

# The Standard of the Reasonable Person in Determining Negligence – Comparative Conclusions

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## Abstract

The standard of the reasonable person or its equivalent, in general, is used in many jurisdictions to determine fault in the form of negligence. Although the standard is predominantly objective it is also subjective in that the subjective attributes of the person against whom the standard applies as well as the subjective circumstances present at the time of the delict or tort lend themselves to an objective-subjective application. In South African law, before a person can be judged according to the standard of the reasonable person, the person must first be held accountable. If a person cannot be held accountable, then the standard does not apply at all.

The general standard of the reasonable person cannot be applied to children, the elderly, persons with physical disabilities, persons with mental impairments or experts. Therefore, depending on the subjective attributes of the person against whom the standard is being applied, the standard may have to be adjusted accordingly. The general standard of the reasonable person would be raised when dealing with experts, for instance, and lowered when dealing with persons with physical disabilities.

This contribution considers whether the current application of the standard of the reasonable person in South African law is satisfactory when applied generally to all persons, no matter their age, experience, gender, physical disability and cognitive ability. The application of the standard of the reasonable person in South African law is compared to the application of the standard of the reasonable person or its equivalent in the United Kingdom, the United States of America and France. Just as South African law applies the standard of the reasonable expert to experts, this contribution explores whether the South African law should be developed to use similar adjusted standards when dealing with children, the elderly, persons with physical disabilities and so on.

## Keywords

American law; *bonus pater familias*; children; delict; English law; fault; *faute*; French law; mental impairment; negligence; physical disability; reasonableness; reasonable expert; reasonable person; South African law; standard; the elderly; tort.

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## 1 Introduction

In all the jurisdictions that will be discussed in this contribution, namely South Africa, France, the United Kingdom and the United States of America, the standard of the "reasonable person" or terms equivalent to it is used in determining fault in the form of negligence.<sup>1</sup>

In a previous contribution,<sup>2</sup> the reasons for the choice of the jurisdictions mentioned above and the fundamental differences and similarities between these legal systems were explained. South African and French law use a generalising approach, in that all the elements of a delict must be present before liability in delict will follow, whereas in the United Kingdom and the United States of America, a system of separate torts is found with the torts having their own requirements, the main tort<sup>3</sup> being the tort of negligence.<sup>4</sup> It was also explained in this previous contribution<sup>5</sup> that there has lately been uncertainty surrounding the role of reasonableness in the South African law of delict.<sup>6</sup> This also applies to the standard of the reasonable person, in that it is used not only in determining negligence but also in determining other elements of delictual or tort liability.<sup>7</sup> In this contribution the focus will be on the application of the standard of the reasonable person in determining negligence only.

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<sup>1</sup> See *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 325, *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 839-840 (where the courts stated that "the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person"), *Kruger v Coetzee* 1966 2 SA 428 (A) 430 and *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077 with regard to South African law; Peel and Goudkamp *Winfield and Jolowicz on Tort* 143 and the authority cited therein with regard to English law; Dobbs, Hayden and Bublick *Hornbook on Torts* 214 and the authority cited therein with regard to American law, and Galand-Carval "Liability for Damage Caused by Others" 90-93 as well as the authority cited therein with regard to French law.

<sup>2</sup> Ahmed 2019 *PELJ* 2-5.

<sup>3</sup> The terms "tort" and "delict" are used synonymously.

<sup>4</sup> Ahmed 2019 *PELJ* 2-5.

<sup>5</sup> Ahmed 2019 *PELJ* 2.

<sup>6</sup> This current contribution is the fourth contribution in a series of contributions based on the influence of reasonableness on the elements of delictual liability.

<sup>7</sup> This will be discussed further in a forthcoming contribution.

In the South African law of delict, the standard of the reasonable person and the reasonable expert are often encountered in determining negligence.<sup>8</sup> There is, however, as will be pointed out further on,<sup>9</sup> a lack of authority in general on how the standard should be applied to persons with physical disabilities or impairments and the elderly. In spite of this lack of authority, it is possible to demarcate the manner in which the standard should be applied in South African law by using a common sense approach and taking into account how French and Anglo-American law<sup>10</sup> apply the standard. Furthermore, in South African law it is trite that the reasonable person test is applied to a child or minor. French law also applies the equivalent of the reasonable person standard albeit in an attenuated form,<sup>11</sup> while the other jurisdictions discussed in this contribution do not.<sup>12</sup> In order to conclude whether the application of the general standard of the reasonable person in determining negligence in South African law is suitable for all persons (no matter their age, gender, disability, impairment etcetera) it is necessary to analyse and consider the similarities and differences between South Africa and other jurisdictions in the application of the standard of the reasonable person (or its equivalent) in determining negligence.<sup>13</sup> It is also necessary to consider how the standard is adjusted when dealing with children, the elderly, persons with physical disabilities, persons with mental impairments and experts.

In South African and French law, when determining fault in the form of negligence, the standard of the reasonable person is encountered under the element of fault or *faute* respectively. In English and American law (from here on referred to as Anglo-American law), the standard of the reasonable person is encountered under the requirement of a "breach of a duty of care", in the tort of negligence. The "breach of a duty of care" requirement questions whether the actor's conduct strayed from the standard of the reasonable person and was negligent.<sup>14</sup>

In this contribution the focus will be on the nature of the standard of the reasonable person as a yardstick in determining negligence and how this

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<sup>8</sup> See Loubser and Midgley *Law of Delict* 154, 171-172; Neethling and Potgieter *Law of Delict* 169, 173-176; Van der Walt and Midgley *Principles of Delict* 237, 269-270; Boberg *Law of Delict* 274, 346.

<sup>9</sup> In para 3.1 below.

<sup>10</sup> The mix of English and American law.

<sup>11</sup> See para 3.4 below.

<sup>12</sup> See para 3.2-3.3 below.

<sup>13</sup> France and the United Kingdom in particular have influenced many legal systems in the world. See Van Dam *European Tort Law* 9.

<sup>14</sup> See Ahmed 2019 *THRHR* 140-145 as well as the authority cited therein with regard to a more detailed explanation of the "duty of care concept".

yardstick is adjusted depending on the subjective attributes of the person against whom the test is being applied. The tests of reasonable foreseeability of harm, reasonable preventability of harm and the circumstances present at the time of the alleged wrongdoing as well as contributory negligence will not be discussed except in a peripheral manner when discussing the nature of the standard of the reasonable person.

For comparative purposes in this contribution, the base standard of the reasonable person was taken to refer to the standard that is applied to a gender-neutral adult over eighteen years of age without any physical disabilities or mental impairments. To begin with, some general observations will be made related to the standard of the reasonable person from Anglo-American Common Law. This will be followed by a discussion of the adaptation of the base standard of the reasonable person in South African, Anglo-American and French law, depending on the subjective attributes of the actor. Thereafter, a summary of the comparative conclusions will be provided, concluding with some possible recommendations for South African law.

## **2 General observations related to the standard of the reasonable person from Common Law**

The concept of the *bonus pater familias* (the good family father)<sup>15</sup> originated in Roman law and is synonymous with the term, "the reasonable person" or its equivalent as used nowadays. The reasonable person standard is normative,<sup>16</sup> flexible and value-based.<sup>17</sup> Members of the community generally assume that fellow members will comply with a "uniform standard of conduct" and a member's conduct must conform to the "ideals and standards of a particular community".<sup>18</sup> The standard has been criticised<sup>19</sup> *inter alia* for being favourable to men<sup>20</sup> and specific classes of persons. When the standard is interpreted by adjudicators, there is a tendency at times for them to reflect their subjective views in judgments.<sup>21</sup> Nevertheless, as a standard it is useful and illustrates the law's devotion to justice.<sup>22</sup> In

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<sup>15</sup> As used in the French law of delict.

<sup>16</sup> Miller and Perry 2012 *NYU L Rev* 323.

<sup>17</sup> Van der Walt and Midgley *Principles of Delict* 237, 243.

<sup>18</sup> Van der Walt and Midgley *Principles of Delict* 237.

<sup>19</sup> See Moran *Rethinking the Reasonable Person*.

<sup>20</sup> See Bender 1988 *J Leg Ed* 3ff. Bender (20-25) traces how initially the concept was formulated in the masculine form, illustrating bias. Also see Martin 1994 *Anglo-Am L Rev* 334, 342-345; Mullender 2005 *MLR* 682.

<sup>21</sup> Mullender 2005 *MLR* 683.

<sup>22</sup> Mullender 2005 *MLR* 681-682.

trying to establish exactly what the reasonable person standard is, a number of academic writers' views will be referred to.

Artosi<sup>23</sup> states that the reasonable person is a well-known, fictional, abstract character supposed to be endowed with the morals, virtues and reasoning ability which society expects from its members. Hart<sup>24</sup> submits that the standard of reasonableness "created space for ordinary moral reasoning". Zipursky<sup>25</sup> submits that the standard of the reasonable person is used as a decision-making tool for adjudicators, allowing them to make determinations of reasonableness with ease. Weinrib<sup>26</sup> submits that the reasonable person standard outlines the limit between the defendant's freedom to act as he or she wishes and "the plaintiff's interest in security by treating certain risks as unreasonable." Ripstein<sup>27</sup> states that the standard encompasses the idea of fair terms with regard to social interactions where there are dividing risks that accompany everyday acceptable human conduct. Generally, a person who fails to meet the required benchmark of acceptable behaviour may be held liable for the harm caused to others.<sup>28</sup>

According to Holmes,<sup>29</sup> the community generally expects individuals to forgo their peculiarities to a certain extent. Prosser,<sup>30</sup> along the same lines, submits that one who lives in a community must conform to the community's standards and be responsible for the harm or loss. There is no leniency or excuse for not applying the standard of the reasonable person where a particular person is unintelligent, emotionally unstable, uneducated and easily excitable or has any other personal idiosyncrasies.<sup>31</sup>

Moran's<sup>32</sup> views on the various understandings of reasonableness in the reasonable person standard are rather interesting. After studying the role of

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<sup>23</sup> Artosi "Reasonableness" 69. Also see Neethling and Potgieter *Law of Delict* 169-176.

<sup>24</sup> Hart *Concept of Law* 132-133. See Moran *Rethinking the Reasonable Person* 281.

<sup>25</sup> Zipursky 2015 *U Pa L Rev* 2149.

<sup>26</sup> Weinrib *Tort Law* 47. See Moran *Rethinking the Reasonable Person* 174.

<sup>27</sup> Ripstein "Reasonable Persons in Private Law" 255, 258.

<sup>28</sup> See Zipursky 2004 *Fordham L Rev* 1929, who refers to Ripstein's concept of the reasonable person as "objective and value laden". Ripstein holds views similar to those of Keating 1996 *Stan L Rev* 329-332, 337-341, which draws on Rawls' idea of reasonableness.

<sup>29</sup> Holmes *Common Law* 86, referred to by Moran *Rethinking the Reasonable Person* 162.

<sup>30</sup> Keeton *et al Prosser and Keeton on the Law of Torts* 153, referred to by Moran *Rethinking the Reasonable Person* 163.

<sup>31</sup> See Van der Walt and Midgley *Principles of Delict* 241.

<sup>32</sup> Moran *Rethinking the Reasonable Person*. Extensive references to the views of Moran in this part of the contribution as well as under para 3.2 below reflect the fact that she is the only researcher, as far as can be determined, who has written in depth

the reasonable person standard extensively in a number of common law jurisdictions, she submits that the reasonable person is regarded as an ordinary, normal, human being. His or her conduct must be "accepted as normal and general by other members of the community in similar circumstances."<sup>33</sup> Moran<sup>34</sup> makes a distinction between normal and reasonable behaviour. The distinction is irrelevant in instances where normal behaviour is considered reasonable behaviour. She<sup>35</sup> points out that in practice, the reasonable person standard is fraught with different understandings of what is normal, natural and ordinary. Moran<sup>36</sup> submits that in practice it is normal and thus reasonable for young boys to be inattentive to their own and others' safety, while with young girls this is not normal, and it would therefore be unreasonable for a young girl to be imprudent. Moran<sup>37</sup> refers to Gilligan,<sup>38</sup> who found substantial gender differences in moral reasoning, whereby "girls use a voice of relation, of care and connection, which differs from boys' emphasis on abstract rules and ... ethics of justice."<sup>39</sup> A woman,<sup>40</sup> young girl<sup>41</sup> and a mentally impaired

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on this topic and, in addition, her views are persuasive. Professor Elspeth Reid (from the University of Edinburgh) advised me from the outset that any research undertaken on the reasonable person or reasonableness must include material from Moran's monograph.

<sup>33</sup> Moran *Rethinking the Reasonable Person* 133. Moran (133) quotes Fleming *Law of Torts* 119-120. See the later edition, Sappideen and Vines *Fleming's The Law of Torts* 128-129. See further authority cited by Moran 134 fn. 15 with reference to customs and the community.

<sup>34</sup> Moran *Rethinking the Reasonable Person* 7.

<sup>35</sup> Moran *Rethinking the Reasonable Person* 9, 17.

<sup>36</sup> Moran *Rethinking the Reasonable Person* 9.

<sup>37</sup> Moran *Rethinking the Reasonable Person* 178.

<sup>38</sup> Gilligan *In a Different Voice* 1982.

<sup>39</sup> Moran *Rethinking the Reasonable Person* 178 in reference to Gilligan's findings.

<sup>40</sup> See the extensive authority cited by Moran *Rethinking the Reasonable Person* 199 fn. 1. Moran (199-231) points out that in a criminal context with regard to provocation, self-defence and sexual assault, the standard of reasonableness applies differently to women (also see Donovan and Wildman 1981 *Loy LA L Rev* 435).

<sup>41</sup> Moran *Rethinking the Reasonable Person* 110-111 and Welke *Recasting American Liberty* 94 refer to *Michigan Central Railroad v Hassenyer* 48 Mich 205, 209-210 (SC 1882) involving the death of a thirteen year-old who was killed when an engine backed up as she was crossing the railway track. Cooley J's instructions to the jury was that however negligent the railroad company had been, the jury must consider the standard of ordinary care that she should have had with regard to herself. To Cooley J, care referred to being more cautious than a male – "a woman would be likely to be more prudent, careful and particular in many positions and in the performance of many duties than a man would. She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such as only great strength and courage could venture to encounter." Moran (111-125), in support of the unequal treatment, refers to a number of cases highlighting that the reasonableness of conduct of girls is judged more harshly than that of boys.

person<sup>42</sup> are held to a harsher standard of reasonableness.<sup>43</sup> A more relaxed standard is, however, generally recommended for the elderly members of the community.<sup>44</sup>

In respect of a mentally impaired person,<sup>45</sup> Moran<sup>46</sup> explains that the impairment is regarded as an abnormality, an "idiosyncrasy or peculiarity". He or she is not regarded as a full member of the community. The mentally impaired are judged according to the uniform standard of the reasonable person despite their cognitive and intellectual shortcomings.<sup>47</sup> Moran refers to the following reasons supplied for applying this uniform standard to the mentally impaired: that it is in line with the idea of the general welfare of the community; it deters dangerous conduct;<sup>48</sup> even though it does impose a form of strict liability, it can be justified as the conduct involves heightened risk and is deemed unreasonably risky conduct;<sup>49</sup> on grounds of equality and fairness, the victim who sustains harm as a result of the defendant's mental impairment should be compensated;<sup>50</sup> and it would be burdensome for the courts to try and establish the extent of a person's mental capacity.<sup>51</sup>

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<sup>42</sup> In Anglo-American law.

