

## An Introduction to the Nature and Role of the Reasonable Person Standard in Asian Civil Law Jurisdictions

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### Abstract

The reasonable person is a legal fiction of normative appeal that plays an important role in many different areas of private law, public law and criminal law. Such standard is present in both contract and tort law. In the area of contract law, it can be used to determine contractual intent, breach of the standard of care or fairness of terms and conditions. In tort law, the reasonable person standard is applied to assess possible negligence. The reasonable person standard is based on the broader concept of reasonableness, which is used to derive various open ended legal expressions. Even though terms such as reasonable doubt, reasonable decision-making and reasonable care have different meanings, the concept of reasonableness acts as a common thread linking these instances of use.

This paper attempts to convey an understanding of the reasonable person standard as it is applied in the civil law systems of Asian countries: who is the reasonable person and how can the reasonableness or “prudence” of his/her conduct be analyzed? After addressing these issues, the paper will analyze the application of the reasonable person standard in contract law and tort law of Asian civil law jurisdictions with a special focus on the legislation of Thailand, Japan, and the Philippines.

**Keywords:** Reasonableness, Person of Ordinary Prudence, Asian Civil Law Jurisdictions, Standard of Care, Negligence.

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## I. Introduction

The reasonable person is a legal fiction of normative appeal that plays an important role in all legal systems. The reasonable person standard is often used in many different aspects of public, criminal, and private law in both common and civil law countries. Its origins can be traced back to Roman private law regime based on the figure of the *pater familias* ("father of a family"). The *pater familias* was not an average person or a typical person. He was the eldest living male of a nuclear family and had complete control of all members of his clan, making only allowable mistakes and maintaining appropriate self-control. This ancient Roman legal system was laid down in the conceptual framework of the French Civil Code of 1804 and then spread through colonization to territories like Indonesia and Indochina. Moreover, other jurisdictions such as China, Japan and Thailand autonomously decided to adopt civil law systems without being colonized.

In many European jurisdictions, the original terminology has been revised and the "the good housefather" has been considered as a redundant expression that goes back to a patriarchal society. Dutch law and more recently French Law have eliminated any reference to, respectively, the *goede huisvader* and *bon père de famille* and replaced it by the reasonable person standard. However, the term is still used in other countries, such as Italy, Spain, Belgium and Malta. The Principles of European Contract Law also provide more modern terminology in the form of what a person "would consider to be reasonable" and the "reasonably careful person."

In the United Kingdom, the existing definitions of the reasonable person standard are mostly based on judicial decisions, rather than to written statutes drafted by legislative bodies. The reasonable person, under case law, is a hypothetical person that sets the legal standard for determining whether ones actions (or inactions) can be considered lawful or not.<sup>2</sup> The reasonable person is an average person in terms of exercising the care, skills and judgment in conduct that is required by the society from its members in order to protect individual and common interests. According to this

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<sup>2</sup> Bohlen F., (1901), "The Probable or the Natural Consequence as the Test of Liability in Negligence," *American Law Register*, 49(3), 148-164.

standard every person has a duty to behave as a reasonable person of ordinary prudence would under the same situation. Thus, the conduct of a person of ordinary prudence is used as a comparative standard for determining liability.<sup>3</sup> The standard encompasses an objective test in which the conduct of the defendant is compared to the conduct of an ordinary person under similar circumstances. The specific context of each case can require varying kinds of conduct.<sup>4</sup>

The reasonable person standard adopted in civil law Asian countries has evolved with different terminology in civil and commercial codes: “reasonable care” in the Civil Code of Japan, “fairness and reasonableness” in The General Principles of the Civil Law of the People’s Republic of China, “person of ordinary prudence” in the Civil and Commercial Code of Thailand. All these codes and laws share a common feature in that they do not provide any direct definition of this standard. Therefore, the existing definitions are mostly based on the views of academics, juristic professionals or other sources outside the legal doctrine. The reasonable person is a hypothetical person in society who exercises average care, skills and judgment in conduct and who serves as a comparative standard for determining liability.

