ERRORS OF JUDGMENT AND THE REASONABLE PERSON

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1. Introduction

There are many cases in which a person did the 'wrong' thing, but the court describes this as a mere 'error of judgment' falling short of negligence. These cases are numerous but controversial. The House of Lords said that an error may or may not be negligent and so describing conduct as an error of judgment 'tells us nothing'[1] and is 'unacceptab[le]' as a response to a negligence claim.[2] For the same reason, the Court of Appeal said that the phrase is 'capable of giving rise to confusion' and so it 'may be wise to avoid' using it.[3] Nevertheless, judges at the highest level continue to use the phrase,[4] including one of the judges who criticised its use.[5]

Simultaneously, sweeping claims are sometimes made about errors and negligence. The leading text on medical errors claims that the standard of care is set 'at too high a level' and does not make sufficient allowance for errors.[6] Yet the authors only cite a single 'error of judgment' case in support of this claim.[7]

Despite their controversial status, the error of judgment cases are under-examined. This article offers the first systematic study of these cases. It is divided into five sections. After this introduction, section 2 recounts the fragmented historical development of these cases. The use of phrase developed in separate pockets of cases, which tend not to cite each other. It seems that the phrase first emerged in cases of allegedly negligent misstatements, where it was said that errors made by lawyers are not necessarily negligent. Outside the context of allegedly negligent misstatements, a claimant could plead that they made a mere error of judgment to escape a finding of contributory negligence or novus actus interveniens. Initially there was some resistance to allowing defendants to make the same argument to escape a finding of breach of duty, but this was forgotten and now the phrase is commonplace.

Section 3 examines what the courts mean when they describe conduct as a mere 'error of judgment' falling short of negligence. It shows that judges use this phrase to capture the idea that the human beings are fallible, the reasonable person is only human, and so sometimes the

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[1] *Whitehouse v Jordan* [1981] 1 WLR 246 (HL) at 263E (Lord Fraser).

[2] *Ibid* at 257H (Lord Edmund-Davies).

[3] *Henry v Chief Constable of Thames Valley Police* [2010] EWCA Civ 5, [2010] RTR 14 at [42]-[43] (Smith LJ).

[4] eg *Barrett v Enfield LBC* [2001] 2 AC 550, 591C–D (Lord Hutton); *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, 682B–C (Lord Steyn), 718G–H, 726G (Lord Hope), 737G–H (Lord Hobhouse); *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [75] (Lord Reed).

[5] *Whitehouse v Jordan* [1980] 1 All ER 650 (CA) at 662e–g (Donaldson LJ); *Marshall v Osmond* [1983] 1 QB 1034, 1038F–G (Sir John Donaldson MR).

[6] A Merry and W Brookbanks, *Merry and McCall Smith's Errors, Medicine and the Law* (2nd edn, Cambridge, CUP, 2017) at 232.

[7] *Ibid* at 228 citing *Whitehouse* (CA) *supra* n 5.

reasonable person acts in a way which is suboptimal. This allows judges to find that suboptimal conduct was reasonable and non-negligent. Though there are some patterns in when judges exercise this power, the fact-specific and open-textured nature of the reasonable person standard affords judges a great deal of leeway to determine whether or not a particular error was reasonable. Understood in this way, the phrase can be defended against its critics.

Section 4 outlines three implications for the broader law of negligence, before section 5 concludes.

2. Historical development

(a) Negligent misstatements

It seems that the phrase was first used in cases of allegedly negligent misstatements, specifically cases of alleged negligence by lawyers. An early example is *Montriou v Jefferys* in 1825 where Lord Abbott CJ said that '[f]or a mere error no man is accountable; no attorney, or counsel, is bound to know the law in all cases; nor is an attorney to lose his fair remuneration, because he has committed such an error, as a cautious or prudent man might make'.[8] Five years later, the full 'error of judgment' phrase was introduced in *Godefroy v Dalton*, where Tindal CJ said that a lawyer 'is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction'.[9]

A similar principle applies to valuers. The leading case is *Singer & Friedlander Ltd v John D Wood & Co*, in which Watkins J said:

> so many imponderables confront the valuer that he is obliged to proceed on the basis of assumptions. Therefore, he cannot be faulted for achieving a result which does not admit of some degree of error. … The permissible margin of error is … generally 10 per cent either side of a figure which can be said to be the right figure … .[10]