<sup>43</sup> Moran *Rethinking the Reasonable Person* 14.

<sup>44</sup> Moran *Rethinking the Reasonable Person* 24-26, 138. She refers to Barrett III 1984 *J Marshall L Rev* 873, who proposes a relaxed standard for the elderly. Also see para 3.4 below in respect of French law with regard to a person over the age of seventy years, and para 3.3 below in respect of American law where contributory negligence cannot be applied to an institutionalised elderly person.

<sup>45</sup> In terms of Anglo-American Common law.

<sup>46</sup> Moran *Rethinking the Reasonable Person* 9, 147-154 illustrates how historically women were also not considered as full citizens. Their liberty was restrained and they were generally considered the weaker sex. Moran (183) refers to Vogel "Is Citizenship Gender-specific?" 62 where historically the following groups *inter alia* lacked legal capacity: children; women; the insane; slaves and serfs. Certain religious groups such as Jews and Catholics as well as certain ethnic groups were denied full legal rights and membership. Moran (184-197) refers to the inequality applied to people from different racial groups and people with different financial standings.

<sup>47</sup> Moran *Rethinking the Reasonable Person* 13. However, in South African law, the standard is applied only if the person can be held accountable. See para 3.1 below.

<sup>48</sup> See the discussion by Moran *Rethinking the Reasonable Person* 31-39 with regard to the deterrence and compensation rationale.

<sup>49</sup> Moran *Rethinking the Reasonable Person* 41-42, 45.

<sup>50</sup> Moran *Rethinking the Reasonable Person* 137-138 refers to Fleming *Law of Torts* 126 (see later edition Sappideen and Vines *Fleming's The Law of Torts* 132) citing *Adamson v Motor Vehicle Insurance Trust* 1957 58 WALR 56 (SC) and Alexander and Szas 1967 *Notre Dame L Rev* 26, who state that mental illness is a deviation "from normal moral and social standards". One must, however, take into account the year in which the contribution was written by latter authors.

<sup>51</sup> Moran *Rethinking the Reasonable Person* 28.

Moran<sup>52</sup> distinguishes between a person without objectively viewed mental or physical impairments and a person with physical disabilities. To illustrate by way of an example, she refers to the English case, *Vaughan v Menlove*.<sup>53</sup> In this case, the defendant built a hay rick close to the boundary of his property. He was informed on numerous occasions, over a period of time, that the manner in which it was built was dangerous but he nonetheless decided to "chance it". The hay subsequently caught alight, spread to the plaintiff's land and caused damage to two of the plaintiff's cottages. The defendant tried to avoid liability by alleging that he was acting to the best of his cognitive abilities. The court applied an objective standard of a man of ordinary prudence, dismissing his subjective cognitive shortcomings. Moran<sup>54</sup> refers to the English case, *Roberts v Ramsbottom*,<sup>55</sup> where the driver suffered a stroke while driving and was found negligent even though the court acknowledged that he was not able to appreciate that he should have stopped. This came close to strict liability, which contradicts fault liability of the tort of negligence itself.<sup>56</sup> She<sup>57</sup> points out, however, that this was revisited by the Court of Appeal in *Mansfield v Weetabix*,<sup>58</sup> where the court took into account the driver's hypoglycaemic state which he was unaware of and found him not to have been negligent.

Moran<sup>59</sup> illustrates that common sense reasoning is applied in assuming what is normal, natural and reasonable. She<sup>60</sup> submits that there is a connection between the freedom to act, blameworthiness and prevention of harm. She<sup>61</sup> points out that Rawls, Holmes and Honoré all require that the actor has the capacity to prevent harm. Normal, natural behaviour is considered as non-culpable conduct.

By applying the standard of the reasonable person, Moran<sup>62</sup> submits that sometimes there is inequality which does not adhere to corrective justice. She<sup>63</sup> does not propose the adoption of a subjective approach, which in her

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<sup>52</sup> Moran *Rethinking the Reasonable Person* 19.

<sup>53</sup> *Vaughan v Menlove* 1837 3 Bing NC 468; 132 ER 490 (CP).

<sup>54</sup> Moran *Rethinking the Reasonable Person* 20-21.

<sup>55</sup> *Roberts v Ramsbottom* 1980 1 All ER 7 (QBD).

<sup>56</sup> Moran *Rethinking the Reasonable Person* 39, however, refers to the idea that the reasonable person standard does in a way apply strict liability as the person's shortcomings are disregarded.

<sup>57</sup> Moran *Rethinking the Reasonable Person* 22.

<sup>58</sup> *Mansfield v Weetabix* 1988 1 WLR 1263.

<sup>59</sup> Moran *Rethinking the Reasonable Person* 131-135.

<sup>60</sup> Moran *Rethinking the Reasonable Person* 175.

<sup>61</sup> Moran *Rethinking the Reasonable Person* 177, 241-248.

<sup>62</sup> Moran *Rethinking the Reasonable person* 11, 52, 56.

<sup>63</sup> Moran *Rethinking the Reasonable Person* 206.



opinion would result in discrimination. She<sup>64</sup> submits that reasonableness is interpreted as ordinariness with reference to customary norms. This is problematic, as what is regarded as ordinary or customary leads to discrimination *inter alia* against persons with mental impairments, girls and women. The result, she submits, is that the standard "operates as an (unjustifiable) standard of ordinariness rather than as a (justifiable) standard of reasonableness".<sup>65</sup> In order to ensure that the reasonableness standard lives up to its egalitarian promise, she proposes that the objective reasonableness standard be understood as "appropriate attentiveness to the interests of others" and unreasonable conduct as "culpable indifference to the interests of others".<sup>66</sup> In short, she proposes removing the person from the standard as her answer to the objective egalitarian approach.<sup>67</sup>

She applies her approach to *Mansfield v Weetabix*,<sup>68</sup> stating that the defendant was not indifferent to the interests of others, and his conduct was not blameworthy or negligent.<sup>69</sup> She applies the same approach to *Roberts v Ramsbottom*,<sup>70</sup> concluding that due to the sudden stroke suffered by the defendant, he was not indifferent to the interests of others. Therefore, his conduct was not objectively unreasonable.<sup>71</sup> In *Vaughan v Menlove*,<sup>72</sup> where the defendant claimed limited intelligence, his conduct showed self-preference for his own interests and indifference to others' interests, which was culpable.<sup>73</sup>

In response to Moran's proposal Mullender<sup>74</sup> submits that she underestimates the tools available in negligence law which would assist in the adaptation of the law according to her proposal. In *Mansfield v Weetabix*,<sup>75</sup> Mullender<sup>76</sup> submits that the defendant did not act, hence he was not a wrongdoer. In terms of corrective justice, the defendant should not be held liable. Mullender<sup>77</sup> submits that there is no problem with the

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<sup>64</sup> Moran *Rethinking the Reasonable Person* 286.

<sup>65</sup> Moran *Rethinking the Reasonable Person* 13.

<sup>66</sup> Moran *Rethinking the Reasonable Person* 304.

<sup>67</sup> Moran *Rethinking the Reasonable Person* 316.

<sup>68</sup> *Mansfield v Weetabix* 1988 1 WLR 1263.

<sup>69</sup> Moran *Rethinking the Reasonable Person* 309.

<sup>70</sup> *Roberts v Ramsbottom* 1980 1 All ER 7 (QBD).

<sup>71</sup> Moran *Rethinking the Reasonable Person* 287.

<sup>72</sup> *Vaughan v Menlove* 1837 3 Bing NC 468; 132 ER 490 (CP).

<sup>73</sup> Moran *Rethinking the Reasonable Person* 310.

<sup>74</sup> Mullender 2005 *MLR* 694-695.

<sup>75</sup> *Mansfield v Weetabix* 1988 1 WLR 1263.

<sup>76</sup> Mullender 2005 *MLR* 688.

<sup>77</sup> Mullender 2005 *MLR* 688.

concept of reasonableness itself but that there is a failure on the part of some adjudicators to dispense justice within the scope of reasonableness.

Moran<sup>78</sup> most certainly points out the inequality of the application of the standard of the reasonable person. One can also agree with Mullender's view<sup>79</sup> that there is no problem with the concept of reasonableness but that the problem lies with the adjudicator's interpretation of it.

From the general observations made above, it is apparent that there are some broad strokes one can make when it comes to understanding the adjudicators' application of the standard of the reasonable person. A person's peculiarities and cognitive shortcomings may not be considered as mitigating factors when applying the standard, but a physical impairment or condition which one is unaware of, such as in the case of *Mansfield v Weetabix*,<sup>80</sup> may result in the exoneration of liability. Children and the elderly, due to their age-related cognitive abilities, may be held to a more relaxed standard of reasonableness. In Anglo-American law as well as in French law,<sup>81</sup> the conduct of a mentally impaired person is judged according to the standard of the reasonable person despite his or her cognitive and intellectual shortcomings. Moran points out<sup>82</sup> that there is a distinction between normal, ordinary and reasonable behaviour. Women and young girls are generally held to a harsher standard of reasonableness than men and young boys. From these general observations we can now look more closely at the adaptation of the standard of the reasonable person, depending on the specific subjective attributes of the alleged wrongdoer or actor in Anglo-American, South African and French law.

### **3 The adaptation of the base standard of the reasonable person depending on the subjective attributes of the actor**

#### **3.1 South Africa (South African law)**

In South African law, the concept of "accountability" is a prerequisite for fault.<sup>83</sup> The actor must have the mental capacity to be at fault at the time of

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<sup>78</sup> Above in the preceding paragraphs.

<sup>79</sup> Above in the preceding paragraphs.

<sup>80</sup> *Mansfield v Weetabix* 1988 1 WLR 1263.

<sup>81</sup> See paras 3.2-3.4 below.

<sup>82</sup> In the preceding paragraphs above.

<sup>83</sup> Neethling and Potgieter *Law of Delict* 157-159; Loubser and Midgley *Law of Delict* 139; Van der Walt and Midgley *Principles of Delict* 226; Burchell *Principles of Delict* 84; Visser "Compensation for Pecuniary Loss" 1122.

the commission of the alleged delict. The actor must understand the difference between what is right and wrong and thereafter act in accordance with such an understanding.<sup>84</sup> An investigation into subjective factors relating to the actor, such as his or her level of knowledge, state of mind, level of maturity, experience and general overall mental development at the time of the commission of the alleged delict are considered.<sup>85</sup> Under certain circumstances children,<sup>86</sup> mentally impaired, emotionally distressed,<sup>87</sup> intoxicated<sup>88</sup> and provoked<sup>89</sup> persons may lack accountability.<sup>90</sup>

According to sections 7 and 11 of the *Child Justice Act*,<sup>91</sup> a child from birth to nine years of age is *culpa incapax* and cannot be held accountable.<sup>92</sup> A child from twelve to fourteen years of age can be held accountable unless the contrary is proven, and a child between fourteen and eighteen years of age is presumed to be *culpa capax* (accountable) unless the contrary is proven. In terms of common law, a child below the age of seven is *culpa incapax* and a child between seven and fourteen years of age is *culpa capax*.<sup>93</sup> A child between fourteen and eighteen years of age is *culpa capax* depending on the circumstances of the case.<sup>94</sup> Jansen and

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<sup>84</sup> *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389; Neethling and Potgieter *Law of Delict* 131; Loubser and Midgley *Law of Delict* 139; Burchell *Principles of Delict* 83; Van der Walt and Midgley *Principles of Delict* 226.

<sup>85</sup> *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 390; Van der Walt and Midgley *Principles of Delict* 226-227; cf Burchell *Principles of Delict* 83.

<sup>86</sup> Boberg *Law of Delict* 659.

<sup>87</sup> See *S v Campher* 1987 1 SA 940 (A); *S v Laubscher* 1998 1 SA 163 (A); Neethling and Potgieter *Law of Delict* 159; Loubser and Midgley *Law of Delict* 142.

<sup>88</sup> See *S v Chretien* 1981 1 SA 1097 (A), where the accused was found not guilty of murder and assault as a result of being in such a state of intoxication that it rendered him unaccountable and lacking fault in the form of intention. Also see Neethling and Potgieter *Law of Delict* 159; Loubser and Midgley *Law of Delict* 143; Van der Walt and Midgley *Principles of Delict* 227. If a person takes an intoxicating substance before he or she becomes intoxicated, thereafter committing a delict, he or she may still be held liable as a result of his or her prior act while he or she was still accountable.

<sup>89</sup> Neethling and Potgieter *Law of Delict* 159; Loubser and Midgley *Law of Delict* 143-144.

<sup>90</sup> Neethling and Potgieter *Law of Delict* 158-159; Loubser and Midgley *Law of Delict* 140; Visser "Compensation for Pecuniary Loss" 1122-1123.

<sup>91</sup> *Child Justice Act* 75 of 2008.

<sup>92</sup> Section 4 of the *Child Justice Amendment Bill* of 2019 is still to become operational, but it states that a child under twelve years of age does not have criminal capacity.

<sup>93</sup> See *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) and *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA), where the children lacked accountability on the basis that the children were between seven and fourteen years of age and had not acted in accordance with an appreciation of the difference between what was right and what was wrong.