The rationale behind the function of care in the domain of the law is that it allows the law to refrain from governing human behavior in excessive detail, i.e. the law does not have to govern every possible situation by means of specific rules.<sup>5</sup> It enables general standards to be used without further official directions on a particular occasion. It is not practical to devise legislation that satisfactorily covers all possible current and future controversies. The standard of care is a norm whose application to particular situation calls for choices made at the time of the situation itself. It is a relatively undetermined rule that allows specific evaluations enabling the legal authorities to fashion rules adapted to the special needs of individual cases. Thus, the standard of care

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<sup>3</sup> Kelman M. A, (1987), *guide to critical legal studies*, (Cambridge. MA: Harvard University Press), 64.

<sup>4</sup> See in particular Sir J Laws, “Wednesbury”, in C. Forsyth and I. Hare (ed.), (OUP 1998), *The Golden Metwand and the Crooked Cord*, Essays on Public law in Honour of Sir William Wade, 185–201; T. Hickman, (Hart 2010), *Public Law after the Human Rights Act* Ch 7; P. Daly, (2010) “Wednesbury’s Reason and Structure,” *Public law*, (2), 238.

<sup>5</sup> R. K.L. Collins, (1977), “Language, History and Legal Process: A Profile of the “Reasonable Man,” *Rutgers-Camden Law Journal*, 8, 311-324.



can be described as “the legal system’s sensitivity to the demands of particularity, and its attentiveness to the specificities of single cases.”<sup>6</sup>

However, along with this history of significant development, the notion of the person of ordinary prudence has also been bedeviled by debate and confusion. What does the expression actually mean? Is it only a standard for judicial discretion? This standard lacks clarity about the real nature of the subjective and objective qualities of the person of ordinary prudence. How is it possible to decide which characteristics of the person of ordinary prudence are objective and which are subjective and therefore vary case by case? These difficulties are even more pronounced when we compare the different sectors of the law they apply. Indeed, some authors criticize this standard because of the vagueness of the notion of “ordinary” and they fear it can represent a vehicle for the judge’s own positions and opinions. The consequence is that while the person of ordinary prudence certainly plays an important function in civil codes, it is extremely challenging to outline the role of this standard.

In this article, I attempt to clarify the meaning of standard of care in civil law Asian countries to the extent relevant to the law of obligations, by examining the person of ordinary prudence in law of contracts. Subsequently, I explain how this standard, somewhat submerged in contract law, can be applied in the tort law context. I first determine the scope of standard of care as a principle of tort law in the notions of fault, negligence and duty of care, before evaluating the substantive implications of the duty of care in vicarious liability.

## II. The Reasonable Person Standard in the Law of Contracts

The function of reasonableness in the area of contract law is similar to other branches of the law. It is used to fill gaps in contracts where every detail is not prescribed.<sup>7</sup> The reasonable person standard can be understood as default rule for contracts. If the contractual parties fail to exercise the power of altering the law of contract for their transaction, this has a normative consequence and the person of ordinary prudence standard

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<sup>6</sup> S. Berteau, Certainty, (2004), “Reasonableness and Argumentation in Law,” *Argumentation*, 18(4), 465-478.

<sup>7</sup> A. M. Tolentino, (1991), *Civil Code of the Philippines Vol. 4*, (Manila Central Lawbook Pub. Co.), 125.

is imposed as a background rule of the contract law. According to the Civil Code of the Philippines, if the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a good father of a family shall be required (Art. 1173). Similarly, the Civil Code of Japan provides that if the parties to a loan for consumption do not define the time for return of borrowed things, the lender may demand the return of such things within a reasonable period (Article 591). On the same line, the Civil Code of Vietnam states that in contracts for loans without fixed term, the lender may reclaim the property, and the borrower may repay the debt, at any time provided that each party gives reasonable prior notice (Article 477).

Reasonableness is closely linked to the concepts of good faith, fair dealings and equity in both case law and legal doctrine.<sup>8</sup> The nature of this standard makes it very flexible and therefore adaptable to large variety of specific circumstances. Besides the elements of reasonableness mentioned before, the usages and practices applied constitute additional important aspects to be considered. Philippine contract law includes a clause emphasizing the effect of usages and practices in trade or profession. It states that the debtor must act with the diligence of a good father of a family, this means the conduct that would be considered reasonable by a person in the debtor's position (Art. 1163 of Civil Code).