An extreme illustration is *Luxmoore-May v Messenger May Baverstock*.[11] Luxmoore-May owned two oil paintings. A valuer valued the paintings at £30 to £50. The paintings were auctioned with a reserve price of £40, but they sold for £840. It was later suggested that the paintings were by George Stubbs and they sold again for more than £88,000. Luxmoore-May sued the valuer in the tort of negligence but the Court of Appeal dismissed the claim, holding that the valuer was not in breach of its duty of care. Slade LJ said that 'the required standard of skill and care allows for differing views, and even a wrong view, without the practitioner holding that view (necessarily) being held in breach of his duty'.[12]

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[8] (1825) Ry & M 317 at 320, 171 ER 1034 at 1035.

[9] (1830) 6 Bing 460 at 468; 130 ER 1357 at 136. See also eg *Hart v Frame* (1839) 6 Cl & F 193, 210; 7 ER 670 at 676 (Lord Cottenham LC); *Fletcher & Son v Jubb, Booth & Helliwell* [1920] 1 KB 275 (CA) at 279 (Bankes LJ); *Sutcliffe v Thackrah* [1974] AC 727 (HL) at 735H–36B (Lord Reid); *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 (HL) at 214F–G, 215H (Lord Wilberforce), 218D–E, 220D–E, 221A–B (Lord Diplock), 231C–E (Lord Salmon); *Hall supra* n 4 at 682B–C (Lord Steyn), 718G–H, 726G (Lord Hope), 737G–H (Lord Hobhouse).

[10] *Singer & Friedlander Ltd v John D Wood & Co* [1955–95] PNLR 70 (QB) at 74. See also *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] 1 All ER (Comm) 999 at [6] (Longmore LJ); *Bratt v Jones* [2025] EWCA Civ 562; [2025] 4 WLR 59.

[11] *Luxmoore-May v Messenger May Baverstock* [1990] 1 WLR 1009 (CA).

[12] *Ibid* at 1020D–E.

(b) Origin in contributory negligence

Outside the misstatement cases, the 'error of judgment' cases had a more tortuous and controversial development. It seems that the phrase first emerged in the defence of contributory negligence. The earliest example I have found is *London Steamboat Co v The Bywell Castle* in 1879.[13] A negligent manoeuvre by one ship, the Princess Alice, caused it to collide with another ship, the Bywell Castle. In the moments before the collision, the Bywell Castle went hard a-port. The question for the Court of Appeal was whether this amounted to contributory negligence.

The Court held that it did not for two reasons. First, the collision was inevitable whatever the Bywell Castle did.[14] Second, all three members of the Court recognised that even if a different manoeuvre by the Bywell Castle would have avoided the collision and so going hard a-port was the 'wrong' manoeuvre,[15] this did not amount to contributory negligence. James LJ explained that:

> if, in that moment of extreme peril and difficulty, [a] ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected.[16]

This principle was quickly approved by the House of Lords in a series of three further cases involving shipping accidents,[17] and the principle continues to be applied in modern contributory negligence cases.[18]

The phrase is also used where there is no emergency or time pressure. This is shown by *Caswell v Powell Duffryn Associated Collieries Ltd*.[19] Caswell worked in a mine. He was caught in machinery and killed. The House of Lords held that the mine's failure to keep the dangerous machinery securely fenced was a breach of statutory duty which caused Caswell's death. The mine argued that Caswell was contributorily negligent, but the House rejected that argument. Lord Wright said:

> he was guilty of [no] more than an error of judgment or heedlessness or inadvertence in regard to his own safety not amounting to contributory negligence or misconduct such as to displace the claim. … What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to

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[13] (1879) 4 PD 219 (CA). cf earlier case of *Jones v Boyce* (1816) 1 Stark 493, 171 ER 540, expressing a similar idea without using the language of an 'error of judgment'.

[14] *Ibid* at 222–23 (James LJ), 227 (Brett LJ), 228 (Cotton LJ).

[15] *Ibid* at 223 (James LJ), 227 (Brett LJ).

[16] *Ibid* at 223. See also 226–27 (Brett LJ), 228–29 (Cotton LJ).