<sup>94</sup> See *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389, 399; *Jones v Santam Bpk* 1965 2 SA 542 (A) 552-554; Neethling and Potgieter *Law of Delict* 158; Visser "Compensation for Pecuniary Loss" 1123; Loubser and Midgley

Neethling<sup>95</sup> submit that the *Child Justice Act* applies to the accountability of children with regard to crimes. The common law position still applies to delictual liability.<sup>96</sup>

It is settled that the "reasonable person" test applies to children who may be held accountable.<sup>97</sup> Previously our courts used to follow the "reasonable child" test, which took into account the youthfulness of the child wrongdoer, but the approach took a turn in *Jones v Santam Bpk*,<sup>98</sup> when the court stated that in all cases, the objective "reasonable person" test must first be applied. Thereafter it must be determined whether the child can be held responsible for his or her conduct; that is, whether the child can be held accountable, taking into account subjective factors relating to the child.<sup>99</sup> In *Roxa v Mtshayi*<sup>100</sup> the court stated that first it must be ascertained whether the child is accountable, taking subjective factors into account and thereafter determine negligence. Therefore, under the concept of accountability the particular child's subjective age, level of maturity and general mental development etcetera at the time of the alleged delict are taken into consideration and thereafter tested against the objective standard of the reasonable person.<sup>101</sup> The harshness of applying the reasonable person standard to a child is somewhat alleviated by the rules of accountability. This approach was endorsed in *Weber v Santam Versekeringsmaatskappy Bpk*<sup>102</sup> and in *Eskom Holdings Ltd v Hendricks*.<sup>103</sup> The standard of the reasonable person that is applied to children in South Africa has been criticised.<sup>104</sup> Neethling and Potgieter<sup>105</sup> point out that a noteworthy criticism is that the reasonable child test is a more suitable standard for a child

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*Law of Delict* 141-142 discussion of *Weber* and *Eskom Holdings Ltd*; Van der Walt and Midgley *Principles of Delict* 227.

<sup>95</sup> Jansen and Neethling 2017 *THRHR* 474.

<sup>96</sup> See Loubser and Midgley *Law of Delict* 140-142; Van der Walt and Midgley *Principles of Delict* 227, who refer to the common law position with regard to the delictual liability of children. Also see Jansen and Neethling 2017 *THRHR* 474-482.

<sup>97</sup> See in general Neethling and Potgieter *Law of Delict* 171-173; Loubser and Midgley *Law of Delict* 135-136 and their discussion of *Haffajee v South African Railways and Harbours* 1981 3 SA 1062 (W); Van der Walt and Midgley *Principles of Delict* 273-274; Burchell *Principles of Delict* 90-91.

<sup>98</sup> *Jones v Santam Bpk* 1965 2 SA 542 (A) 551-552.

<sup>99</sup> The decision in *Jones v Santam* 1965 2 SA 542 (A) has been criticised for in effect determining negligence before accountability. However, in *Roxa v Mtshayi* 1975 3 SA 761 (A) 765-766 accountability was correctly determined before negligence (see Neethling and Potgieter *Law of Delict* 171-173).

<sup>100</sup> *Roxa v Mtshayi* 1975 3 SA 761 (A) 765-766.

<sup>101</sup> See Neethling and Potgieter *Law of Delict* 171.

<sup>102</sup> *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 400.

<sup>103</sup> *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA) 511-512.

<sup>104</sup> See Neethling and Potgieter *Law of Delict* 144 fn 109 and the authority cited therein.

<sup>105</sup> Neethling and Potgieter *Law of Delict* 172.

because even though a child may be accountable, the child's conduct cannot realistically be measured against that of an adult.<sup>106</sup>

In South African law, if a person has a mental impairment or sustains severe emotional distress and cannot distinguish right from wrong or can but is unable to act in accordance with the appreciation of that distinction at the time of the delict, he or she is *culpaē incapax*. The person does not act with fault and cannot be held delictually liable.<sup>107</sup> The position in South African law, as will be explained further below, is markedly different from that in French and Anglo-American law.<sup>108</sup>

Van der Walt and Midgley<sup>109</sup> point out that there is a lack of authority on whether subjective physical attributes of the person such as a person's disabilities play a part in determining negligence. However, with reference to common law Van der Walt and Midgley<sup>110</sup> state that the general approach is to consider the physical disability in adjusting the (base) standard of the reasonable person. The conduct of the person with a physical disability must still be reasonable in the light of his or her knowledge of the disability.<sup>111</sup> A person who is visually impaired and aware of it will be found negligent if he or she drives a car on the street and causes harm to another.<sup>112</sup>

From a cursory reading of textbooks on delict, there is also a lack of authority on how the standard of the reasonable person should be applied to the elderly. It may be assumed, though, that in terms of a common sense approach, the base standard could be adjusted and perhaps lowered when applied to the elderly in view of their age, physical and cognitive abilities. However, along the same lines as the person with a physical disability, the conduct of the elderly person must still be reasonable in the light of his age, physical and cognitive abilities.

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<sup>106</sup> Also see Loubser and Midgley *Law of Delict* 173-174 with reference to different outcomes reached (dealing with children) in *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA) and *Hafajee v South African Railways and Harbours* 1981 3 SA 1062 (W).

<sup>107</sup> Neethling and Potgieter *Law of Delict* 158; Loubser and Midgley *Law of Delict* 140-143; Van der Walt and Midgley *Principles of Delict* 227. Also see *S v Campher* 1987 1 SA 940 (A) with regard to emotional and mental distress; *S v Chretien* 1981 1 SA 1097 (A) with regard to severe intoxication.

<sup>108</sup> See paras 3.2-3.4 below with regard to French and Anglo-American law.

<sup>109</sup> Van der Walt and Midgley *Principles of Delict* 241.

<sup>110</sup> Van der Walt and Midgley *Principles of Delict* 241.

<sup>111</sup> *R v Verster* 1952 2 SA 231 (A) 234; Van der Walt and Midgley *Principles of Delict* 241.

<sup>112</sup> Van der Walt and Midgley *Principles of Delict* 241.

The reasonable person standard in South African law, generally, does not relate to a specific gender<sup>113</sup> or to a particular physical characteristics of a person.<sup>114</sup> It is not expected of the person to be exceptionally skilled, developed or too careful, nor is the person underdeveloped, thoughtless or reckless.<sup>115</sup> The reasonable person test is flexible and adaptable in that the courts adapt the standard depending on the circumstances of each case.

At times the adjudicator may raise the standard in instances where the defendant has expertise in a certain field.<sup>116</sup> For example, the conduct of a doctor would be tested against the standard of the reasonable doctor and not against the standard of the reasonable person.<sup>117</sup> The "reasonable expert" test is similar to the reasonable person test, although a reasonable measure of the particular expertise is applied.<sup>118</sup> The reasonable expert test does not expect the person to have the highest level of skill and expertise but rather the "general level of skill and diligence possessed and exercised at the time by members of the branch of the professional to which the practitioner belongs."<sup>119</sup> The test is based on the acquired necessary knowledge as well as the exercise of the necessary skill, care and diligence.<sup>120</sup> Besides the application of the standard of the reasonable expert, the court will still look at the surrounding circumstances of the case and then decide what conduct was reasonably to be expected in the

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<sup>113</sup> Neethling and Potgieter *Law of Delict* 169-170.

<sup>114</sup> *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 410-411.

<sup>115</sup> See in general Neethling and Potgieter *Law of Delict* 169-170; Loubser and Midgley *Law of Delict* 154; Van der Walt and Midgley *Principles of Delict* 239. Van den Heever JA in *Herschel v Mrupe* 1954 3 SA 464 (A) 490 stated that the concept of the "*bonus paterfamilias*" is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise." Also see *iMvula Quality Protection v Loureiro* 2013 3 SA 407 (SCA) 416.

<sup>116</sup> Scott 2014 *De Jure* 390.

<sup>117</sup> See *Van Wyk v Lewis* 1924 AD 438 456; *Lymbrey v Jefferies* 1925 AD 236; *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 723; *Louwrens v Oldwage* 2006 1 All SA 197 (SCA) 207; *Medi-Clinic v Vermeulen* 2015 1 SA 241 (SCA) 243 with respect to the reasonable doctor test.

<sup>118</sup> See Neethling 2002 *SALJ* 287; Neethling and Potgieter *Law of Delict* 173-176; Loubser and Midgley *Law of Delict* 171; Van der Walt and Midgley *Principles of Delict* 269-270; Boberg *Law of Delict* 346.

<sup>119</sup> *Van Wyk v Lewis* 1924 AD 438, 444; Neethling and Potgieter *Law of Delict* 147; Loubser and Midgley *Law of Delict* 171-172; Van der Walt and Midgley *Principles of Delict* 269.

<sup>120</sup> Van der Walt and Midgley *Principles of Delict* 269.

circumstances.<sup>121</sup> The same standard of competence is required of persons with similar skills, irrespective of their experience.<sup>122</sup>

Where there is a lack of experience, for example in the case of a learner driver who does not have the knowledge or skill of an experienced driver, the lack of experience may not count in his or her favour and he or she may not be excused or treated more leniently because of the lack of experience.<sup>123</sup> Even though beginners or novices are encouraged to develop and apply their knowledge, skill and experience in their occupation or profession, if their lack of skill and experience poses a danger to others, the standard of the reasonable person may not be lowered.<sup>124</sup> Where the beginner driver creates an appreciable risk of harm, it is expected of him or her to act with the same level of proficiency as an experienced driver.<sup>125</sup> However, a novice golfer<sup>126</sup> or young, inexperienced teacher<sup>127</sup> will not be expected to display the same level of knowledge and skill as that of the experienced teacher or golfer. It is apparent that the base standard of the reasonable person is applied where the risk of harm is appreciable. In instances where a person undertakes an activity which requires a certain level of skill and knowledge and that person knows or ought to know that he or she lacks the skill or knowledge but still undertakes the activity, the person may be found negligent.<sup>128</sup>

### **3.2 The United Kingdom (English law)**

#### *3.2.1 The tort of negligence*

As already mentioned,<sup>129</sup> Anglo-American tort law comprises of a system of a number of torts. There is the tort of negligence and numerous intentional torts. For the purpose of this contribution, the tort of negligence is of importance. In the tort of negligence, the standard of care is generally tested objectively against the reasonable person,<sup>130</sup> also referred to as the ordinary

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<sup>121</sup> Neethling and Potgieter *Law of Delict* 175; Loubser and Midgley *Law of Delict* 172.

<sup>122</sup> Van der Walt and Midgley *Principles of Delict* 269.

<sup>123</sup> Loubser and Midgley *Law of Delict* 171.

<sup>124</sup> See Van der Walt and Midgley *Principles of Delict* 271.

<sup>125</sup> See *Simon's Town Municipality v Dews* 1993 1 SA 191 (A); Loubser and Midgley *Law of Delict* 171.

<sup>126</sup> *Clark v Welsh* 1976 3 SA 484 (A) 486; Van der Walt and Midgley *Principles of Delict* 272.

<sup>127</sup> *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 1 SA 160 (WCC) [73, 76]; Van der Walt and Midgley *Principles of Delict* 272.

<sup>128</sup> Loubser and Midgley *Law of Delict* 171.

<sup>129</sup> In para 1 above.

<sup>130</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 143; Jones "Negligence" 553.

man or woman on the "Clapham omnibus".<sup>131</sup> The reasonable person is not exceptionally skilled or inexperienced,<sup>132</sup> nor is he or she extraordinary careful or extraordinarily vigilant.<sup>133</sup> Lord Macmillan in *Glasgow Corporation v Muir*<sup>134</sup> stated that the standard "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question."

It is trite law that the standard of care varies with certain types of defendants such as children, persons with disabilities or impairments, or professionals.

In respect of professionals such as doctors, the standard applied is the reasonable, skilled, competent, professional doctor.<sup>135</sup> In assessing the standard of reasonableness of professionals, unrealistic standards, knowledge or skill must not be expected of them.<sup>136</sup> *Bolam v Friern Hospital*<sup>137</sup> (hereinafter referred to as "*Bolam*") is authority<sup>138</sup> for the approach applied to professionals, which is the "standard of the ordinary skilled man exercising and professing to have that special skill." In this well-known case it was held that "a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique."<sup>139</sup> Therefore, a professional who acts according to the practice accepted by a responsible body of persons experienced and skilled in that particular profession may not be held negligent. This is commonly referred to as the "*Bolam* principle".<sup>140</sup> Furthermore, where there are almost equally compelling professional opinions or where the opinions are divided, the professional will not be held liable.<sup>141</sup>

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<sup>131</sup> Deakin and Adams *Markesinis and Deakin's Tort Law* 185.

<sup>132</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 145, 146.

<sup>133</sup> Deakin and Adams *Markesinis and Deakin's Tort Law* 189-190.

<sup>134</sup> *Glasgow Corporation v Muir* 1943 AC 488.

<sup>135</sup> Deakin and Adams *Markesinis and Deakin's Tort Law* 190.

<sup>136</sup> *Witting Street on Torts* 137-139.

<sup>137</sup> *Bolam v Friern Hospital* 1957 1 WLR 582 586.

<sup>138</sup> See *Maynard v West Midlands RHA* 1984 1 WLR 634; *Sidaway v Bethlem Royal Hospital* 1985 AC 871.

<sup>139</sup> *Bolam v Friern Hospital* 1957 1 WLR 582 587.

<sup>140</sup> See Deakin and Adams *Markesinis and Deakin's Tort Law* 189-190; Peel and Goudkamp *Winfield and Jolowicz on Tort* 157.

<sup>141</sup> Deakin and Adams *Markesinis and Deakin's Tort Law* 190; Peel and Goudkamp *Winfield and Jolowicz on Tort* 157. In *Medi-Clinic Ltd v Vermeulen* 2015 1 SA 241 (SCA) 243-245, the South African Supreme Court of Appeal when faced with two conflicting medical opinions referred with approval to the *Bolam* principle as well as



In respect of defendants with exceptional skills, the subjective level of skill of the defendant is not taken into account and all that is required is the standard expected of the reasonably skilled person.<sup>142</sup> If a defendant professes to have a particular acquired skill or experience, however, he or she will be held to a reasonable degree to such skill or expertise.<sup>143</sup>

The standard of the reasonable person may be adjusted depending on the circumstances and risks involved. For example, in *Wells v Cooper*<sup>144</sup> the defendant had negligently fitted a door handle himself. The plaintiff was injured when the door handle came loose from the door. The Court of Appeal was faced with the question of which standard of care should be applied in such an instance. The court held that the standard should not be that of the reasonable competent carpenter but that of the reasonably skilled amateur carpenter.<sup>145</sup> In *Philips v William Whitely Ltd*<sup>146</sup> a jeweler pierced the plaintiff's ears and it appeared that he took steps to disinfect the pierced ears but an abscess subsequently developed which could have been avoided had it been done by a medical practitioner. The court held that the jeweler took reasonable steps to avoid infection and needed to show only the skill required of a jeweler and not that of a surgeon.<sup>147</sup> If a defendant is lacking in experience or skill in comparison to the reasonable person, the defendant may still be held liable in spite of his or her incompetence.<sup>148</sup> The authority for this approach stems from the well-known case, *Nettleship v Weston*.<sup>149</sup> In this case the Court of Appeal held that a learner driver who collided with a lamppost causing injury to her instructor was liable based on the (base) standard of the reasonable driver.<sup>150</sup> Although it may be argued that the conduct of the learner driver was something that could have been

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the two English decisions of *Bolitho v City Hackney Health Authority* 1998 AC 232 243-244 and *Roe v Minister of Health* 1954 2 QB 66 252. The court concluded that the hospital was not negligent in failing to ensure that a patient did not develop bed sores in the circumstance which led to his eventually being paralysed and confined to a wheelchair.

