Is it always true that the reasonable person test 'eliminates the personal equation' (*Glasgow Corp v Muir*, per Lord MacMillan)? In particular, how do you reconcile *Philips v William Whiteley* with *Nettleship v Weston*?

Negligence consists of falling below the standard of care required in the circumstances to protect others from the unreasonable risk of harm. Generally, the law regards this standard of care objectively, demanded by the activity in question, and prima facie declines to accept any excuses found on the defendant's inability to measure up to such standard. As Lord Macmillan put it in *Glasgow Corporation v Muir [1943] AC 448, 458,* this objective standard 'eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'. However, over the years it has been argued that case-law has established a rather perplex set of rules and principles regarding this test for breach of duty, allowing certain subjective factors to be considered when assessing the standard of care applicable. It is this issue which has lead to a heated debate of what the test is and/or should be, and that will form the basis of this essay. Firstly, the case law on this matter will be examined, and we shall analyse the applicability of the test to specific contexts. Next, the reasonable person test in both *Philips v William Whiteley Ltd [1938] 1 All ER 566* and *Nettleship v Weston [1971] 2 QB 691* shall be compared and contrasted, and an attempt shall be made to reconcile the two, albeit stringently.

The Reasonable Person Test – An Objective/Subjective Dichotomy

The crucial question to be asked in all cases of negligent actions is 'What level of care and skill was required by the activity which the defendant was pursuing?' This leads us to consider an objective standard of care. Such objectivity can be justified on the fact that 'the standards of law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education which make the internal character of a given act so different in different men,' (Oliver Wendell Holmes (1881)).This in *Nettleship v Weston,* a learner-driver who failed to straighten the steering-wheel after turning a corner and running into a lamp post, injuring her instructor, was consequently held liable as she was found to have fallen below the standard expected of a

qualified, 'competent and experienced driver'. It was irrelevant that she as a learner driver might not be able to attain that standard. She held herself out as possessing a certain standard of skill and experience by going out on to the road, and the court felt a uniform standard of skill was preferable due to the practical difficulty of assessing a particular person's actual skill/experience. As a consequence, the legal standard takes no account of personal characteristics of particular defendants, who cannot thereafter claim inexperience, lack of intelligence or slow reactions to charges of negligence.

Everyone thus is judged by the same standard; everyone except skilled defendants, children, the insane and physically ill. It appears therefore that age and certain other physical characteristics will be taken into account. For instance, in *Mullin v Richards [1998] 1 WLR 1304,* the test to apply was whether an ordinarily prudent and reasonable fifteen year old school girl would have realised in the circumstances that her actions gave rise to a real risk of injury. This appears to contradict the maxim of objectivity and indeed Lord MacMillan's 'elimination of personal equation' dicta, since the test seems to now take into account specific characteristics of the defendant. However, it must be noted that the activity in question in this case was a child's game. It is all too easy to see that a different conclusion may be found if a child undertook an adult activity, in the knowledge that it requires the skills of a grown-up i.e. s/he'd most likely be measured against the standard of care reasonably to be expected of an adult in such position, not withstanding his/her age.

Subjectivity has also been seen to intrude the objective standard applied by the courts where the defendant has a mental/physical disability. In *Mansfield v Weetabix Ltd [1998] 1 WLR 126,* the standard to be applied was that of a reasonably competent driver with the impairment in question. Here, the fact of whether or not the defendant had been aware of the condition whilst driving, and the question of whether it was unreasonable to continue driving on becoming aware of the condition, were both taken into account. Even though the defendant had not completely lost consciousness or control, he was held not to be liable as he was unaware of his condition which led to the mental impairment. His Lordship Leggatt LJ commented that to hold the driver to an objective standard of care in

such scenario which completely ignored his condition would not be negligence based liability, but rather strict liability. Similarly, in *Roberts v Ramsbottom [1980] 1 WLR 823,* his Lordship Neill LJ held that the defendant had 'continued to drive when he was unfit to do so and when he should have been aware of his unfitness' (pp. 832-3).