[17] *Stoomvaart Maatschappy Nederland v Peninsular and Oriental Steam Navigation Co (The Voorwarts)* (1880) 5 App Cas 876 (HL) at 890–91 (Lord Blackburn); *Admiralty Commissioners v The Volute* [1922] 1 AC 129 (HL) at 136 (Viscount Birkenhead LC); *USA v Laird Line Ltd* [1924] AC 286 (HL).

[18] *Crabtree v Midlands British Road Services Limited* (CA, 24 January 1980); *Tolley v Carr* [2010] EWHC 2191 (QB), [2011] RTR 7 at [23] (Hickinbottom J).

[19] [1940] AC 152 (HL). See also *Hopwood v Rolls Royce Ltd* (1947) 176 LT 514 (CA) at 520 (Lord Greene MR); *Thurogood v Van Den Berghs & Jurgens Ltd* [1951] 2 KB 537 (CA) at 550 (Cohen LJ); *John Summers & Sons Ltd v Frost* [1955] AC 740 (HL) at 754 (Viscount Simonds), 773 (Lord Reid), 777 (Lord Keith); *Jones v Staveley Iron and Chemical Co Ltd* [1955] 1 QB 474 (CA) affd [1956] AC 627 (HL).

> the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety.[20]

(c) Extension to novus actus interveniens

By 1928, the phrase was also used in the doctrine of novus actus interveniens, as shown by *The Baron Vernon v The Metagama*.[21] The Metagama collided with the Baron Vernon. The latter ship was badly damaged and later sunk. The owners of the Metagama conceded that their crew's negligence had caused the accident. However, they argued that the crew of the Baron Vernon had mishandled their ship after the accident, and that this constituted a novus actus interveniens, breaking the chain of causation between the Metagama's negligence and the Baron Vernon's sinking. The House of Lords rejected that argument. Viscount Haldane said:

> It is [the damaged vessel's] duty to do all they can to minimise that damage, but they do not fail in this duty if they only commit an error of judgment in deciding on the best course in difficult circumstances. … [The chain of causation is not broken by an] action on an erroneous opinion by people who have *bona fide* made a mistake while trying to do their best, which is all that is shown to have happened in the present case.[22]

(d) *Jones v Staveley Iron & Chemical Co Ltd*

By the middle of the twentieth century, then, a *claimant* could plead that they committed a mere error of judgment, in order to avoid a finding that their conduct was contributorily negligent or broke the chain of causation. *Jones v Staveley Iron & Chemical Co Ltd* tested whether a *defendant* could make the same argument (outside the misstatement cases) to avoid a finding that they breached their duty of care.[23] Jones was a factory worker. He loaded a crane; the crane lifted the load, which came loose and trapped his hand, injuring him. The accident was caused by two errors. First, Jones failed to alert to crane driver that the load was not centred. Second, the crane driver lifted the load without first taking the strain to check that it was secure. Jones sued his employer, arguing that it was vicariously liable for the crane driver's negligence.

At first instance, Sellers J denied the claim. He held that both Jones and the crane driver 'were guilty of errors of judgment but not of negligence'.[24] Consequently, the crane driver had not breached her duty and so the employer was not liable. This led Denning LJ to remark that '[t]he trial judge seems to have thought that "what is sauce for the goose is sauce for the gander" – that the same standard of care should be applied to the crane driver as to the injured man, and that she should be excused for thoughtlessness or inadvertence the same as he.'[25]

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[20] *Caswell supra* n 19 at 174–79 (Lord Wright).
[21] *The Baron Vernon v The Metagama* 1928 SC (HL) 21, applied by *Morris v Richards* [2003] EWCA Civ 232 at [16] (Schiemann LJ). See also *The Oropesa* [1943] P 32 (CA) at 37 (Lord Wright); *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* 1970 SC (HL) 20 at 26 (Lord Reid); *Rawson v Clark* (CA, 16 October 1980). cf *The Singleton Abbey v The Paludina* [1927] AC 16 (HL).
[22] *The Metagama supra* n 21 at 26. See also 32 (Lord Phillimore).
[23] *Jones* (CA) *supra* n 19; *Jones* (HL) *supra* n 19.
[24] *Jones* (HL) *supra* n 19 at 640 (Sellers J).
[25] *Jones* (CA) *supra* n 19 at 479.