<sup>142</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 144; Jones "Negligence" 556.

<sup>143</sup> *Woolridge v Sumner* 1963 2 QB 43; *Witting Street on Torts* 137-138.

<sup>144</sup> *Wells v Cooper* 1958 2 QB 265.

<sup>145</sup> Deakin and Adams *Markesinis and Deakin's Tort Law* 185.

<sup>146</sup> *Philips v William Whitely Ltd* 1938 1 All ER 566.

<sup>147</sup> *Witting Street on Torts* 132.

<sup>148</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 143.

<sup>149</sup> *Nettleship v Weston* 1971 2 QB 691. In *Wilsher v Essex Area Health Authority* 1987 QB 730, the fact that the defendant was lacking experience in that he was a junior doctor was not taken into account. See Peel and Goudkamp *Winfield and Jolowicz on Tort* 146-147; Jones "Negligence" 554; Deakin and Adams *Markesinis and Deakin's Tort Law* 188-189; *Witting Street on Torts* 135.

<sup>150</sup> See *Cook v Cook* 1986 68 ALR 353, where the High Court of Australia took into account the inexperience of the learner driver. However, the same approach was not followed in *McNeilly v Imbree* 2008 HCA 40.

expected, the court was influenced *inter alia* by the fact that she had previously been convicted of driving without due care, and had insurance.<sup>151</sup>

In respect of a child defendant, the test is varied to that of the reasonable child of the same age.<sup>152</sup> It has not been settled in English tort law whether the child's subjective maturity, mental ability or experience should be considered.<sup>153</sup> However, in exceptional circumstances where a child partakes in activities normally undertaken by an adult, the reasonable person test will apply.<sup>154</sup> In general, a very young child, for example, under the age of three years old cannot be held liable.<sup>155</sup>

Moran<sup>156</sup> refers to a number of examples to illustrate under what circumstances child defendants are held liable in terms of Common Law. For example, in *McHale v Watson*<sup>157</sup> a twelve-year-old boy threw a metal rod which struck a nine-year-old girl's right eye, rendering her blind in that eye. The standard applied was that of an ordinary child of a similar age.<sup>158</sup> Moran<sup>159</sup> explains how content was given to the standard; that is, whether the young boy had behaved reasonably in the circumstances. In respect of foreseeability, it was held that the child did not have knowledge or appreciation of the risk of throwing the rod.<sup>160</sup> He did not reasonably foresee that when the rod was thrown it would taper off and strike the girl.<sup>161</sup> The boy's age limited his ability to foresee harm and also his ability to act prudently.<sup>162</sup> He was found not culpable because his "capacity for foresight or prudence" was "characteristic of humanity at his stage of development and in that sense normal."<sup>163</sup> Moran highlights that the court found the boy's conduct normal, natural, and not an idiosyncrasy.<sup>164</sup> Kitko J<sup>165</sup> concluded,

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<sup>151</sup> *Nettleship v Weston* 1971 2 QB 691 699. See Deakin and Adams *Markesinis and Deakin's Tort Law* 189.

<sup>152</sup> See *Mullin v Richards* 1998 1 WLR 1304 1308-1309, where the standard applied was that of "an ordinarily prudent and reasonable fifteen-year old schoolgirl in the defendant's situation"; *Blake v Galloway* 2004 1 WLR 284; *Orchard v Lee* 2009 PIQR P16; Peel and Goudkamp *Winfield and Jolowicz on Tort* 146; Jones "Negligence" 562-563; Deakin and Adams *Markesinis and Deakin's Tort Law* 187-188.

<sup>153</sup> *Witting Street on Torts* 135.

<sup>154</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 148.

<sup>155</sup> *Witting Street on Torts* 135.

<sup>156</sup> Moran *Rethinking the Reasonable Person* 60-83.

<sup>157</sup> *McHale v Watson* 1966 115 CLR 199 (Aust HC).

<sup>158</sup> Moran *Rethinking the Reasonable Person* 63, 215.

<sup>159</sup> Moran *Rethinking the Reasonable Person* 64.

<sup>160</sup> *McHale v Watson* 1966 115 CLR 199 (Aust HC) 214-215.

<sup>161</sup> *McHale v Watson* 1966 115 CLR 199 (Aust HC) 215-216.

<sup>162</sup> *McHale v Watson* 1966 115 CLR 199 (Aust HC) 215.

<sup>163</sup> *McHale v Watson* 1966 115 CLR 199 (Aust HC) 213.

<sup>164</sup> Moran *Rethinking the Reasonable Person* 77.

<sup>165</sup> *McHale v Watson* 1966 115 CLR 199 (Aust HC) 216.

"that boys of twelve may behave as boys of twelve and that, sometimes, is a risk indeed." Moran<sup>166</sup> submits that the majority of judges had empathy for the boy. They referred to the nostalgia of their childhood and they could not find liability for "boyish imprudence". Moran explains that after surveying cases<sup>167</sup> involving children, almost "all of the child defendants are boys".<sup>168</sup> Moran<sup>169</sup> refers to *Michaud v Dupuis*,<sup>170</sup> where the court found negligent an eleven-year-old boy who threw a stone at a four-year-old girl rendering her blind in an eye. The court<sup>171</sup> found his conduct "reckless ... with complete disregard for the safety of other people." Moran<sup>172</sup> points out that there was no mutual play, there was a larger age difference between them and the boy's conduct was close to the intentional infliction of harm. In *Pollock v Lipkowitz*<sup>173</sup> a thirteen-year-old boy was found liable for his "senseless act of folly"<sup>174</sup> when he threw nitric acid at an eleven-year-old girl. Thus the latter two cases illustrate abnormal behaviour.<sup>175</sup> In *Mullin v Richards*,<sup>176</sup> where two fifteen-year-old schoolgirls were playing sword-fighting with rulers, the ruler snapped and a fragment of the plastic struck Mullin's eye, rendering her blind in that eye. The appeal court held that both the girls' conduct was not excessively or inappropriately violent. Their conduct was commonplace in school and neither of them had foreseen the risk of harm.<sup>177</sup> Butler-Sloss LJ concluded that "girls of 15 playing together may play as somewhat irresponsible girls of 15."<sup>178</sup> Moran<sup>179</sup> submits that the objective standard of reasonableness relates to the ordinariness, normalcy or commonness of sword-fighting and the lack of foreseeability of harm.

Moran<sup>180</sup> interestingly refers to the application of the doctrine of allurement. According to this doctrine, children are often naturally tempted and attracted to play with dangerous things but are unaware of the reality of the danger.

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<sup>166</sup> Moran *Rethinking the Reasonable Person* 79-82.

<sup>167</sup> At the time of writing the book.

<sup>168</sup> Moran *Rethinking the Reasonable Person* 86.

<sup>169</sup> Moran *Rethinking the Reasonable Person* 86.

<sup>170</sup> *Michaud v Dupuis* 1977 20 NBR 2d 305 (QB).

<sup>171</sup> *Michaud v Dupuis* 1977 20 NBR 2d 305 (QB) 308.

<sup>172</sup> Moran *Rethinking the Reasonable Person* 86.

<sup>173</sup> *Pollock v Lipkowitz* 1970 17 DLR 3d 766 (Man QB). See Moran *Rethinking the Reasonable Person* 86.

<sup>174</sup> *Pollock v Lipkowitz* 1970 17 DLR 3d 766 (Man QB) 768.

<sup>175</sup> Moran *Rethinking the Reasonable Person* 86-87.

<sup>176</sup> *Mullin v Richards* 1998 1 All ER 920 (CA). See Moran *Rethinking the Reasonable Person* 88-89.

<sup>177</sup> *Mullin v Richards* 1998 1 All ER 920 (CA) 927.

<sup>178</sup> *Mullin v Richards* 1998 1 All ER 920 (CA) 928. Also see *Blake v Galloway* 2004 1 WLR 284, where the court found that horseplay between two fifteen-year old children did not amount to negligence.

<sup>179</sup> Moran *Rethinking the Reasonable Person* 89-90, 94, 129, 131.

<sup>180</sup> Moran *Rethinking the Reasonable Person* 97-98, 114.

They are generally not held liable because this behaviour is considered natural.<sup>181</sup>

In situations where a person suffers some kind of physical disability<sup>182</sup> such as a heart attack,<sup>183</sup> loss of consciousness as a result of hypoglycaemia<sup>184</sup> or a sudden blackout not caused by his or her own fault, the person will not be held liable. In English law it is acknowledged that the reasonable person may suffer a disabling condition which suddenly manifests itself and of which he or she is not aware (or should not reasonably have been reasonably aware of). Under the circumstances, the reasonable person with the sudden disabling condition may have acted as the defendant did.<sup>185</sup> English law does not differentiate between conduct and fault as in South African law, where both conduct and fault under such circumstances would be absent. If the defendant through fault on his part forgets to take his medication, thereby leading to a blackout, the principle of "prior fault" applies and the defendant may be held liable.<sup>186</sup>

A mentally impaired person can generally be held liable and the standard of the reasonable person will be applied unless the person "cannot understand the nature and consequence of his act."<sup>187</sup> The decision would depend on

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<sup>181</sup> Moran *Rethinking the Reasonable Person* 104, 107, 126-128 refers to *Gough v National Coal Board* 1953 2 All ER 1283 (CA) 1293, where it was stated the boy was "extremely likely to succumb to the temptation" and boys have been behaving in such a manner since "time immemorial"; *Cooke v Midland Great Western Railway of Ireland* 1909 AC 229 (HL) 237, where unguarded vehicles and machines were considered "calculated to attract or allure"; *Lengyel v Manitoba Power Commission* 1957 12 DLR 2d 126 (Man CA) 133, where the court held that the device was "calculated to attract small boys, to arouse their curiosity"; *Coley v CPR* 1906 29 (Que SC) 285, where it was held that a turntable was an allurements to children. In this case a nine-year-old girl was playing on a turntable and was seriously injured resulting in the amputation of her foot. See further cases referred to by Moran *Rethinking the Reasonable Person* 104-107.

<sup>182</sup> Or has a condition.

<sup>183</sup> See *Roberts v Ramsbottom* 1980 1 WLR 823, where the defendant who was unaware that he had suffered a stroke resulting in an accident but admitted to feeling dizzy before driving, was found negligent. The court held that the plaintiff continued to drive when he should have been aware that he was unfit and would have escaped liability only if his actions had been entirely beyond his control. *Witting Street on Torts* 135-136.

<sup>184</sup> In *Mansfield v Weetabix* 1998 1 WLR 1263 1268 Leggat LJ held that the standard of care applicable to the driver who suffered from hypoglycaemia of which he was unaware was judged according to "that which is to be expected of a reasonably competent driver unaware that he is or may be suffering" from such a condition. The Appeal Court found the driver not liable. See Jones "Negligence" 561; *Witting Street on Torts* 136.

<sup>185</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 148. See Ahmed 2019 *PELJ* 13.

<sup>186</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 149.

<sup>187</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 778 with reference to *Hanbury v Hanbury* 1892 8 TLR 559 569.

whether the defendant had the "requisite state of mind for liability in the particular tort with which he is charged."<sup>188</sup> For example, in *Morris v Marsden*<sup>189</sup> the mentally impaired defendant attacked the manager of the hotel he was staying at. It transpired that the defendant was aware of the nature and extent of his conduct but not aware that what he was doing was indeed wrong. It was held that because he was aware of the nature and extent of his conduct, he was liable for the intentional tort of battery. His obliviousness of the fact that what he was doing was wrong was considered immaterial.<sup>190</sup> *Stable J*<sup>191</sup> held that if a person acts without intention and "carelessness", causing grievous injury, thus being without fault and in a complete state of automatism, then he cannot be held liable.<sup>192</sup>

### **3.3 The United States of America (American law)**

#### **3.3.1 Tort of negligence**

Once it has been established that a duty of reasonable care is owed, the conduct of the parties is tested against the standard of a reasonable person under the circumstances.<sup>193</sup> Sometimes the standard must be adjusted, for example to that of the reasonable professional, and the adjudicator determines the standard that should be applied in the particular circumstances of the case.<sup>194</sup> The standard of the reasonable person is predominantly objective in that it applies generally to cases testing the parties' conduct against the hypothetical, model reasonable person. It is an external standard based on "what society demands generally of its members rather than upon the actor's personal morality or individual sense

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<sup>188</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 778.

<sup>189</sup> *Morris v Marsden* 1952 1 All ER 925.

<sup>190</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 778; McBride and Bagshaw *Tort Law* 699.

<sup>191</sup> *Morris v Marsden* 1952 1 All ER 925, 927.

<sup>192</sup> See Ahmed 2019 *PELJ* 11.

<sup>193</sup> See *Lugtu v Cal Highway Patrol* 26 Cal 4th 703, 110 Cal Rptr 2d 528, 28 P 3d 249 (2011); *Gossett v Jackson* 249 Va 549, 457 SE 2d 97 (1995); American Law Institute *Restatement Second of Torts* 1965 § 282-283 (1965); American Law Institute *Restatement Third of Torts* 2010 §§ 7, 16(2); Dobbs, Hayden and Bublick *Hornbook on Torts* 214. Different volumes of the *Restatement of Torts* will be referred to in this contribution as they are influential in American law. These volumes consist of black letter law applied throughout the different states in the United States of America as well as case law restating current existing common law, see Zweigert and Kötz *Introduction to Comparative Law* 252. See Ahmed 2019 *PELJ* fn 102.

<sup>194</sup> American Law Institute *Restatement Third of Torts* 2010 § 10(1).

of right and wrong."<sup>195</sup> The reasonable person has reasonable prudence<sup>196</sup> as well as common knowledge,<sup>197</sup> is cautious,<sup>198</sup> and possesses normal perception and memory.<sup>199</sup> The subjective part of the reasonable person standard relates to "additional intelligence, skill, or knowledge actually possessed by the individual"<sup>200</sup> coupled with his "physical attributes", although they are still tested objectively.<sup>201</sup>

The *Restatement Third of Torts*<sup>202</sup> refers to superior skills or knowledge as circumstances to be taken into account in determining whether the actor acted reasonably. For example, a race car driver who has superior driving abilities would be more skilled at avoiding an accident in an emergency than an ordinary driver. The race car driver may be held negligent for failing to use his superior skill in avoiding an accident.<sup>203</sup>

Professionals are expected to exercise reasonable care and to possess a minimum standard of knowledge and ability. If the professional professes further specialised knowledge or skills, the standard is adjusted to the specialised skill and knowledge held to the accepted practice, customary

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<sup>195</sup> Keeton *et al* *Prosser and Keeton on the Law of Torts* 169. See *McNeely v M & M Supermarkets Inc* 1980 154 Ga App 675, 269 SE 2d 483; *Stewart v Jefferson Plywood Co* 1970 255 Or 603, 469 P 2d 783.