The standard of care is developed not only in civil codes but also in other sources of the law. For example, the Unfair Contract Act B.E. (2540) 1997 of the Kingdom of Thailand specifies that a contract can be deemed unfair if "other party is obliged to comply or bear more burden than that could have been anticipated by a person of ordinary prudence in normal circumstance" (section 4, paragraph 3). Thus, a court may refuse to enforce a contract if it is seen as unfair towards one of the parties – even if the unfair terms were agreed upon by both parties when contract was made. The court may only enforce the contract to the extent that it is fair and reasonable according to the circumstances. By the same token, rule 18.03 of the Code of Professional Responsibility of Philippine explicitly provides that negligence of lawyers in connection with legal matters entrusted to them for handling shall render them liable. It is a basic postulate in legal ethics that when a lawyer

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<sup>8</sup> A. Veneziano, and L. Antoniolli, (2005), *Principles of European contract law and Italian law: a commentary*, (The Hague: Kluwer), 85.



takes a client's cause, he covenants that he will exercise due diligence in protecting his rights. The failure to exercise that degree of vigilance and attention expected of a good father of a family makes such lawyer unworthy of the trust reposed upon him by his client and makes him answerable to him, to the courts and to society.<sup>9</sup>

Apart from the clauses provided in civil codes and other laws on the hypothetical person of ordinary prudence, the expression is frequently recurring in case law in many Asian civil law jurisdictions. The Supreme Court of Japan describes the reasonable person as a person whose conduct holds between excessive caution and indifference to risk. Thus, this person considers the foreseeable risks according to their probability and takes into account all the evidence and views of others before jumping to conclusions.<sup>10</sup> The same principle is evident in the decision of the Supreme Court of the Philippines that define the reasonable person standard as the level of expected conduct that is required by the nature of the obligation and that corresponds to the circumstances of the person, time and place. The most common standard of conduct is that of a good father of a family or that of a reasonably prudent person. To determine the diligence which must be required of all persons, the Supreme Court uses the abstract average standard of conduct corresponding to a normal orderly person as the starting point.<sup>11</sup>

In some cases the standard of care required is higher than that of a good father of a family. With regard to the degree of diligence that banks are required to exert in their commercial dealings, for example, the Supreme Court of the Philippine ruled that the degree of diligence required of banks, is more than that of a good father of a family where the fiduciary nature of their relationship with their depositors is concerned. In other words banks are duty bound to treat the deposit accounts of their depositors with the highest degree of care. But the said ruling applies only to cases where banks act under their fiduciary capacity, that is, as depositary of the deposits of their depositors. But the same higher degree of diligence is not expected to be exerted by banks in commercial transactions that do not involve their fiduciary relationship with their depositors.<sup>12</sup>

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<sup>9</sup> *Santos v Lazaro*, [2003] Second Division AC 5085.

<sup>10</sup> S. Saibansho, (1975), *Outline of civil trial in Japan*, (Japan: Supreme Court of Japan), 7.

<sup>11</sup> *Antonio Francisco v Chemical Bulk Carriers, Incorporated*, G.R. No. 193577, September 7, 2011.

<sup>12</sup> *Philippine Bank of Commerce v Court of Appeals*, G.R. No. 118492, August 15, 2001.

A person of ordinary prudence is aware of the fact that practical dilemmas might encompass different values and interests which should be taken seriously, even if they represent competing perspectives. If a reasonable person is faced with inevitable conflict, he acts according to the values that have more weight. He evaluates situations from a broad perspective and seeks to understand the feelings and motives of others involved. The reasonable person is not exclusively pursuing his own interests but rather tries to balance a plurality of values. He has the ability to judge his own objectives in competition with others' and recognize that a greater priority of another can properly take over his own interests. These types of virtuous, perfectly reasonable people do not probably exist in large numbers. Most of the ordinary people are act reasonably only some of the time. Yet still, the law imposes the requirement act reasonably in various juristic contexts.<sup>13</sup>

#### A. On the efficiency of the reasonable person test

The main way to analyze the duty of care that can be applied to the person of ordinary prudence is the so called reasonableness test. This is the previously mentioned method where the legal decision maker resolves an issue by asking what the person of ordinary prudence under similar circumstances would have thought or done. The result of this inquiry is compared against the behavior of a person whose conduct is being evaluated. Through this process the conduct of the subject can then be deemed to conform or diverge from the standard set by the hypothetical person of ordinary prudence. The person of ordinary prudence test in Asian civil law jurisdictions requires the decision making authority to use a set of background ideas that are not necessary fully articulated and apply these ideas in a way that is sensitive to the relevant circumstances. Using the hypothetical person of ordinary prudence to test the conduct of behavior is a flexible method that allows the decision making authority to balance various considerations and it can therefore be used in a broad scope of distinct circumstances. The fault in this