This was overturned on appeal. The Court of Appeal and House of Lords accepted that, applying *Caswell*, Jones' error of judgment did not amount to contributory negligence. But they held that the defendant could not rely on *Caswell* to deny that there was a breach of duty.

Two lines of reasoning can be detected in the Court of Appeal's decision. First, parts of Denning LJ's judgment suggest that employers are held to a higher standard of care than employees.[26] This argument was disapproved by the House of Lords.[27] This was not a case of an employer's personal liability but of vicarious liability. The employer would therefore only be liable if their employee, the crane driver, was negligent.

Instead, the House of Lords endorsed the reasoning of Hodson and Romer LJJ: that *Caswell* only applied to determining a claimant's contributory negligence, and did not apply to determining whether a defendant was in breach of a duty of care.[28] However, some care is needed in determining the exact ratio of the case. Hodson LJ went on to say that 'I do not intend to be taken as saying that every error … must necessarily be negligent. This is a question of fact to be decided in each case.'[29] This leaves open the possibility that a defendant may make an error falling short of negligence. Thus, the ratio of *Jones* is that this argument will be more readily accepted in the doctrine of contributory negligence and less readily accepted in determining whether there was a breach of duty. In other words, there are some errors which would be negligent if committed by a defendant but not contributorily negligent if committed by a claimant. Sauce for the goose is *not* sauce for the gander.[30]

(e) Extension to breach of duty

Less than a decade after *Jones*, courts began accepting the argument that the defendant made a mere error of judgment falling short of negligence. The font[31] seems to be *Wooldridge v Sumner* in 1962.[32] At a horse show, a jockey rode his horse around a corner 'too fast',[33] crashing into a spectator and injuring him. The Court of Appeal held that the jockey did not fall below the standard of care. Diplock LJ reasoned that in 'the agony of the moment',[34] a defendant must exercise:

> such care as is reasonable in circumstances in which he has not really time to think. … If, therefore, in the course of the game or competition, at a moment when he really has not time to think, a participant by mistake takes a wrong measure, he is not, in my view, to be held guilty of any negligence.

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[26] *Ibid* at 480.
[27] *Jones* (HL) *supra* n 19 at 639-40 (Lord Morton), 643-44 (Lord Reid),
[28] *Jones* (CA) *supra* n 19 at 482-83 (Hodson LJ), 484-85 (Romer LJ); *Jones* (HL) *supra* n 19 at 642 (Lord Reid), 646, 648 (Lord Tucker).
[29] *Jones* (CA) *supra* n 19 at 483.
[30] See further R W Wright 'The Standards of Care in Negligence Law' in D G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, OUP, 1995); R Stevens, 'Should Contributory Fault be Analogue or Digital?' in A Dyson, J Goudkamp, and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015). cf *Casson v Spotmix Ltd* [2017] EWCA Civ 1994 at [6] (Etherton MR, Sir Ernest Ryder, and Turner J).
[31] There are some scattered earlier examples: the misstatement cases in section 2(a) above; the brief report of Lush J's jury direction in *Cohn v Davidson* (1877) 2 QBD 455 at 455; the obiter dicta of Lord Bramwell in *Mills v Armstrong (The Bernina)* (1888) 13 HLC 1 at 12, 14; the Irish case *Martin v Dublin United Tramways Co Ltd* [1909] 2 IR 13 (KB) at 21 (Andrews J), holding that the defendant's forgetfulness did not amount to negligence, but without the language of an 'error of judgment'.
[32] *Wooldridge v Sumner* [1963] 2 QB 43 (CA).
[33] *Ibid* at 53 (Sellers LJ), 58 (Danckwerts LJ), cf 61, 63 (Diplock LJ).
[34] *Ibid* at 67 (Diplock LJ).

> … The most that can be said against [the jockey] is that in the course of and for the purposes of the competition he was guilty of an error or errors of judgment or a lapse of skill. That is not enough to constitute a breach of the duty of reasonable care which a participant owes to a spectator.[35]

Wooldridge sits uneasily with *Jones*, where the argument that the defendant made a mere error of judgment falling short of negligence had been rejected by the Court of Appeal and House of Lords. *Jones* does not seem to have been cited to the Court in *Wooldridge*. Nevertheless, *Wooldridge* was not decided *per incuriam*, since in *Jones* Hodson LJ expressly left open the possibility that, on different facts, a defendant may make an error falling short of negligence. *Wooldridge* was such a case. Nevertheless, it is notable that *Wooldridge* has since been cited with approval repeatedly by the Court of Appeal,[36] while *Jones* has been largely forgotten on this point. *Jones*' scepticism towards the 'error of judgment' phrase has been forgotten, and *Wooldridge*'s enthusiasm warmly embraced.