<sup>196</sup> See *Trentacoast v Brussel* 1980 82 NJ 214, 412 A 2d 436; *Swenson Trucking & Excavating Inc v Truckweld Equipment Co Alaska* 1980 604 P 2d 1113; Keeton *et al* *Prosser and Keeton on the Law of Torts* 174 (referring to the reasonable prudent person).

<sup>197</sup> Compared with common knowledge in the community at the time of the tort.

<sup>198</sup> See *Massey v Scripser* 1977 401 Mich 385, 258 NW 2d 44; *St Mary's Hosp Inc v Bynum*, Ark 1978 573 SW 2d 914; Keeton *et al* *Prosser and Keeton on the Law of Torts* 174 (referring to the reasonably careful person).

<sup>199</sup> Dobbs, Hayden and Bublick *Hornbook on Torts* 222, 229. See *Restatement Second of Torts* 1965 289-290, which states that an ordinary person has knowledge that matches will burn, alcohol induces intoxication, gravity makes weight fall from a high place, and a person can get electrocuted when coming into contact with a power line. American Law Institute *Restatement Third of Torts* 2010 § 12. For example, a reasonable person is not expected to know that fumes from gasoline are heavier than air (see *Blakes v Blakes* 517 So 2d 444 (La Ct App 1987)). Also see the discussion by Keeton *et al* *Prosser and Keeton on the Law of Torts* 182-185 with regard to the difficulty with the question of how much knowledge the defendant is required to possess.

<sup>200</sup> See American Law Institute *Restatement Second of Torts* 1965 §§ 289, 290 cmt f, 299 cmt f.

<sup>201</sup> Dobbs, Hayden and Bublick *Hornbook on Torts* 222.

<sup>202</sup> American Law Institute *Restatement Third of Torts* 2010 § 12. See *Sinai v Polinger Co* 498 A 2d 520 (DC 1985); Dobbs, Hayden and Bublick *Hornbook on Torts* 230-231. See fn. 195 above regarding the different volumes of the *Restatement of Torts* referred to in this contribution.

<sup>203</sup> See American Law Institute *Restatement Third of Torts* 2010 § 12; Green and Card "Basic Questions of Tort Law" 484.

and usual standard of the relevant professional, such as a doctor, dentist, accountant etcetera.<sup>204</sup>

A person with a disability is judged according to the standard of the reasonable person with such a disability.<sup>205</sup> The *Restatement Third of Torts*<sup>206</sup> with reference to conduct of persons with physical disability states that the standard of negligence is that of a "reasonably careful person with the same disability". This standard is usually applied to persons who are blind or deaf or where there is a loss of a motor function.<sup>207</sup> If a person is below average in "judgment, knowledge, or skills" such as a learner driver, he or she is still judged according to the (base) standard of the reasonable person.<sup>208</sup>

A person who is "reasonably unaware" of his or her physical limitation, impairment or disability, as when a person unaware of her heart condition suffers a heart attack, may not be held liable, as the heart attack was not foreseeable.<sup>209</sup> Even though conduct is present, negligence is absent.<sup>210</sup> The same principles will apply with other types of conditions, as when a person sustains an epileptic fit, sustains a stroke, or faints.<sup>211</sup> In instances where a person is aware of their physical impairment, pre-existing condition or disability or can reasonably foresee that they are prone to such a condition, impairment or disability, the person may be held negligent for not controlling the condition.<sup>212</sup>

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<sup>204</sup> See the discussion by Keeton *et al* *Prosser and Keeton on the Law of Torts* 185-193 as well as the authority referred to.

<sup>205</sup> See *Fink v City of New York* 206 Misc 79, 132 NYS 2d 172 (Sup Ct 1954); American Law Institute *Restatement Second of Torts* 1965 § 283C; Dobbs, Hayden and Bublick *Hornbook on Torts* 223; cases referred to Keeton *et al* *Prosser and Keeton on the Law of Torts* 176 fn. 23 in respect of people with disabilities, who are blind and deaf.

<sup>206</sup> American Law Institute *Restatement Third of Torts* 2010 § 11(a).

<sup>207</sup> Epstein and Sharkey *Cases and Materials on Torts* 158.

<sup>208</sup> American Law Institute *Restatement Third of Torts* 2010 § 10 cmt b; Epstein and Sharkey *Cases and Materials on Torts* 147-148.

<sup>209</sup> See Ahmed 2019 *PELJ* 20-21.

<sup>210</sup> See *Baker v Joyal* 4 AD 3d 596, 771 NYS 2d 269 (2004); *Hancock-Underwood v Knight* 670 SE 2d 720 (Va 2009); American Law Institute *Restatement Third of Torts* 2010 § 11(b); Dobbs, Hayden and Bublick *Hornbook on Torts* 224; Ahmed 2019 *PELJ* fn. 147.

<sup>211</sup> See Ahmed 2019 *PELJ* 2019 20-21, fn. 148; *Moore v Preenell* 1977 38 Md App 243, 379 A 2d 1246 as well as *Frechette v Welch* (1st Cir 1980) 621 F 2d 11; Keeton *et al* *Prosser and Keeton on the Law of Torts* 162.

<sup>212</sup> See Ahmed 2019 *PELJ* fn. 149; *Goodrich v Blair* 132 Ariz 459, 646 P 2d 890 (1982); *Lutzkovitz v Murray* 339 A 2d 64, 93 ALR 3d 321 (Del 1975); *Howle v PYA/Monarch Inc* 288 SC 586, 344 SE 2d 157 (1986); Dobbs, Hayden and Bublick *Hornbook on Torts* 225 fn157-159.

Generally, children under the age of five are deemed incapable of being negligent.<sup>213</sup> In a few states, children under seven years of age may not be held liable in tort and children from seven to fourteen years of age are presumed incapable of negligence which may be rebutted.<sup>214</sup> The conduct of a minor is not judged according to the standard of the reasonable person or the reasonable child of the same age but with the care of a reasonable person "of his age, intelligence, and experience in similar circumstances", (a more subjective standard).<sup>215</sup> Liability in tort will depend on whether in the light of the child's age, experience and intelligence he or she acted reasonably.<sup>216</sup> The age of the child, maturity, knowledge, prior experience, whether he or she can understand the consequences of his or her actions (accountability), as well as other surrounding circumstances are taken into account.<sup>217</sup> A child with a mental impairment or incapacity is not expected to act with the care of a child without such an impairment or incapacity.<sup>218</sup> Similarly, a child with the experience and intelligence equivalent to that of an adult will be expected to act like a reasonable person.<sup>219</sup> A child's conduct may be judged according to the standard of the reasonable person when a child undertakes a dangerous activity usually undertaken by adults.<sup>220</sup> For example, the courts have applied the reasonable person test

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<sup>213</sup> See *Mastland Inc v Evans Furniture Inc* 498 NW 2d 682 (Iowa 1993); *Price v Kitsap Transit* 125 Wash 2d 456, 886 P 2d 556 (1994); American Law Institute *Restatement Third of Torts 2010* § 10(b); Dobbs, Hayden and Bublick *Hornbook on Torts* 233; Epstein and Sharkey *Cases and Materials on Torts* 150.

<sup>214</sup> Georgia has by a statute exempted children under thirteen years of age from liability in tort. See *Horton v Hinley* 261 Ga 863, 413 SE 2d 199 (1992); *Savage Indus v Duke* 598 So 2d 856 (Ala 1992); *Queen Ins v Hammond* 374 Mich 655, 132 NW 2d 792 (1965); *Steele v Holiday Inns Inc* 626 So 2d 593 (Miss 1993); Dobbs, Hayden and Bublick *Hornbook on Torts* 233; authority referred to by Keeton *et al Prosser and Keeton on the Law of Torts* 179 fn. 58.

<sup>215</sup> See *First Nat'l Bank of Ariz v Dupree* 136 Ariz 296, 665 P 2d 1018 (Ct App 1983); *Lehmuth v Long Beach Unified Sch Dist* 53 Cal 2d 544, 348 P 2d 887, 2 Cal Rptr 279 (1960); American Law Institute *Restatement Second of Torts 1965* § 283A; *Restatement Third of Torts 2010* §§ 8(2), 10(a); Dobbs, Hayden and Bublick *Hornbook on Torts* 233 fn. 224; cases referred to by Keeton *et al Prosser and Keeton on the Law of Torts* 179 fn. 47.

<sup>216</sup> See cases cited by Dobbs, Hayden and Bublick *Hornbook on Torts* 233 fn 227-280.

<sup>217</sup> See *Hudson v Old Guard Ins* 3 A 3d 246 (Del 2010); Dobbs, Hayden and Bublick *Hornbook on Torts* 233 fn 236.

<sup>218</sup> See *Lafayette Par Sch Bd v Cormier ex rel Cormier* 901 So 2d 1197 (La Ct App 2005); Dobbs, Hayden and Bublick *Hornbook on Torts* 234.

<sup>219</sup> *Dorais v Paquin* 113 NH 187, 304 A 2d 369 (1973); Dobbs, Hayden and Bublick *Hornbook on Torts* 234.

<sup>220</sup> See American Law Institute *Restatement Second of Torts 1965* § 283(A); American Law Institute *Restatement Third of Torts 2010* § 10(c); Dobbs, Hayden and Bublick *Hornbook on Torts* 236; Epstein and Sharkey *Cases and Materials on Torts* 150-151.



to children operating a motorised vehicle,<sup>221</sup> tractor,<sup>222</sup> boat,<sup>223</sup> and a snowmobile.<sup>224</sup> The reasonable person standard, however, does not apply to minors who were involved in hunting accidents where guns were involved<sup>225</sup> or where minors ride bicycles.<sup>226</sup>

If an elderly driver is not able to respond to accidents as a result of a decline in his or her mental or physical abilities then he or she should not be driving as he or she poses a risk to others.<sup>227</sup> The *Restatement Third of Torts*<sup>228</sup> provides a rule that a child under the age of five cannot be held to be contributorily negligent. This rule has also been applied to an institutionalised elderly person.<sup>229</sup>

A mental impairment, incapacity or disability will generally not exonerate a person from liability in tort.<sup>230</sup> American law developed in this way and an insane person or a person with a mental impairment will still be judged according to the reasonable person standard.<sup>231</sup> Even though this has been widely criticised, the standard of care applied to a mentally impaired person

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<sup>221</sup> See *Adams v Lopez* 407 P 2d 50 (NM 1965) in respect of a motorised scooter; *Pritchard v Veterans Cab Co* 63 Cal 2d 727, 408 P 2d 360, 47 Cal Rptr 904 (1965); other cases referred to by Dobbs, Hayden and Bublick *Hornbook on Torts* 236 fn 251; Keeton *et al Prosser and Keeton on the Law of Torts* 179.

<sup>222</sup> See *Jackson v McCuiston* 448 SW 2d 33 (Ark 1969); *Goodfellow v Cogburn* 98 Idaho 202, 203-204, 560 P 2d 873 (1977).

<sup>223</sup> *Dellwo v Pearson* 259 Minn 452, 107 NW 2d 859, 97 ALR 2d 866 (1961).

<sup>224</sup> See *Robinson v Lindsay* 92 Wash 2d 410, 598 P 2d 392 (1979); Dobbs, Hayden and Bublick *Hornbook on Torts* 236; Keeton *et al Prosser and Keeton on the Law of Torts* 179.

<sup>225</sup> See *Purtle v Shelton* 474 SW 2d 123 (Ark 1971), where the reasonable person standard was not applied, the minors age (a seventeen-year-old child) was considered.

<sup>226</sup> American Law Institute *Restatement Third of Torts* 2005 § 8 cmt f; Epstein and Sharkey *Cases and Materials on Torts* 119.

<sup>227</sup> *Roberts v Ring* 173 NW 437, 438 (Minn 1919); American Law Institute *Restatement Third of Torts* 2005 § 9 cmt c; Epstein and Sharkey *Cases and Materials on Torts* 151.

<sup>228</sup> American Law Institute *Restatement Third of Torts* 2000 § 10 cmt e. See Dobbs, Hayden and Bublick *Hornbook on Torts* 392.

<sup>229</sup> See *Fields v Senior Citizens Ctr Inc* 528 So 2d 573, 581 (La Ct App 1988); Dobbs, Hayden and Bublick *Hornbook on Torts* 392.

<sup>230</sup> See *McGuire v Almy* 8 NE 2d 760 (Mass 1936); *Polmatier v Russ* 537 A 2d 468 (Conn 1988); *Williams v Kearby* 775 P 2d 670 (Kan App 1989); American Law Institute *Restatement Second of Torts* 1979 § 895J; American Law Institute *Restatement Third of Torts* 2010 § 11(c).

<sup>231</sup> See Ahmed 2019 *PELJ* 21; Keeton *et al Prosser and Keeton on the Law of Torts* 177 fn. 32 and the cases cited therein; Epstein and Sharkey *Cases and Materials on Torts* 156.

or insane person remains that of the reasonable person and not that of the reasonable person affected with a mental impairment.<sup>232</sup>

Certain statutes may in a sense lower the standard of reasonable care. For example, motor vehicles responding to an emergency such as police motor vehicles, fire engines and ambulances etcetera may according to certain legislation disobey usual traffic rules but must still either drive with reasonable care<sup>233</sup> or not recklessly in the circumstances.<sup>234</sup>

### **3.4 France (French law)**

#### *3.4.1 Articles 1382 to 1383 of the French Civil Code of 1804 (hereinafter referred to as the "CC")<sup>235</sup> relating to liability for one's own personal conduct where fault is required*

The terms "imputability", "discernment" (*discernement*), or "culpability" in French law are used interchangeably and are somewhat similar to the concept "capacity" in Anglo-American law and "accountability" in South African law. "Imputability" refers to an element of blameworthiness and whether the defendant was aware that his or her conduct was wrongful or could lead to harmful consequences.<sup>236</sup> In French law the requirement of "imputability" for delictual liability has been dispensed with. This has affected mainly minors and mentally impaired persons.<sup>237</sup>

Previously mentally impaired persons could not be held liable on the ground that the person lacked "imputability". This changed, however, with the

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<sup>232</sup> See Ahmed 2019 *PELJ* 21-22.