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<sup>13</sup> Another key point of reasonableness is its distinction to rationality. Rational behavior acts efficiently to promote one's own system of ends whereas reasonable behavior is interacting with others on terms of equality. Therefore it is possible to distinguish a rational person, who does what's seems best for her to achieve her own ends from a person of ordinary prudence who considers the interest of others.



method is that it lacks descriptive guidance, relying on the decision makers' ability to assess the situation in detail and balance the relevant considerations to derive a justified decision.<sup>14</sup>

There are two levels of variables related to the person of ordinary prudence test: the legal topics which question of reasonableness relates to and the factors affecting the judgment in that particular topic<sup>15</sup>. For example, the topic could be decisions of public authorities assessing contractual relationships or determining the breach of duty of care. Therefore certain aspects of reasonableness are pure questions of legal discourse. The second level variables relevant to the given legal topic associated with the interpretation of specific laws. These might be provided by statutes or previous cases.

Thus, it is possible to address the process of interpreting reasonableness emphasizing the difference between judging what is right and judging what is reasonable. "In the light of human values, interest and purposes, one must consider all that is relevant, and assume an impartial stance in assigning relative weight or importance to different contextually relevant values or interests."<sup>16</sup> Because of this, the process of interpretation may produce different outcomes among people depending on how they weight different value factors and carry out the balancing. In any case, the decision maker needs to know what was done and what was not done, the relevant motives for the actions and what is the normal practice in matter at hand before any actions or inactions can be judged in terms of reasonableness. Consequently, the process of judgment should be divided into two phases. The first phase entails discovering the chain of events and the reasons behind the events. The second phase is interpreting the events in the light of the appropriate value factors.

It is important to point out that the person of ordinary prudence test is actually impersonal in its nature because it does not consider the personality characteristics of the individual being evaluated. This means that the temperament, apathy, aggressiveness or other factors arising from the nature of the person carrying out the behavior are not considered relevant when evaluating the reasonableness. The person of ordinary

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<sup>14</sup> A. Donovan, S, (1981), "Wildman, Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation," *Loyola Law Review*, 14, 435-458.

<sup>15</sup> N. MacCromick, (1999), "Reasonableness and Objectivity," *Notre Dame Law Review*, 74(5), 1575-1604.

<sup>16</sup> *Supra* note 11.



prudence test can be thought of as an operational test of deciding whether someone was trying their best to not to cause injury or harm to others or as is typical in contractual obligations, whether the person actually believed what he claimed to believe. The abstraction from details inherent in the person of ordinary prudence test supports the ideal of equality.

The person of ordinary prudence test is attractive because it requires the decision making authority to apply knowledge and standards that are associated with plain, ordinary people. This ordinary person has sometimes being referred in common law as “the person on the Clapham omnibus”<sup>17</sup> suggesting that the person does not necessary need to have any special knowledge or expertise.<sup>18</sup> The law uses person of ordinary prudence to enforce a standard of conduct rather than standard of perfection. The advantage is to achieve flexibility in establishing and balancing the relevant factors in varying contexts. Because of this advantage it is justified to forgo some aspects of predictability.<sup>19</sup>

#### **B. On the relation between the reasonable person test and the objective theory of contracts**

In order to analyze the intention of parties in contracts, there is an essential principle that must be considered: the objective theory of contracts. Intent is an important element in determining whether a contract has been formed and the objective theory of contracts is used to interpret the intent. According to this theory, a person's intent to enter into a legally binding contractual relationship can be assessed from external, objective facts which are interpreted in a way that a person of ordinary prudence would. The key idea is that the intent is determined by the objective view of the person of ordinary prudence, not by the personal or subjective intent or believes of the contractual parties. The relevant objective fact that should be taken into consideration in determining intention

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<sup>17</sup> *McGuire v Western Morning News Co Ltd* (1903), 2 KB 100, 109.