Finally, where a person holds themselves out as possessing a special skill over those of reasonable people, they are expected to live up to such standards that they have represented they can attain, and so the standard of care of a person in possession of such skill will be applied. Therefore, skilled defendants in negligence-based actions are judged by higher standards than the ordinary defendant, namely those standards reasonably expected of the same class of people as the defendant is in. The test was encapsulated by his Lordship McNair J in *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582,* 'The test is the standard of the ordinary skilled man exercising and professing to have that particular skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art,' Hence, this seems to be yet another exception to the rule that everyone is judged by the same standard and that the reasonable person test 'eliminates the personal equation', since another subjective element is being taken into account (i.e. the defendant's skills).

Nevertheless, the House of Lords in *Bolitho v City and Hackney Health Authority [1998] AC 232* stated that a doctor was not negligent if s/he had acted in accordance with a 'competent reasonable body of professional opinion', i.e. A 'respectable body of medical men', which supported his/her actions, ultimately causing a more objective approach. In situations where there happen to be competing and conflicting expert witness opinions, their Lordships in *Bolitho* ruled that judges are entitled to choose between various bodies of expert opinion and reject the one(s) that is 'logically indefensible' – an example of which wholly 'eliminates the personal equation'. The harshness of this objective standard for skilled defendants is illustrated by *Wilsher v Essex Area Health Authority [1987] AC 750 (HL).* Here, a young and inexperienced doctor was judged by the standards of a competent experienced doctor, even though he was unable to attain that high standard.

Glidewell LJ commented, 'the law requires the trainee or learner to be judged by he same standard as his more experienced colleagues. If it did not, inexperience would frequently be urged as a defence to an action for professional negligence.' Might it have been fair, just and reasonable to have the defendant judged instead against a reasonable doctor at the same level of training and stage in his career? This at least would have allowed for a less objective and more subjective analysis, taking the defendant's skills and reasonably expected competencies at the time of the negligent act into account, as was endorsed in *Philips v William Whiteley*. It was here where the court rejected the idea that a jeweller who carried out an ear-piercing operation should be judged by the standard of a surgeon; the jeweller should be judged against a reasonably competent jeweller carrying out that particular task. On the other hand, it would be no excuse for the surgeon whose piercing of ears resulted in an infection to say that the appellant was not entitled to demand more hygienic care or competence than you would expect of a jeweller. However, a jeweller performing the same service need not match the standards of surgeons, as ear-piercing doesn't require any special surgical skill. It was with this judicial reasoning which led the court to hold the charge of negligence as a failed one. The defendant never departed from the standard of care which one would reasonably expect from a man of 'his position and training'. Isn't such a test clearly in opposition to Lord MacMillan's view of there being no subjective 'personal equation' in the 'reasonable person in the defendant's shoes' test? It seems that courts are willing to depart from such analysis, making it relatively difficult to ascertain such standards in different circumstances containing a wide variety of diverse professions. If such objective standard as in *Nettleship* is to be applied in these professional negligence cases, then inevitably it will lead to rather unfair and absurd consequences. Sir Nicolas Browne-Wilkinson VC dissented in *Wilsher (at 777)*, rejecting the view that there was an objective standard which could be determined irrespective of the experience of the individual doctor, 'such doctors cannot in fairness be said to be at fault if, at the start of their time, they lack the very skills which they are seeking to acquire… a doctor who has properly accepted a post in a hospital to gain necessary experience should only be held liable for acts or omissions which a careful doctor with his qualifications and experience would not have done or omitted.' Reiterating and applying to this context the core principle of what Leggatt LJ mentioned in *Mansfield,* to

hold a professional to a complete objective standard of care would be to ignore his relevant experience, skills and personal circumstances, and thus impose strict liability but not negligence based liability – going against the fundamentals in establishing a tortious breach of a standard of care.