<sup>233</sup> See *Torres v City of Los Angeles* 58 Cal 2d 35, 372 P 2d 906, 22 Cal Rptr 866 (1962); *Frazier v Common Wealth* 845 A 2d 253, 260 (Pa Commw Ct 2004); Dobbs, Hayden and Bublick *Hornbook on Torts* 221 fn. 134.

<sup>234</sup> See *Robins v City of Wichita* 285 Kan 455, 172 P 3d 1187 (2007); *Lenard v Dilley* 805 So 2d 175 (La 2002); Dobbs, Hayden and Bublick *Hornbook on Torts* 221 fn 135.

<sup>235</sup> The French law of delict is regulated by the *French Civil Code* of 1804 (the "CC"), in particular Arts 1382-1386.

<sup>236</sup> Van Gerven, Lever and Larouche *Tort Law* 332, 354.

<sup>237</sup> Van Gerven, Lever and Larouche *Tort Law* 332-333.

decision in *Buguel v Morin*.<sup>238</sup> Following this decision, Article 489-2<sup>239</sup> was subsequently incorporated in the CC (now Article 414-3),<sup>240</sup> which states that "[h]e who has caused harm to another while under the control of a mental disturbance is nevertheless obligated to provide reparation."<sup>241</sup> The intention behind the insertion of this new article was to remove (subjective) "imputability" as a requirement for liability. Mental disturbance is defined in a strict sense for the purposes of this Article and it does not cover brief intervals of lapse of consciousness.<sup>242</sup> After the implementation of Article 489-2, the *Cour de Cassation*<sup>243</sup> in 1976 held that the article applied to all persons with mental impairments whether they were minors or majors. The principles applied in *Buguel v Morin* are still valid in that they apply in instances where the parent or person responsible for the minor cannot be held liable and where a person who is ill has a duty to take care of himself or herself, which includes taking necessary precautions with regard to his or her condition.<sup>244</sup>

Prior to 1968, children could only be held delictually liable when they had reached the "*âge de raison*" (age of reason or discernment), typically from seven years onwards. The courts<sup>245</sup> had to establish in each case whether the child had reached the age of discernment. The "reasonable child" test

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<sup>238</sup> Cass civ 2 15 December 1965, D 1966 Jur 397 where a mentally impaired person had just been released from a psychiatric institution. He had not fully recovered but was in a state of "sufficient awareness and free will". It was expected of him to take care of himself but instead he drank heavily for two days. While in the intoxicated state he shot and seriously injured the plaintiff. Criminal proceedings could not be instituted against him due to the mental state he was in when he shot the plaintiff. However, the *Cour de Cassation* (the highest civil court in France) confirmed that he had committed a *faute* and that his "mental deficiency which continued to exist, did not deprive him of all awareness and free will." He was held delictually liable. See the discussion of this case in Van Gerven, Lever and Larouche *Tort Law* 313-314.

<sup>239</sup> Law no 68-5 of 3 January 1968 inserted Art 489-2.

<sup>240</sup> Now Art 414-3 by Law no 2007-308 of 5 March 2007.

<sup>241</sup> Légifrance-translations. See Moréteau "Basic Questions of Tort Law" 65.

<sup>242</sup> Where for example a person suffers a heart attack and falls unconscious (Cass civ 2 4 February 1981 **79-11243**, Bull civ 1981 II 21, JCP 1981 IV 136). See Van Dam *European Tort Law* 272; Van Gerven, Lever and Larouche *Tort Law* 334.

<sup>243</sup> Cass civ 1 20 July 1976 74-10238, Bull civ 1976 I 270 218. See the discussion of this case in Van Gerven, Lever and Larouche *Tort Law* 336. The *Cour de Cassation* is the highest civil court in France, see fn 240 above.

<sup>244</sup> Van Gerven, Lever and Larouche *Tort Law* 314.

<sup>245</sup> See Cass civ 2 8 February 1962, Bull civ 1962 II 180, where it was held that an eight-year-old child did not understand that the fire would spread to other buildings and could therefore not be held liable; CA Paris 6 June 1959, D 1959 76, where a six-year-old child was held liable for running a bicycle against a person who was sitting on a bench; TGI St Etienne 15 May 1974, Gaz Pal 1976 109, where it was held that a fourteen-year-old child was old enough to appreciate the consequences of using an air rifle (Ferreira *Fundamental Rights and Private Law in Europe* 142-143). Also see Van Dam *European Tort Law* 272.

was applied to children, and age was considered as a subjective factor. A similar approach was applied in assessing the conduct of an elderly person, usually over seventy years of age.<sup>246</sup> In 1984 a number of decisions<sup>247</sup> dealing with minors were considered culminating in the landmark decision of *SAMDA v Molina*,<sup>248</sup> where the *Cour de Cassation* held that it was not necessary to prove that the minor was able to "appreciate the consequences of his actions" or that he had sufficient discernment to appreciate the consequences of his actions. The *Cour de Cassation* showed a clear shift in determining *faute* in an objective manner, dispensing with the requirement of "imputability" in the French law of delict. This shift was aimed at benefitting the plaintiff and protecting his or her rights.<sup>249</sup> Discernment, however, remains a requirement in criminal law in terms of the French Penal Code (*Code Pénal*).<sup>250</sup>

Currently, a minor in French law is a child under the age of eighteen years, and in order for a minor to be at fault, it must be shown that he or she did not act like a "*bonus pater familias*".<sup>251</sup> This standard is equivalent to the standard of the reasonable person applied in South African and Anglo-American law in determining negligence. *Faute*, a concept which encompasses fault as known in South African and Anglo-American law, is now a "social concept" and not a moral concept,<sup>252</sup> in that it does not refer to morals or culpability and is applied objectively to all persons whether they are minors or have mental impairments and so on.<sup>253</sup> In French law, parents and other persons who are responsible for minors may be held strictly liable for the conduct of the minors in terms of Article 1384 of the CC. This will be discussed in more detail below.<sup>254</sup>

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<sup>246</sup> See Galand-Carval "Liability for Damage Caused by Others" 92; Van Dam *European Tort Law* 270; Van Gerven, Lever and Larouche *Tort Law* 336.

<sup>247</sup> See Cass Ass plén 9 May 1984 **80-93481**, Bull crim 1984 164, JCP 1984 II 20255 note Dejean de La Bathie, D 1984 525 note Chabas RTDciv 1984 509 observations Huet; Moréteau "Basic Questions of Tort Law" 65; Van Gerven, Lever and Larouche *Tort Law* 336.

<sup>248</sup> Cass civ 2 12 December 1984 82-12627, Bull civ 1984 II 193. In this case, a seven-year-old schoolboy violently pushed his classmate. The classmate subsequently struck a bench and sustained a burst spleen which caused a haemorrhage. See the discussion of this case in Van Gerven, Lever and Larouche *Tort Law* 335-337.

<sup>249</sup> Galand-Carval "Liability for Damage Caused by Others" 90.

<sup>250</sup> Van Gerven, Lever and Larouche *Tort Law* 302.

<sup>251</sup> "Good family father". Galand-Carval "Liability for Damage Caused by Others" 92; Van Dam *European Tort Law* 270; Van Gerven, Lever and Larouche *Tort Law* 336.

<sup>252</sup> As it does not refer to morals or culpability.

<sup>253</sup> See Van Dam *European Tort Law* 58; Van Gerven, Lever and Larouche *Tort Law* 280.

<sup>254</sup> See para 3.4.2 below.

French law assesses the defendant's conduct *in abstracto* as compared to *in concreto*. That is, it does not consider internal circumstances (subjective factors including *inter alia* the age or cultural and social characteristics of a person, or the physical, psychological, or other inherent infirmities of a person) but considering external circumstances (the nature of the conduct as well as the time and place where the delict occurred). Certain so-called inferior internal circumstances, such as physical disabilities, or so-called superior factors, such as professional experience or skill, are considered when assessing the degree of caution or diligence required.<sup>255</sup>

Statutory provisions may adjust the standard of the "*bonus pater familias*". For example, in respect of road accidents where the *loi Badinter* is applicable,<sup>256</sup> contributory negligence on the part of a child under sixteen years of age, a person older than seventy years, and a person more than eighty per cent incapacitated can no longer apply as a defence in limiting liability. However, drivers may still be held contributorily negligent.<sup>257</sup>

The standard is adjusted and raised when it comes to professionals like medical practitioners. Sound examples of how the adjusted standard of reasonable conduct is assessed are found in cases dealing with medical practitioners. In private hospitals, medical practitioners including staff at clinics, may generally be held contractually liable. The patient must still prove *faute*, causation and damage as with delictual liability. The medical practitioner is the debtor in terms of the contractual obligations who must treat the patient with all possible means.<sup>258</sup> In respect of a contractual obligation, *obligation de moyens*, the defences that may be raised are contributory fault on the part of the plaintiff or some extraneous cause which cannot be attributed to the conduct of the defendant.<sup>259</sup> In some instances, an obligation may be to do the best one can do under the circumstances. For example, a medical practitioner has an obligation to use his or her best efforts to cure a patient.<sup>260</sup>

Generally, medical practitioners and other staff such as midwives will not be held liable for negligent conduct or have *faute* if they were acting like reasonable professionals in the course and scope of their functions. Currently, employees may be held liable only if they "wilfully commit a

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<sup>255</sup> Van Gerven, Lever and Larouche *Tort Law* 353.

<sup>256</sup> Law no 85-677 of 5 July 1985, hereinafter referred to as "*loi Badinter*". This act has regulated traffic accidents in France since 5 July 1985.

<sup>257</sup> Van Gerven, Lever and Larouche *Tort Law* 314.

<sup>258</sup> See Cass civ 1 20 May 1936 (*Mercier*), DP I 88; Brun 2002 *Eur Tort Law Yearb* 180.

<sup>259</sup> See Van Gerven, Lever and Larouche *Tort Law* 285.

<sup>260</sup> Van Gerven, Lever and Larouche *Tort Law* 285-286.

criminal offence" or "act outside the scope of their functions".<sup>261</sup> For example, in a case<sup>262</sup> where a patient's intestine was perforated during a colonoscopy, the patient sued the medical practitioner for damages. The medical practitioner argued that the risk was inherent in the technique and that there was no *faute* on his part. The *Cour de Cassation* confirmed the decision of the lower court in finding that the perforation resulted from the inept conduct of the medical practitioner in that his conduct strayed from that of the reasonable medical practitioner and was therefore unreasonable. The purpose of the colonoscopy was to examine the intestinal walls, and harm to the intestinal wall was not included. The damages claimed were awarded to the patient. Generally, if there is a risk inherent in the medical procedure, then it is likely that there is no *faute* on the part of the medical practitioner. In another case<sup>263</sup> a medical practitioner was not held liable when he performed an operation on the carpal tunnel of the plaintiff's left hand. During the operation he severed the median nerve of the plaintiff's hand. The operation was performed under endoscopy using specific instruments and the procedure itself carries risks because every individual's hand is anatomically different. The *Cour de Cassation* found that the medical practitioner's conduct was reasonable under the circumstances. The medical practitioner had taken the necessary precautions, had not been careless or negligent, had not committed an error, and there was no *faute* on his part. In another case,<sup>264</sup> while operating on a patient's Achilles tendon a surgeon damaged the patient's tibial nerve, even though it was five centimetres away from the tendon. The appeal court held that such a lesion was a risk inherent in such a procedure. The *Cour de Cassation* agreed and liability was excluded. Moréteau<sup>265</sup> points out that liability on the part of the medical practitioner may still be found even when the medical procedures carry inherent risks.

Inexperience in French law does not seem to be considered as a mitigating factor or apply in lowering the base standard. For example, in *Lignon v Avri*<sup>266</sup> an amateur volleyball player inadvertently fell down during a game and unintentionally kicked a fellow player, injuring him. The injured player then sued the amateur player. The *Cour de Cassation* found the amateur

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<sup>261</sup> See Cass civ 1 9 November 2004 01-17908, Bull civ 2004 I 262 219; Moréteau 2007 *Eur Tort Law Yearb* 276.

<sup>262</sup> Cass civ 1 18 September 2008 **07-12170**; Bull civ 2008 I 205. See the discussion of this case by Moréteau 2009 *Eur Tort Law Yearb* 206-208.

<sup>263</sup> Cass civ 1 29 November 2005 03-16308, Bull civ 2005 I 456 383.

<sup>264</sup> Cass civ 1 18 September 2008 07-13080, Bull civ 2008 I 206.

<sup>265</sup> Moréteau 2009 *Eur Tort Law Yearb* 207-208.

<sup>266</sup> Cass civ 2 3 July 1991 90-13158, Bull civ 1991 II 210 111.

player liable, even though the conduct was involuntary and not wrongful.<sup>267</sup> The *Cour de Cassation* found that the inexperienced player could not judge distances and should have warned the other player of his lack of an ability to judge distances. He was found to be negligent in not informing the injured player.<sup>268</sup> In instances where an inexperienced or drunken driver or pilot raises voluntary assumption of risk as a defence, it is rare that it will apply in exonerating liability but may apply in limiting liability based on contributory fault on the part of the plaintiff.<sup>269</sup>

### 3.4.2 *Strict liability for the acts of a person for whom one is responsible in terms of Article 1384 of the CC*

The French concept of liability for the act of another is somewhat similar to vicarious liability in other jurisdictions, but in French law fault on the part of the person who committed the delict is not a requirement. Common to both concepts is a differentiation between personal liability and liability for the act of another.<sup>270</sup> Even though this paragraph does not deal with the application of the standard of the reasonable person in French law, the point here is to give a holistic view of a person's liability for the conduct of a minor or person with a mental impairment.

Stemming from *Teffaine*<sup>271</sup> and thereafter the landmark decision referred to as "*Blieck*",<sup>272</sup> the *Cour de Cassation* held that the general provision in Article 1384(1) permitted it to develop further heads of delictual liability. In *Blieck* a mentally impaired boy was placed in an institution.<sup>273</sup> He was entrusted to do some unsupervised work outside the centre during the day. One day while working outside the centre, he set fire to the plaintiff's wood. The damages could not be recovered from the boy. The plaintiff claimed from the institution and the *Cour de Cassation* held that the institution could be held strictly liable in terms of Article 1384(1) as the institution had control and supervision of a permanent nature over the boy. Since this decision a number of institutions have been held liable for acts of persons over which

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<sup>267</sup> See Ahmed 2019 *PELJ* 23-24.

<sup>268</sup> Van Gerven, Lever and Larouche *Tort Law* 339.

<sup>269</sup> See Van Gerven, Lever and Larouche *Tort Law* 734.

<sup>270</sup> Galand-Carval "Liability for Damage Caused by Others" 85.

<sup>271</sup> Cass civ 18 June 1896, S 1897 1 17 note Esmein, D 1897 1 4333, note Saleilles.