<sup>18</sup> P. Byrden, (June 25-27, 2008), *In Search of the Reasonable Person in Canadian Law – Are We Asking the Wrong Question?*, A Presentation to the 24<sup>th</sup> Annual Conference of the Council of Canadian Administrative Tribunals.

<sup>19</sup> See in particular Sir J Laws, “*Wednesbury*”, in C Forsyth and I Hare (ed.), (OUP 1998), *The Golden Metwand and the Crooked Cord*, Essays on Public law in Honour of Sir William Wade, 185–201; T Hickman, *Public Law after the Human Rights Act*, Ch 7; P. Daly, (2011) “*Wednesbury's Reason and Structure*,” *Public law*, (2), 238.



include what the person said at the time of entering the contract, how the person acted or appeared and the circumstances present in the transaction. In the context of relevant facts it should be emphasized that intent may be manifested by conduct and verbally in addition to written statements.

“The objective theory contracts dictates that a contract shall have the meaning that a person of ordinary prudence would give it under the circumstances under which it was made, if he knew everything he should plus everything he actually knew.”<sup>20</sup> Because of this rationale, the standard of the person of ordinary prudence changes depending on the context of the contract. This person of ordinary prudence applied in the contract law, has the intellect, sophistication and good faith of the average ordinary individual. A dispute can be solved by substituting the subjective intent of the contractual parties by the intent of the person of ordinary prudence.

The imposition of default rules by person of ordinary prudence represents externalities. Because the law has nothing to do with the actual state of mind of the parties, as pointed out in the objective theory of contracts, it must go by externalities. These externalities are based on the community standards of fairness and reasonableness and implicated through the person of ordinary prudence. Therefore it can be stated that the person of ordinary prudence is the personification of contract law's externalities. It can also be considered as an operational system for the symmetrical application of doctrine and rules that is meant to support the norms of certainty, predictability and generality. The person of ordinary prudence must be wholly objective and follow the generalized application of rule of law.

Consequently, determining the reasonableness of a person's conduct is meant to be based on objective evaluation, in contrast with liability based on the actual intentions of the acting person. In application this means that reasonableness should be construed without any regard to individual characteristics or personal biases caused by the particular relationship of the parties in question. The person of ordinary prudence test can still be argued to include subjective elements because the subjective values and perceptions of the decision maker cannot be entirely removed from the process.

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<sup>20</sup> Slawson, as cited in L. A. DiMatteo, (1997), “The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment,” *South Carolina Law Review*, 48, 293-356.

The hypothetical person of ordinary prudence must pass through the filter of the judicial mind, and therefore the objective standards are applicable only through adjudicative subjectivity. It follows that the decision maker is required to undertake the effort of replacing his/her personal beliefs and standards to applying the standards that are objectively justifiable as is required by the law.

### III. The Standard of Care in the Law of Torts

The law of tort constitutes an important area where the standard of care is applied. Torts refer to wrongful acts where one person intentionally or unintentionally causes injury or harm to third parties and thereby creates an obligation of compensation. The purpose of tort law is to provide compensation to those who have suffered losses or injuries because of the wrongful conduct of others. It provides remedies for the infringement of various protected interests such as physical safety, freedom of movement, property protection and protection for intangible interests such as personal privacy, family-relations, reputation and dignity. In the Civil Code of Japan the definition of wrongful acts is expressed as follows: "A person who, wilfully or negligently, infringes any right or legally protected interest of another, is bound to compensate him for any damage arising therefrom" (Article 709). In the same line, the Tort Law of the People's Republic of China states that a person who infringes upon civil rights and interests shall be subject to the tort liability (article 2). Similar provisions can be found in article 743 of the Civil Code of Cambodia, Section 420 of Thai Civil and commercial code, and article 604 of the Civil Code of Vietnam that uses the expression "non-contractual damages" instead of torts.

