried to escape where the nursing home knew she did not want to be there. *Big Town*[74] involved a 67 year old man who was confined to a nursing home against his will but who made several attempts to and finally did successfully escape. The woman did not recover for false imprisonment while the man did. I truly believe that due to her physical size, age, strength and her socialisation, the old woman did not believe she could escape. She did not believe this was an option; therefore she was imprisoned. Escaping was not within the range of experience which she could imagine herself doing and the nursing home management knew that taking her shoes, keeping her on the second floor and not permitting visitors would effectively confine her.

Applying the reasonable woman standard of care to the limited types of cases which I have described would show that the law values women's experiences. It would acknowledge that at present society's norms are masculine and that these norms need to be changed in order to accommodate the feelings and experiences of those of us who make up more than half the human race.

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70 J. Scutt, *supra* note at 479.

71 Accord Lemieux, *supra* note, at 52-54. In contrast to Lemieux's argument for a reasonable woman standard based on women having a different moral worldview, *ibid*, I believe the reasonable woman standard should be based on women's views and experiences as to what is consensual intercourse and what is rape. Furthermore, I believe the law needs to give content to what the reasonable woman would believe by presuming that a reasonable woman would intend 'no' to mean 'no'.

See generally S. Estrich, *Real Rape* (Harv U Press 1987).

72 See, for example, *Spivey v Battaglia*, 258 So 2d 815 (Fla 1972); *DeMay v Roberts*, 46 Mich 160, 9 NW 146 (1881).

73 *Pounders v Trinity Court Nursing Home, Inc*, 576 SW 2d 934 (Ark 1979).

See Kazin, '"Nowhere To Go and Chose to Stay": Using the Tort of False Imprisonment to Redress Involuntary Confinement of the Elderly in Nursing Homes and Hospitals', 137 U Pa L Rev 903 (1989).

74 *Big Town Nursing Home, Inc v Newman*, 461 SW 2d 195 (Ct of Civ App Tex 1970).