<sup>272</sup> Cass Ass plén 29 March 1991 89-15231, Bull Ass plén 1991 1, D 1991 Jur 324 note Larroumet, JCP 1991 II 21673, conclusions Dontenwille note Ghestin, Gaz Pal 1991 Jur 513 note Chabas. See Van Dam *European Tort Law* 68-69; Viney "Tort Liability" 253; Galand-Carval "Liability for Damage Caused by Others" 86 fn 4.

<sup>273</sup> Employment Help Centre.

they had permanent or temporary control.<sup>274</sup> The justification for the liability of the public institution is based on the premise that the public institution takes a "special risk" in establishing itself as such an institution and providing such a service, according to the "risk theory".<sup>275</sup> The justification for the liability of the acts of the person for whom one is responsible is based on the risk theory. For example, institutions such as medical and rehabilitation institutions, social services, educational institutions and sports clubs take a "special risk" in running such institutions and providing such services. Sports clubs organise, control and direct their members' activities. Parents who have children living with them have power and control over their children while raising them. Parents and most institutions, therefore, have insurance for such potential liability. Therefore, Article 1384(1) allows a plaintiff to claim compensation from the person who cares for, supervises, or has control over the person who caused the damage.<sup>276</sup> Article 1384(1) may be applied where one is supervising an adult of unsound mind. Liability may be found if the harmful conduct was committed when the defendant had the power to "organize, direct and control the wrongdoer's way of life".<sup>277</sup> In a case,<sup>278</sup> an adult who had a mental impairment and was living with his father attended a specialised institution during the day. On one particular day he set fire to a building while on his way home from the institution. The plaintiff sued the institution as well as the father who was his *administrateur legal* (legal guardian). The *Cour de Cassation* held that the claim against the institution failed because at the time of the delict he was not under the supervision of the institution. The claim against the father also failed because the child was not a minor.

Article 1384 of the *CC* provides *inter alia* for the strict liability of parents for the acts of their children who are still living with them.<sup>279</sup> In France parents take out insurance which covers damage caused by children for whom they are responsible when they take out home insurance or insurance over rental

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<sup>274</sup> Such as medical and rehabilitation institutions, social services, educational institutions and sports clubs for harm caused by club players. See Cass crim 26 March 1997 95-83957, Bull crim 1997 124 414, JCP 1997 II 22868 and authority cited by Viney "Tort Liability" 253 fn 44-46; Van Dam *European Tort Law* 69; Galand-Carval "Liability for Damage Caused by Others" 86 fn. 5; Van Gerven, Lever and Larouche *Tort Law* 520-521; Moréteau 2007 *Eur Tort Law Yearb* 278.

<sup>275</sup> Galand-Carval "Liability for Damage Caused by Others" 101.

<sup>276</sup> Van Dam *European Tort Law* 69; Galand-Carval "Liability for Damage Caused by Others" 90.

<sup>277</sup> See Galand-Carval "Liability for Damage Caused by Others" 91.

<sup>278</sup> Cass civ 2 25 February 1998 95-20419, Bull civ 1998 II 62 38, JCP II 10149 note Viney. See Galand-Carval "Liability for Damage Caused by Others" 91.

<sup>279</sup> Viney "Tort Liability" 251; Galand-Carval "Liability for Damage Caused by Others" 86.



property.<sup>280</sup> In terms of Article 1384(4) the parents of a minor<sup>281</sup> may be held liable jointly and severally<sup>282</sup> for damage caused by their minor child if at the time they exercised "parental authority" over the child; that is, if the child still *usually* lives with them.<sup>283</sup> If a child commits a delict while in another person's care, the parents will not escape liability. All that needs to be established is that the child is liable to the plaintiff. Fault on the part of the child is not a requirement.<sup>284</sup> The parents may still be held liable if the child causes harm to another while at school or on a school outing.<sup>285</sup> It is not necessary to establish that the child directly caused the harm or loss.<sup>286</sup> Liability is strict in that the parents cannot raise a defence that "they did not contribute to the child's harmful act by a lack of supervision or a defective education."<sup>287</sup> Previously parents were generally not held liable for the conduct of older children if they could establish that there was no *faute* on their part; that is, if they could prove that there was no failure on their part in supervising the child or no failure on their part in respect of the manner in which the child was brought up.<sup>288</sup> In most instances the parents were personally at fault but their liability still fell under "*responsabilité du fait d'autrui*" (liability for the act of another).<sup>289</sup> But since 1977, stemming from *Bertrand v Domingues*,<sup>290</sup> lack of supervision as a requirement was discarded.<sup>291</sup> Fault-based liability was changed to so-called objective liability.<sup>292</sup> Furthermore, stemming from this decision the only defence a parent can rely on is contributory negligence on the part of the plaintiff, or if

<sup>280</sup> Moréteau "Basic Questions of Tort Law" 66; Van Dam *European Tort Law* 273.

<sup>281</sup> Under eighteen years of age.

<sup>282</sup> The joint liability of both the parents was applicable as a result of legislation of 4 June 1970. See Viney "Tort Liability" 252.

<sup>283</sup> See Art 1384 (4) of the CC; Cass civ 2 20 January 2000 98-17005, Bull civ 2000 II 15 10; Van Dam *European Tort Law* 493; Viney "Tort Liability" 252; Galand-Carval "Liability for Damage Caused by Others" 88-89.

<sup>284</sup> See Galand-Carval "Liability for Damage Caused by Others" 89 fn. 14, which refers to an example, Cass civ 2 9 March 2000 98-18095, Bull civ 2000 II 44 31, where a child injured another child with a pencil he was holding. The parents of the boy holding the pencil were held vicariously liable. Compare Van Gerven, Lever and Larouche *Tort Law* 521.

<sup>285</sup> Galand-Carval "Liability for Damage Caused by Others" 100.

<sup>286</sup> Cass Ass plén 9 May 1984 80-93481, Bull crim 1984 164, JCP 1984 II 20255 note Dejean de la Bathie, D 1984 525 note Chabas, RTDciv 1984 509 observations Huet. See Galand-Carval "Liability for Damage Caused by Others" 89 fn. 15.

<sup>287</sup> Galand-Carval "Liability for Damage Caused by Others" 85.

<sup>288</sup> Van Dam *European Tort Law* 494. Compare Viney "Tort Liability" 252; Galand-Carval "Liability for Damage Caused by Others" 85.

<sup>289</sup> Galand-Carval "Liability for Damage Caused by Others" 85.

<sup>290</sup> Cass civ 2 19 February 1997 94-21111, Bull civ 1997 II 56 32, JCP 1997 II 22848.

<sup>291</sup> In this case a twelve-year-old boy caused an accident while riding his bicycle. The *Cour de Cassation* held the boy's parents strictly liable and lack of supervision as a requirement was discarded. See Viney "Tort Liability" 252.

<sup>292</sup> Van Gerven, Lever and Larouche *Tort Law* 523.

there was some external cause to the damage.<sup>293</sup> Article 1384(4) only applies to the parents, not for example to grandparents,<sup>294</sup> and there is still uncertainty as to whether it applies to guardians.<sup>295</sup>

The strict liability rule holding the parents liable may apply in instances where: the child committed a *faute* and an unlawful or wrongful act is sufficient; an "*acte objectivement illicite*" where the child need not be aware of the unlawfulness of his conduct;<sup>296</sup> if the damage occurred as a result of a "thing" and the child was the custodian of the thing;<sup>297</sup> and where the child directly caused the damage suffered by the plaintiff.<sup>298</sup> For example, in one case,<sup>299</sup> a child injured another child during a rugby game. The child's parents were held liable for the direct causing of injury, even though the child had not committed a *faute*. Article 1384(7) of the CC, however, states that the parents may not be held liable if they could not have prevented the harmful act. This relates for example to instances such as *force majeure*<sup>300</sup> or where there is contributory fault on the part of the plaintiff.<sup>301302</sup>

<sup>293</sup> Cass civ 2 19 February 1997 94-21111, Bull civ 1997 II 56 32, JCP 1997 II 22848. See Van Dam *European Tort Law* 493-494; Viney "Tort Liability" 252.

<sup>294</sup> In Cass civ 2 18 March 2004 03-10600, Bull civ 2004 II 140 118, the parents of a ten-year-old child left him in the care of his grandparents and the child set a canister of petrol alight in a shed. The child sustained burns and the parents sued the grandparents for negligent lack of supervision. The *Cour de Cassation* in terms of Art 1382 of the CC (dealing with personal liability as opposed to strict liability of the parents) dismissed the parents' claim, holding that the child had been staying with his grandparents for over three weeks and was not particularly reckless or undisciplined and therefore did not require special supervision from the grandparents. See Cannarsa 2004 *Eur Tort Law Yearb* 285-287.

<sup>295</sup> See Cass civ 2 25 January 1995 92-18802, Bull civ 1995 II 29 17; Van Dam *European Tort Law* 493. Galand-Carval "Liability for Damage Caused by Others" 90 refers to Cass Crim 28 March 2000 99-84075, Bull crim 2000 140 416, where the guardian was held liable in an instance where the child accidentally shot and killed a playmate with a rifle.

<sup>296</sup> Van Dam *European Tort Law* 494.

<sup>297</sup> Cass civ 2 10 February 1966, D 1966 332. See Van Dam *European Tort Law* 494.

<sup>298</sup> See cases cited by Van Dam *European Tort Law* 494 fn 17.

<sup>299</sup> Cass Ass plén 13 December 2002 **00-13787**, Bull Ass plén 2002 4 7, D 2003 231 note Jourdain. See Brun 2002 *Eur Tort Law Yearb* 199; Van Dam *European Tort Law* 494.

<sup>300</sup> See Cass civ 2 19 February 1997 94-21111, Bull civ 1997 II 56 32, JCP 1997 II 22848; Galand-Carval "Liability for Damage Caused by Others" 89.

<sup>301</sup> See Cass civ 2 1 December 1965, JCP 1966 2 14567; Cass civ 2 2 December 1998 96-22158, Bull civ 1998 292 176; Cass civ 2 20 April 2000 98-18809, Bull civ 2000 66 46; Cass civ 2 9 March 2000 (*Epoux X v Mutuelle Générale de l'Éducation Nationale*) 98-18095, Bull civ 2000 II 44 31; Cass civ 2 29 March 2001 98-20721, Bull civ 2001 II 69 46; Ferreira *Fundamental Rights and Private Law in Europe* 142-143 fn. 193.

<sup>302</sup> See, for example, in *Lacouture v Société Pyrotechnique Industrielle et agricole*, Cass civ 2 4 July 1990 89-15177, Bull civ 1990 II 167 84, a nine-year-old child on a beach picked up a discarded firework which exploded. The parents of the child sued the

## 4 Comparative conclusions

Now that an idea has been conveyed of how the reasonable person standard is applied and adjusted depending on the subjective attributes of the actor in the above-mentioned jurisdictions, it is possible to compare the different applications and analyse how the standard is adjusted from the base standard of the reasonable person.

It is apparent that the standard of the reasonable person is objective as well as subjective. It is objective in the sense that it is the uniform standard that is applied in all the jurisdictions mentioned above to test fault in the form of negligence in the general community. It therefore applies generally to cases, testing the parties' conduct against the hypothetical model reasonable person.<sup>303</sup> As already mentioned,<sup>304</sup> the subjective part of the reasonable person standard relates to the personal subjective attributes of the actor, such as *inter alia* his or her age, knowledge, intelligence, experience, skill, physical attributes, and mental capacity, but still tested objectively.<sup>305</sup> Depending on the jurisdiction the standard applicable may be the reasonable child, the reasonable person with a physical disability, the reasonable professional and so on, where the test is still objective but also subjective when taking into consideration the subjective attributes of the actor.

In all the jurisdictions discussed, the base standard of the reasonable person is not lowered to take into account the particular person's idiosyncrasies.<sup>306</sup> Furthermore, in all the jurisdictions discussed, where a person is an expert the base standard of the reasonable person is raised, depending on the person's profession, and a reasonable measure of the particular expertise is expected.<sup>307</sup> In respect of the reasonable expert standard, besides the particular circumstances present at the time of the delict or tort having an effect, the expert is expected to possess the level of skill and diligence at the time of the delict or tort of other members of the

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person looking after the child, the "caretaker". The caretaker then submitted that there was *faute* on the part of the child, but the *Cour de Cassation* confirmed that there was *faute* on the part of the caretaker and not the child. The *Cour de Cassation* held that the child had not been warned by the caretaker that the firework he picked up was dangerous and that the child could not have been aware that it could explode as the fuses for the firework had already been used. See the discussion of this case in Van Gerven, Lever and Larouche *Tort Law* 337-338.

<sup>303</sup> See para 3.3.1 above.

<sup>304</sup> In para 3.3.1 above.

<sup>305</sup> See Dobbs, Hayden and Bublick *Hornbook on Torts* 222; para 3.3.1 above.

<sup>306</sup> See paras 3.1-3.4 above.

<sup>307</sup> See paras 3.1-3.4 above.

professional body to which he or she belongs.<sup>308</sup> In terms of an expert, whether his or her conduct deviated from that of the reasonable expert will depend on whether the professional acted within the scope of his or her functions and whether he or she acted with the necessary care, skill, and diligence expected of the expert under the same circumstances.<sup>309</sup> In making a careless error such as perforating an intestinal wall while undertaking a routine scope, a professional's conduct is considered unreasonable and may be found negligent.<sup>310</sup> Where a person professes to have a particular acquired skill or experience, the person will be held to a reasonable degree of such skill or expertise.<sup>311</sup>

In instances where there is a lack of experience, such as in the case of the learner driver, it seems that there is no leniency and the base standard of the reasonable person applies, especially where the lack of skill and experience poses a danger to others.<sup>312</sup> The rationale for this is that the learner driver undertakes an activity that requires a certain level of skill or knowledge and he or she ought to know that he or she lacks the required skill or knowledge while undertaking the activity. If the learner driver causes harm to another as a result of his or her lack of skill or experience, then the learner driver may be found negligent.<sup>313</sup> In South African law, however, it seems that where the lack of experience and skill does not pose any danger (as in the examples of the novice golfer or inexperienced young teacher) the base standard of the reasonable person may not be applied but rather lowered, as the inexperienced person may not be expected to display the same level of knowledge and skill as that of the experienced golfer or teacher.<sup>314</sup> In American law, as already said,<sup>315</sup> certain statutes may lower the standard of reasonable care of drivers who respond to an emergency, such as police motor vehicles, fire engines and ambulances etcetera. The drivers may disobey the usual traffic rules but must still either drive with reasonable care or not recklessly under the circumstances. In France, according to the *loi Badinter*,<sup>316</sup> children under sixteen years of age, a person older than seventy years and a person more than eighty per cent

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<sup>308</sup> See paras 3.1-3.4 above.