The tort law establishes a duty incumbent on all persons to exercise a reasonable amount of care in their interactions with others. The duty of care sets the limit where peoples' actions do not infringe the interests of others. A failure to display reasonable behavior leads to a breach of duty of care, giving rise to commitment of potentially tortious acts. The person of ordinary prudence standard serves as a means to determine whether the duty of care is breached. The potential breach can be based on an act (e.g. setting fire to a building) or an omission (neglecting to put out a fire). The act may be performed carefully and still be a dangerous act that inflicts injury. The court can ask how a person of ordinary prudence would have acted in a particular situation and evaluate



the defendant's actions against those of a person of ordinary prudence.<sup>21</sup>

The person of ordinary prudence standard is meant to be an objective way of determining the breach of duty for it represents the society's idea of the conduct of an ordinarily prudent person. The term standard of care which is sometimes used interchangeably with the person of ordinary prudence standard is misleading because it because it suggests that negligence is measured against some pre-existing standard. In determining the reasonableness of an act the court reaches decision by an ex post facto (having retrospective effect) basis after considering the nature of the act, the manner of its performance and the nature of injury. Judges have a lot of discretion in negligence cases and the degree of care required in varies according to factors such as the defendant's occupation and his relationship with the plaintiff.<sup>22</sup> Reasonable behavior does not necessary mean average behavior and the fact that most people might behave in a certain way does not guarantee that that behavior is reasonable. Because of these issues the outcome of breach of duty depends strongly on context of the particular case in question and on

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<sup>21</sup> Because the reasonable person test is rather vague and weak in terms of determinative guidance, it becomes necessary to objectify the concept of reasonableness by specifying its components into a more logical form. The most distinguished approach for doing this is articulated in "*The Hand Formula*" devised by Judge Learned hand in 1947 during the case of *United States vs. Carroll Towing*. In this case Judge Hand defined reasonable conduct by applying three factors: 1) the seriousness of loss suffered by the plaintiff; 2) the probability of the occurrence of this loss and 3) the precaution taken by the defendant against this loss. These factors constitute a formula that measures the balance between the degree of care exercised by the defendant and the seriousness of the caused injury multiplied by the probability of its occurrence. If the first side of this equation entails a higher value than the latter, the defendant's actions can be considered as reasonable because the costs of taking precaution were higher than the costs of potential injury. From a rational point of view, it can be stated that reasonable behavior, as it's defined by the Hand formula, requires a person to compare the expected consequences given a high degree precautions, with the consequences without precautions in the context of their individual decision making about risks of causing harm or injuries to others. Furthermore the person should choose to take more precautions if the expected positive consequences from doing this outweigh the costs. See on this point Miller, A. D., Perry, R. (2012). "The Reasonable Person," *New York University Law Review*, 87(2), 323-387; Gilles, S. G. (2001), "On determining negligence: Hand formula balancing, the reasonable person standard, and the jury," *Vanderbilt Law Review*, 54(3), 813-861.

<sup>22</sup> The reasonable person criteria plays an important role in the law of negligence because it provides the standard by which litigants are judged. Their actions may be negligent to the extent that they depart from those of the reasonable person and exemplary to the extent that they mirror them. On this point see P. Craig, P. Craig, (2013), "The Nature of Reasonableness Review," *Current Legal Problems*, 131, 165.

how the judge's opinion on how a person of ordinary prudence would act under similar circumstances.

Reasonableness becomes a relevant factor in the unintentional torts, which often result from negligence.<sup>23</sup> If the defendant acted without the degree of care that a person of ordinary prudence would have exercised according to his or her capabilities in similar circumstances, the conduct is deemed to be negligent.<sup>24</sup>

#### A. Fault, negligence and duty of care

An important implication of reasonableness in civil cases is that being found liable does not necessary require intentional misconduct. Willful misconduct may occur whether there is an intention to cause harm or there is an awareness that the action will cause harm to others. If the tortfeasor's behavior was deliberate, then the situation is one of willful misconduct. Negligence, on the other hand, can be defined in a negative way as a failure to employ such care and attention as everyone is under a duty to observe in their daily lives.<sup>25</sup> Negligence means that the tortfeasor (defendant) did not wish to cause the injury or loss of the plaintiff or did not believe that his actions would lead to such consequences, i.e. the intention of the act is missing or cannot be proved. If a person is held liable for failing to act according to the conduct determined by the person of ordinary prudence standard, it can be acknowledged that there does not need to be real intentions behind his actions. In fact there might even not be real fault, as the defendant may have been striving to prevent the unreasonable occurrence from happening. Reasonableness is a common standard that is set for all persons so everyone must act according to it or be held liable in event of occurring mishap. The purpose is to apply the conduct of a person of ordinary prudence objectively, instead of attempting to assess the degree of fault according the individual capabilities of parties involved.

