

## THE DOCTRINE OF THE "NORMAL MAN."

This doctrine occurs in one shape or other in many connections, but as it is most prominent in the law relating to cases of negligence, it is there that we shall look first for a description of it. The "normal man" is sometimes known as the "reasonable man" or the "reasonably prudent man" or the "man of ordinary sense." But under these various titles there is one outstanding, easily recognized feature; and that is, that he does not have his counterpart in particular, everyday life. He is rather a type with whom everybody may be compared, and it is for this reason he has been described as the "normal man."

Probably the best definition that can be obtained of this "reasonably prudent man" is picked up piecemeal from Pollock on Torts.<sup>1</sup> "The doctrine of 'natural and probable consequences' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong is failure to act with due foresight: it has been defined as 'the omission to do something which a reasonably prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do.' Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by what appears likely in the known course of things.

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1. Pollock on Torts, pp. 39-40.

This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules), the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability, and the statement proposed, though not positively laid down, 'that a person is not expected to anticipate and guard against that which no reasonable man would expect to occur,' appears to contain the only rule tenable on principle where the liability is founded solely on negligence. And again when defining negligence, the general rule was thus stated by Baron Alderson: 'Negligence is the omission to do something which a reasonably prudent man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do.' This, it will be observed, says nothing of the party's state of mind, and rightly. The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behavior was or was not such as we demand of a prudent man under the given circumstances. Facts which were known to him or by the exercise of appropriate diligence would have been known to a prudent man in his place, come into account as part of the circumstances. Even as to these, the point for actual knowledge is a subordinate one as regards the theoretical foundation of liability. The question is not so much what a man of whom diligence was required actually thought of or perceived, as what would have been perceived by a man of ordinary senses who did think."

The question was squarely put to the court in *Vaughan v. Menlove*.<sup>2</sup> This was a suit based on the destruction of a hayrick by fire. The jury had been directed "that the question for them to consider was whether the fire had been occasioned by gross negligence on the part of the defendant,"

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2. 3 Bing. N. C. 468.

and that "he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances." A rule for a new trial was obtained on the ground that "the jury should have been directed to consider, not whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion, but whether he had acted bona fide to the best of his judgment; if he had, he ought not to be responsible for not possessing the highest order of intelligence." In dismissing the rule, the court unanimously declined to accede to this view, and said: "We have assumed that the standard of duty is not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man,—the average prudent man, or as our text-books affect to say, a reasonable man,—standing in this or that man's shoes." It has always been so laid down and the alleged uncertainty of the rule has been found no obstacle to its application by juries. It is not for the court to define a reasonably prudent man, but for the jury to say whether he acted like one.

In favor of this view of the doctrine, it is claimed that it can be generally or universally applied, whereas the test of the man's actual capacity displayed in each case must continually vary; that it is sufficiently well understood that a court need not define it, but juries can apply it without any instructions and in fact have always done so, and that the court may assume that every man has a capacity to judge events equal to that of the man of ordinary prudence.

At first blush, this text-book theory appears to be a panacea for legal ills of a negligent character. But immediately a doubt arises when one attempts to see how it actually works. The first question that one may ask is whether as a matter of fact it is ever put into actual application. The "normal man" regarded as an idea can hardly be that of a concrete individual, for, if it were so, it could not boast of

general applicability, and further, it is expressly stated that the law deliberately leaves the personal characteristics or idiosyncracies of the individual out of account. This idea of the "normal man" must then, it seems, be taken to be a general or abstract one. The question remains as to how it can be applied to individual instances.

Most psychologists have a theory of general ideas,<sup>3</sup> but they do not all agree as to what they are or as to how they are formed. There is not, however, any real dispute as to the fact that they arise through a comparison of individual instances, by which the common or like characteristics are retained, and the unlike ones either merely disregarded, as Bain said, or definitely recognized as irrelevant, as Prof. Stout insists. It is because of this dropping of particular details that the charge of vagueness has been brought against generic images by Prof. Huxley,<sup>4</sup> who compared them to what one sees in dreams. If they are really of this vague character, it is not surprising that the "normal man" has been tagged as a "standard too uncertain to afford any criterion."

It was maintained by Berkley<sup>5</sup> that if we tried to picture to ourselves an abstract idea such as "man," "humanity," etc., we did as a matter of fact always call up the image of an individual with some particular shape and color. It seems now to be generally admitted that it is impossible to image a general idea. For example, Hoffding says, "that general outline or pattern which we think of as filled up in different ways, can not in itself be pictured. It shares the fate of all general ideas and requires an individual representation," and speaks of the name as a substitute for the impossible intuition.

My belief is that consciously or unconsciously, the judge or the juryman does, in each case, when he attempts to apply

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3. Bain, *Mental and Moral Science*, p. 177; Stout, *Analytical Psychology*, Vol. II, p. 176.

4. Huxley's *Hume*, pp. 92-94.

5. Berkeley, *Principles of Human Knowledge*, Intro. Secs. 10, 14.

his test, have in mind a concrete individual who is no less a person than his own self. This is his mental image, and the question which he really asks himself is, "Does the defendant appear to me to have exercised prudence or not? Should I have done the same if I had been in his place?" And he answers this to himself, without any reference to any general standard or general rule at all, but merely according to his own individual experience and the idiosyncracies of his own particular disposition. Hence it results that so far, from the test of "the man of average prudence" being a general one, it varies with each individual who applies it, and the Learned Chief Justice in the case of *Vaughan v. Menlove*,<sup>6</sup> quoted above, accurately described his own test when using the phrase "as variable as the foot of each individual."

In other words the standard of the "normal man" is simply neglected altogether and another standard is substituted for it, and this is the real explanation of why "the alleged uncertainty of the rule has been found no obstacle to its application by juries," and why it had been found unnecessary, too, for the court to define a prudent man. It could not have defined one had it tried.

In the case of *Vaughan v. Menlove*, supra, if the defendant fell below the "normal man" then it is evident that a higher standard was being demanded of him than it was possible for him to attain to. All men are not alike, and some men must clearly be inferior in prudence to the normal man, for he is avowedly the man of average prudence, and all averages are reached by taking the mean between inferiority and excess. Now, then, those who seek to apply the test of the "normal man"—the reasonably prudent man—must avowedly expect and preach what is for some men an impossibility, and it is of no use to assert that such men ought to have trained themselves beforehand to be "the reasonable

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6. 3 Bing. N. C. 468.

man," unless one can show that all men, even with training can reach that standard, and also what that standard is.

It is not improbable that some lawyers will admit that there is much truth in what has been said, but will nevertheless maintain that it is advisable to employ it even though some individuals may suffer injustice thereby. It is in anticipation of this that I have taken up so much space in an attempt to show that the general rule in question is a delusion, and is not as a matter of fact applied at all, though vain and fanciful attempts are made to use it. And if the question be asked, "Why, if it is not in fact used, is it so strongly objected to?"—my reply would be, that not only do the attempts to use it in themselves do harm—and I trust no one seriously controverts this—but also that this sham standard by its very acceptance stands in the way of the adoption of a better one.

A universal standard by abstraction can not result in anything but mere form. Instead of grasping this point, our judges and lawyers have compromised between the form and the matter, and tried to unite two inconsistent elements in a universal rule; they have made their man typical or general, but the circumstances under which he is to act, in particular. For the standard which they recommend is not how the "normal man" would act under normal or general circumstances, but under the given circumstances, i. e., the circumstances of the individual whose case they are deciding.

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