<sup>309</sup> See para 3.4 above.

<sup>310</sup> See para 3.4 above.

<sup>311</sup> See *Woolridge v Sumner* 1963 2 QB 43; para 3.2 above.

<sup>312</sup> See paras 3.1-3.4 above.

<sup>313</sup> See paras 3.1-3.3 above.

<sup>314</sup> See para 3.1 above.

<sup>315</sup> See para 3.3 above.

<sup>316</sup> Law no 85-677 of 5 July 1985.

incapacitated may not be held contributorily negligent, but it seems that the base standard of the "*bonus pater familias*" applies to all drivers.<sup>317</sup>

Children are generally held to a more relaxed standard when compared to adults, in that, to begin with, in some jurisdictions very young children cannot be held negligent.<sup>318</sup> Generally, in English law a very young child such as a child under the age of three, in American law a child under the age of five, and in South African law a child under the age of seven cannot be held negligent or liable in delict or tort.<sup>319</sup> It is submitted that generally the child's age, intellect, maturity, experience etcetera as subjective factors are considered when judging their conduct.<sup>320</sup> The subjective factors may be considered directly or indirectly and lend to the more relaxed treatment applied to children, which is reasonable and justifiable. In English law the reasonable child test is applied.<sup>321</sup> In South African law it must first be considered whether a child can be held accountable. Under accountability, subjective factors such as whether the child can tell the difference between right and wrong, experience, maturity, intellect and so on are considered.<sup>322</sup> Even though the age of the child may not be referred to (as in American law),<sup>323</sup> the other subjective factors considered in a sense correlate with the child's age. In American law a child's conduct is tested against that of the reasonable person of his age, intelligence, maturity, and experience in similar circumstances.<sup>324</sup> In French law the situation is indeed unique in that even though in principle the *bonus pater familias* standard is applied, the requirement of discernment (which is similar to the concept of accountability) has been dispensed with and the parents are generally held strictly liable for the conduct of children still living with them.<sup>325</sup> Although the strict liability rule that applies to parents may seem harsh, it is tempered by the fact that almost all French families are protected by liability insurance cover at a minimal cost.<sup>326</sup> Furthermore, most social institutions are insured against civil liability.<sup>327</sup> It may be argued, though, that this rule is not really tempered as the parents or institutions have to pay for the insurance, but it

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<sup>317</sup> See Van Gerven, Lever and Larouche *Tort Law* 314; para 3.4 above.

<sup>318</sup> See para 3.1-3.4 above.

<sup>319</sup> See para above 3.1-3.3 above.

<sup>320</sup> However, in France the requirement of discernment similar to the concept of accountability and capacity has been dispensed with. See para 3.4 above.

<sup>321</sup> See para 3.2 above.

<sup>322</sup> See para 3.1 above.

<sup>323</sup> See para 3.3 above.

<sup>324</sup> See Dobbs, Hayden and Bublick *Hornbook on Torts* 233; Keeton *et al Prosser and Keeton on the Law of Torts* 179; para 3.3 above.

<sup>325</sup> In terms of Art 1384 of the CC. See para 3.4 above.

<sup>326</sup> Van Dam *European Tort Law* 495.

<sup>327</sup> See Galand-Carval "Liability for Damage Caused by Others" 91.

may be understood and regarded as reasonable where it is apparent that France follows a pro-victim approach, ensuring that the plaintiff receives compensation.

In Anglo-American law, if an elderly driver poses a risk of harm to others as a result of his or her declining mental or physical abilities, then he or she is held to the base standard of the reasonable person and may be held negligent.<sup>328</sup> In France, where the *loi badinter*<sup>329</sup> is applicable, contributory negligence as a defence is no longer applicable to an elderly person over seventy years of age. A more relaxed approach seems to apply to plaintiffs only with regard to road accident claims in France and American law.<sup>330</sup> As already mentioned,<sup>331</sup> there is also a lack of authority on how the standard of the reasonable person should be applied to the elderly in South African law. It is submitted that in terms of a fair and reasonable common sense approach, the naturally declining physical and cognitive abilities of an elderly person should be considered in lowering the base standard of the reasonable person. This recommendation will be discussed further below.<sup>332</sup>

In respect of persons with physical disabilities or impairments, there seems to be a lack of authority. However, of all the jurisdictions, American law seems to adopt the most sensible approach. Physical disability or impairment may have the effect of either lowering the base standard of the reasonable person or in certain instances exonerating the person from liability. American law specifically refers to the standard of the reasonable person with a similar disability.<sup>333</sup> This standard is generally applied to persons where there is a loss of a motor function, such as persons who are blind or deaf. In these instances it is apparent that the base standard is lowered, taking into consideration the nature and extent of the disability. Naturally, the conduct of the person with a physical disability or impairment must still be reasonable in the context of his or her knowledge of the

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<sup>328</sup> See *Roberts v Ring* 173 NW 437, 438 (Minn 1919); American Law Institute *Restatement Third of Torts 2005* § 9 cmt c; Epstein and Sharkey *Cases and Materials on Torts* 119; Baret III 1984 *J Marshall L Rev* 873.

<sup>329</sup> Law no 85-677 of 5 July 1985, which has regulated traffic accidents in France since 5 July 1985.

<sup>330</sup> See Baret III 1984 *J Marshall L Rev* 889 with regard to American law in some states.

<sup>331</sup> In para 3.1.

<sup>332</sup> See para 5 below.

<sup>333</sup> American Law Institute *Restatement Third of Torts 2010* § 11(a). See para 3.3 above.

disability or impairment.<sup>334</sup> Van der Walt and Midgley<sup>335</sup> provide a good example of a person who is blind and aware of his physical impairment. In this instance the person will be found negligent if he or she drives a car on the street and causes harm.

In situations where a person suffers some kind of condition or physical disability of which he or she is unaware, such as a heart attack or sudden blackout, and causes harm, in Anglo-American law as well as South African law the person may be exonerated from liability. In Anglo-American law fault is absent as the heart attack or sudden blackout was unforeseeable.<sup>336</sup> In South African law there is an absence of conduct<sup>337</sup> as well as fault.<sup>338</sup> Where a person is aware of his or her condition or can reasonably foresee that he or she is prone to the condition and for example forgets to take his or her medication, which eventually leads to the causing of harm, generally the principle of "prior fault" applies and the person may be held negligent for not controlling the condition.<sup>339</sup>

With regard to persons with mental impairments, of all the jurisdictions South African law seems to have the most lenient approach in that, depending on the circumstances, conduct may be absent<sup>340</sup> and the base standard of the reasonable person will not even come into play if the person cannot be held accountable. If the person's cognitive and intellectual shortcomings result in him or her not being able to distinguish between right and wrong and act in accordance with such appreciation, then the question of fault does not even arise.<sup>341</sup> In Anglo-American law a mentally impaired person is judged according to the base standard of the reasonable person despite his or her cognitive and intellectual shortcomings.<sup>342</sup> The person with the mental impairment is in a sense held strictly liable and even though holding such a person to the base standard of the reasonable person has been criticised, French law seems to offer the most plausible rationale for this approach - that it is fair and reasonable to compensate the innocent plaintiff.<sup>343</sup> With regard to French law, which generally favours strict liability, the dispensing with the requirement of discernment (which is similar to the

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<sup>334</sup> *R v Verster* 1952 2 SA 231 (A) 234; Van der Walt and Midgley *Principles of Delict* 241.

<sup>335</sup> Van der Walt and Midgley *Principles of Delict* 241. See para 3.1 above.

<sup>336</sup> See paras 3.2-3.3 above.

<sup>337</sup> As the conduct is not voluntary, see para 3.1 above,

<sup>338</sup> See para 3.1 above.

<sup>339</sup> Peel and Goudkamp *Winfield and Jolowicz on Tort* 149. See para 3.1-3.3.

<sup>340</sup> If the conduct is deemed involuntary. See para 3.1 above.

<sup>341</sup> See para 3.1 above.

<sup>342</sup> See para 2 above.

<sup>343</sup> See paras 3.2-3.4 above.

concept of accountability), coupled with the fact that most French people take out insurance to cover delictual liability, explains the more claimant-biased approach followed in France as against the South African approach, for instance.

## 5 Recommendations for the South African law of delict

The South African approach to determining the negligence of a person with a mental impairment is commendable, in that the standard of the reasonable person will be applied only if the person can be held accountable. The person's cognitive and intellectual state of mind at the time of the delict are taken into consideration and if he or she cannot be held accountable, then the base standard of the reasonable person is not applied.<sup>344</sup>

South African law follows the same approach as the other jurisdictions discussed in this contribution of raising the base standard of the reasonable person when it comes to experts. All the jurisdictions apply the base standard of the reasonable person where a person is inexperienced and in instances where the risk of harm is high in respect of the activity undertaken, such as in the case of the learner driver. This is understandable when taking into account the foreseeable risk of harm. It is also understandable that in South African law, where the foreseeable risk of harm is not appreciable, as in the example of the novice golfer or the inexperienced young teacher, it may not be fair or reasonable to judge the inexperienced person according to the base standard of the reasonable person. Thus, the base standard of the reasonable person may be lowered to take into consideration the subjective lack of skill, knowledge and experience of the actor.<sup>345</sup>

Concerning children, the applicability of the concept of accountability in South African law is commendable. However, the criticism that a child's conduct cannot realistically be measured against that of an adult should be earnestly noted.<sup>346</sup> The American approach follows an appealing middle path between the reasonable child standard and the base standard of the reasonable person, in that the standard applied is that of the reasonable person "of his own age, intelligence, and experience in similar circumstances."<sup>347</sup> The age, level of maturity, knowledge, prior experience, whether he or she can understand the consequences of his or her actions and the surrounding circumstances are taken into consideration in a

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<sup>344</sup> See para 3.1 above.

<sup>345</sup> See para 3.1 above.

<sup>346</sup> See Neethling and Potgieter *Law of Delict* 144, para 3.1 above.

<sup>347</sup> Dobbs, Hayden and Bublick *Hornbook on Torts* 233 fn 224.



meaningful manner.<sup>348</sup> The approach followed in American law in respect of minors could also be followed in South African law. In respect of minors, South African law already applies the concept of accountability as a prerequisite for negligence<sup>349</sup> and could apply the standard of the reasonable person of his or her age, intellect, level of maturity and experience under similar circumstances. It follows that the minor's conduct is not tested against the base standard of the reasonable person but is lowered to take into account the subjective attributes of the child relating to his or her age, intellect, level of maturity and experience in a more expressive and meaningful way.

In respect of the elderly it is recommended that the base standard of the reasonable person be lowered generally to take into account their naturally declining physical and cognitive abilities. Barrett III<sup>350</sup> submits that the "characteristics of old age are predictable and capable of diagnosis, ample scientific and medical authority is available" in order to determine the capacity of the elderly person. He<sup>351</sup> encourages a more lenient approach to persons from the age of sixty-five years onwards. He explains that once capacity has been established, the standard of the "reasonably careful person of like age and similar infirmities" be applied. He<sup>352</sup> submits though that as with children who undertake certain risky activities usually undertaken by adults (such as driving a car), the base standard of the reasonable person should apply to the elderly person under these circumstances unless out of necessity, the elderly person had no other choice but to undertake the risky activity (that is, driving the car under the circumstances). The rationale behind this base standard being applied to minors and the elderly is that driving a car is an inherently dangerous activity and due to the concerns of public interest and safety, society requires an exception to apply in this instance.<sup>353</sup> Barrett III<sup>354</sup> persuasively submits that from a statistical, legal and practical point of view, the law should be reformed to take into account the subjective naturally declining, physical and cognitive abilities of the elderly defendant when determining negligence. The elderly person should generally not be held to the base standard of the reasonable person. It is recommended that South African law should consider applying a more lenient approach when determining the

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<sup>348</sup> See para 3.1 and 3.3 above.

<sup>349</sup> See para 3.1 above.

<sup>350</sup> Barrett III 1984 *J Marshall L Rev* 884 in respect of American law.

<sup>351</sup> Barrett III 1984 *J Marshall L Rev* 891-892.

<sup>352</sup> Barrett III 1984 *J Marshall L Rev* 884-886.

<sup>353</sup> Barrett III 1984 *J Marshall L Rev* 885.

<sup>354</sup> Barrett III 1984 *J Marshall L Rev* 892-893.

negligence of elderly persons to take into account their naturally declining physical and cognitive abilities. Again, accountability would in any event apply as a prerequisite for negligence. The standard of the reasonable person of like age and similar physical and cognitive abilities or infirmities could be applied to persons over the age of sixty-five years.

In South African law, even though there is a lack of authority on how the standard should apply to persons with physical disabilities, one can see the appeal of the American approach once again, which generally uses the standard of the reasonable person with the same disability.<sup>355</sup> In effect, the base standard of the reasonable person is lowered to take into account the subjective disability but is still tested objectively. South African law could adopt this approach.

In instances where a person suffers some kind of condition, such as the example of a heart attack where the person was unaware of his or her condition, South African law follows a commendable approach whereby the elements of conduct and fault are called into question. If the conduct was mechanical and involuntary under the circumstances, conduct is lacking and fault is absent unless the principle of "prior fault" applies.<sup>356</sup>

On a final note with regard to the recommendations and possible reform of the application of the standard of the reasonable person in South African law, Moran's<sup>357</sup> concerns regarding our distinction and understanding of the concepts of normal, ordinary and reasonable behaviour should be heeded so as not to lead to any discrimination. Thus ordinary, natural, normal behaviour need not equate to reasonable behaviour in all instances. Furthermore, gender equality should apply and the standard of the reasonable person should be applied in the same manner to all genders.

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<sup>355</sup> See para 3.3 above.

<sup>356</sup> See para 3.1 above.

<sup>357</sup> Moran *Rethinking the Reasonable Person*; see paras 2 and 3.2 above.

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Law no 2007-308 5 March 2007

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*Child Justice Act 75 of 2008*

*Child Justice Amendment Bill of 2019*

## **LIST OF ABBREVIATIONS**

Anglo-Am L Rev	Anglo-American Law Review
CC	French Civil Code of 1804
Eur Tort Law Yearb	European Tort Law Yearbook
Fordham L Rev	Fordham Law Review
J Leg Ed	Journal of Legal Education
J Marshall L Rev	John Marshall Law Review
Loy LA L Rev	Loyola of Los Angeles Law Review
MLR	Modern Law Review
Notre Dame L Rev	Notre Dame Law Review

NYU L Rev	New York University Law Review
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
Stan L Rev	Stanford Law Review
THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg
U Pa L Rev	University of Pennsylvania Law Review