It is enough that the actor's conduct created a foreseeable risk of the consequences. Foreseeable here means that a person of ordinary prudence in the same circumstances would anticipate that risk and take precaution against it. The reasonable

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<sup>23</sup> L. Green, (1928), "The Negligence Issue," *Yale Law Journal*, 37, 1029-1043.

<sup>24</sup> This aspect was famously articulated by English courts in *Vaughan v. Menlove*.

<sup>25</sup> E. Green, (February 1968), "The Reasonable Man: Legal Fiction or Psychosocial Reality?," *Law & Society Review*, 2, 241-257.



conduct in guarding against potential risks depends among other things on the nature of possible harm and the probability for its occurrence. Creating a marginal risk for life threatening event might be interpreted as unreasonable conduct whereas a high risk for minimal harm caused might be considered reasonable.

Civil codes of Asian jurisdictions do not provide a specific definition of negligence. The Civil Code of Cambodia is the only Asian Code that gives a detailed explanation of the term negligent act and indirectly of reasonable person. Section 742 the Civil Code of Cambodia defines a negligent act as an act with respect to which (i) a person having the same occupation or experience as the actor could have foreseen that a particular result would normally occur from the act, but the actor failed to foresee the result due to an absence of care, and (ii) the actor owes a duty to avoid the occurrence of such result but neglected to fulfill such duty.

However, the duty of care imposed by law has been interpreted as the degree of carefulness that a person having the same skills or knowledge as the actor should exercise. The author of the act is negligent, if in similar circumstances a reasonable person would have acted differently and not produced the damage, or would have foreseen or avoided it. A person breaches his duty of due care by failing to behave the way a person of ordinary prudence would under like circumstances. In determining whether a person's conduct is reasonable, the law takes into account the specific skills or knowledge of the actor. This criteria applies to professionals such as lawyers, architects, engineers, doctors and accountants, and to those who work in skilled trades, such as carpenters, electricians, welders and plumbers.

For example, if the person is physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonably careful person with the same disability. Thus, he is required to use the same degree of care that a reasonably careful person who has the same physical disability would use. Physical handicaps and infirmities, such as blindness or deafness, are treated as part of the circumstances under which a reasonable person must act.<sup>26</sup>

With regard to the liability of minors, the solutions in Asian jurisdictions the solutions become more complex and diversified. There are three main approaches: liability, non-liability and semi liability regime.

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<sup>26</sup> T. Aquino, (2001), *Torts and damages*, (Manila: Rex Book Store), 92.

Under the first approach, a person, even though incapacitated, on account of minority or unsoundness of mind is liable for the consequences of his wrongful act. Thus, the standard of conduct to which a child must conform to avoid being negligent is that of a reasonably careful person of the same age, intelligence, and experience under all the circumstances. This is the case of Thai Civil and Commercial Code (Section 429).

Under the second approach, a minor is not liable for the consequences of his wrongful act. For example, the Civil Code of Cambodia states that a minor under the age of 14 cannot be held liable in tort (Article 745).

Under the third approach, the minor is liable of his actions only in some specific circumstances. Civil Code of Japan provides that in cases where a minor has inflicted damages on others, if the minor does not have sufficient intellectual capacity to appreciate his/her liability for his/her own act, the minor shall not be liable to compensate for that act (Article 712). Similarly, in the Tort Law of the People's Republic of China a person without civil conduct capacity or with limited civil conduct capacity can be held responsible of his wrongful acts only in case he has property (Article 32). The same approach is followed in the Civil Code of Vietnam where a minor under fifteen years of age must compensate the other party only in case the parents have insufficient property to compensate and the minor who has caused the damage has property of his or her own (Article 606, point 2).

#### **B. Duty of care in vicarious liability**

The doctrine of vicarious liability represents the foundation of all civil law systems of tort law. In Asian civil codes, there are some particular kinds of torts that require fault by the defendant but which arise from the presumption that such fault exists. In other words, there is a shift of the burden of proof in the victim's favor.