The Reconciliation of *Philips v William Whiteley Ltd [1938] 1 All ER 566* and *Nettleship v Weston [1971] 2 QB 691.*

Prima facie, it is very difficult to reconcile the two cases. The learner-driver in *Nettleship* was judged against all qualified and experienced drivers, not the less demanding standard of the average learner driver for which the defendant had argued, and thus was bound to have her claim fail; in *Philips,* the jeweller was judged by Goddard J against a jeweller in the defendant's 'position and training' i.e. the lower of the two standards he had to choose between (the alternative being the standard expected from a doctor-surgeon). It seems apparent that *Nettleship* adopted a very high and objective standard of care to be expected from the defendant, whereby *Philips* was less stringent and allowed certain characteristics of the defendant, such as his proficiency and skills, to be taken into consideration before arriving at a judgment. It can be argued that *Nettleship* could well have adopted the reasoning in *Philips,* and formulated a test whereby the defendant learner-driver's actions are judged against what a 'reasonable learner driver' would have done in the same situation, rather than assessing the defendant against all professional drivers, allowing the test to remain within the boundaries of objectivity, yet not causing it to become too subjective. However, *Philips* was a case on professional negligence, and *Nettleship* on ordinary liability in negligence – two different sets of rules and principles are deemed to apply to both separately, causing an even further challenging task for us to reconcile the two cases.

The two troublesome cases can be fused together through taking a close look at the activities in question. In both, it can be said that the court merely re-asserted the normal standard of care that's reasonably expected for the activity in question. In *Nettleship,* his Lordship Lord Denning in his judgment at 699-700, stated that 'The high standard

imposed by the judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third-party risks.' The defendant was trying to lower the statutory standard below that which governs all driving on the roads. In *Philips,* the plaintiff attempted to raise the standard, to his benefit, above which that the court deemed appropriate to ear-piercing at the time in question i.e. the plaintiff tried to assess the defendant against the standards of a surgeon/doctor instead of a jeweller 'with his position and training'.

Furthermore, referring back to Lord Denning's Judgment in *Nettleship* , 'the injured person is only able to recover if the driver is liable in law. So the judges see to it that he liable, unless he can prove care and skill of a high standard…. Thus we are, in this branch of the law, moving away from the concept: "No liability without fault". We are beginning to apply the test: "On whom should the risk fall?" Morally the learner-driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.' Applying this ratio to *Philips*, a significant comparison can be made between the two cases. The jeweller in *Philips* wasn't liable in law, nor was he morally culpable, as he was able to prove that he exercised a high standard of care and skill reasonably expected of him in his profession and activity – much like the learner-driver in *Nettleship,* who failed to prove that she exercised the same high standard of care and skill reasonably expected of her in her activity. Additionally, because the plaintiff in *Philips* had the opportunity to go to a surgeon if she wanted to ensure that the operation of piercing her ears were to be carried out with a surgical proportion of skill, she should have gone to a surgeon and hence the risk, if any, should be apportioned and fall on her as well.

Finally, in *Nettleship,* the defendant learner-driver was insured and hence any damages paid out were from the insurance fund. As we have seen, the law has evidently been more inclined to find liable those who are insured and have an action against them in negligence, than those who are not ('it is no sin to rob an apparently rich man', as argued by D. Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries'). This is effectively to spread the cost and risk and give a definite rise to a remedy for the injured party. The question accordingly lies - was the defendant

jeweller in *Philips* insured against negligence claims regarding ear-piercing related infections? If not, then the judgment seems logical with the rationale just stated and we can see a deeper reconciliation between the two cases (applying such doctrine: the defendant in *Nettleship* was found liable as he was insured; assuming defendant in *Philips* was not insured, the defendant was not found liable). If he was however insured, then the judgment seems to undermine this negligent liability insurance maxim and a wider separation of the two cases is evidenced (as in *Philips* the defendant was not found negligently liable, yet in *Nettleship* the insured defendant was found liable). Essentially, it all seems to fall upon the activity carried out in question, and it is in this difference of activities where the underlying similarities appear to materialize, via the notion of set standards of 'reasonable care and skill' imposed by both Parliament and the Common Law.