In all these cases, the duty of care that is requested from the tortfeasor represents a rule of responsibility which makes the defendant liable for the wrongs caused by others. More precisely, the rule of responsibility should be analyzed through the perspectives of certainty and reasonableness. Certainty represents regularity and uniformity whereas reasonableness is sensitive to particularity and to the context of independent cases admitting exceptions to the general and uniform rules. Because of this there is a strong contrast between reasonableness and certainty and they cannot be fully implemented at the same time.



Asian civil law legal systems attempt to balance the needs of safety and rigidity with the needs for flexible and reasonable regulation. The classic example is that of the liability for damage caused by animals. Section 433 of Thai Civil and Commercial Code states that the owner of the animal is bound to compensate the injured party for any damage unless he can prove that he has exercised proper care in keeping it or that the damage would have been occasioned notwithstanding the exercise of such care. Similarly, Article 718 (1) of the Civil Code of Japan, provides that "A possessor of an animal shall be liable to compensate for the damages that the animal has inflicted on others; provided, however, that this shall not apply if he/she managed the animal with reasonable care according to the kind and nature of the animal."

Thus, an animal's owner is liable for the damage caused by the animal, except if he can prove he acted with reasonable care. Here again, each person owes a duty to behave as a reasonable person would under the same or similar circumstances.

Another interesting area to analyze civil liability through the lens of the reasonable standard concerns supervisor and supervisee: the supervisor is rendered liable for the torts of his supervisee, provided that it can be proved that he has not exercised proper care. The burden of proof lies with the defendant, not the victim. If the supervisor cannot prove he has exercised proper care, he cannot escape liability. Under Section 430 of Thai Civil and Commercial Code, a teacher, employer or other person who undertakes the supervision of an incapacitated person either permanently or temporarily, is jointly liable with such person for any wrongful act committed by the latter whilst under his supervision, provided that it can be proved that he has not exercised proper care.

In these cases, the legislator indirectly refers to the reasonable person standard. In fact, the standard of care of a supervisor is strictly related to the concept of reasonable person. They both represent standards of right decision making and right action within the law of torts. Reasonableness is a very context sensitive in terms of what is reasonable to assert, to do, to determine or to doubt in a particular case. There may be several aspects that have to be measured and evaluated in judging the reasonableness of an act in its specific context.

Similarly, Article 714, paragraph 1 of Japanese civil code, states that the supervisor of a person without capacity is liable for the damages that the person without capacity has inflicted on a third party. However, a defendant can avoid liability by proving that he did not fail to perform his obligation or if the event amounted to inevitable



accident. The defendant is liable if the incident that causes harm is foreseeable or preventable. Here reasonableness can be defined in terms of the idea of fair terms of interaction. These terms of interaction allow people to do whatever they wish, but at the same time guarantee each individual protection from the actions of others.

This is made even clearer in Section 2180 of the Civil Code of the Philippines which states that the responsibility of the supervisor shall cease when he proves that he observed all the diligence of a good father of a family to prevent damage. Thus, reasonableness produces a compromise between security and freedom. It requires people to sacrifice some of their liberty in order to obtain all the advantages of civil society.

#### IV. Conclusion

This paper has sought to contribute to discussions concerning the role of reasonableness in Asian civil law jurisdictions by theoretical clarification of what the reasonable person standard entails with a special focus on the legislation of Thailand, Japan, and the Philippines. Reasonableness is one of the law's most ubiquitous standards, appearing in several different areas of the law; from the use of the reasonable person or person of ordinary prudence standard in the law of contracts through torts law and the concept of negligence. While for this reason, the conceptual analysis of the person of ordinary prudence in Asian civil law jurisdictions is inevitably diversified and broad, it is nevertheless possible to identify some principal patterns. In fact, considering the person of ordinary prudence and his many characteristics in Asian codes, it can be said that he is most often the normal or average man. Hence, both in the context of contract law and tort law, the objective content of the person of ordinary prudence is strictly related to standards of normalcy or commonness. This is quite clear in civil and commercial codes of many Asian jurisdictions, where the person of ordinary prudence is continuously defined as a standard of normalcy and not as criteria to determine moral culpability. Independent from the weaknesses of the reasonable person's standard, and they seem to be many, we probably should not expect its demise in the short term. This debate will undoubtedly continue over the next decade as to the intensity and scope of judicial use of discretionary power in fleshing out the reasonable person standard and of the process through which this should be formulated. The law will, indeed, continue to put in place some mechanisms for situations that require some type of complex point of view.



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