There are also many examples outside the sporting context, such as *Marshall v Osmond*.[37] A police car was pursuing a suspected stolen car. The latter car stopped and the occupants got out to escape on foot. The police driver intended to pull up next to the stolen car. However, they skidded into it, causing one of the suspects serious injuries. The injured party sued the police in the tort of negligence. In an ex tempore judgment, Sir John Donaldson MR dismissed the claim. He said:

> [The police officer] was driving on a gravelly surface, at night, in what were no doubt stressful circumstances. There is no doubt that he made an error of judgment because, in the absence of an error of judgment, there would have been no contact between the cars. But I am far from satisfied on the evidence that the police officer was negligent.[38]

This was quoted with approval by the Supreme Court in *Robinson v West Yorkshire Police*.[39]

3. What is an error of judgment?

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[35] *Ibid* at 68, 72 (Diplock LJ).

[36] *Wilks v Cheltenham Homeguard Motor Cycle and Light Car Club* [1971] 1 WLR 668 (CA) at 674A–D (Edmund-Davies LJ, obiter), 676B–D (Phillimore LJ, obiter); *Smoldon v Whitworth* [1996] EWCA Civ 1225, [1997] PIQR 133 at 139 (Lord Bingham CJ, obiter); *Caldwell v Maguire* [2001] EWCA Civ 1054 at [23], [28](Tuckey LJ), [33], [40] (Judge LJ); *Blake v Galloway* [2004] EWCA Civ 814, [2004] 1 WLR 2844 at [16]–[17] (Dyson LJ). See also *Beton v Toone* [1978] 7 WLUK 72, [1978] CLY 2055; *Sharp v Highland and Islands Fire Board* 2005 SLT 855 at [26] (Lord Macphail); *Fulham FC v Jon*es [2022] EWHC 1108 (QB) at [29] (Lane J).

[37] *Marshall supra* n 5. See also *Saul v St Andrew's Steam Fishing Co Ltd* [1965] 2 Lloyds LR 1 at 7 (Willmer LJ), 7 (Harman LJ); *Hucks v Cole* [1993] 4 Med LR 393 (CA) at 396 (Lord Denning MR); *Horsley v MacLaren (The Ogopogo)* [1975] 2 Lloyd's LR 410 (SCC) at 415 (Ritchie J); *Silver v Hyde* (CA, 5 June 1980); *Whitehouse* (CA) *supra* n 5 at 658 (Lord Denning MR), 661h–j (Lawton LJ); *Hippolyte v London Borough of Bexley* [1995] PIQR P309 (CA) at 313 (Steyn LJ); *X v Bedfordshire CC* [1995] 2 AC 633 (CA) at 662D (Lord Bingham MR); *Barrett supra* n 4 at 591C–D (Lord Hutton). Expressing a similar idea, without using the language of error of judgment: *Wilsher v Essex AHA* [1987] 1 QB 730 (CA) at 749D–E (Mustill LJ)*; Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 (PC) at 302 (Lord Griffiths); *Huggins v Southmead HA* [2001] EWCA Civ 160 at [16] (Latham LJ).

[38] *Marshall supra* n 5 at 1038.

[39] [2018] UKSC 4, [2018] AC 736 at [75] (Lord Reed), [121] (Lord Hughes).

To summarise, there are many cases in which a person does the 'wrong' thing, but the court treats this as a mere 'error of judgment' falling short of negligence. This principle has been used to determine whether there was a breach of duty, whether there was contributory negligence, and whether there was a novus actus interveniens. This section examines what the courts mean when they describe conduct as a mere 'error of judgment'.

(a) An error of judgment is neither necessary nor sufficient to escape a finding of negligence

The first point to note is that finding that a party made an error of judgment is neither necessary nor sufficient to escape a finding of negligence. It is not necessary, because the courts do not use the phrase 'error of judgment' to describe every case of non-negligence, and indeed in some cases of non-negligence the phrase would be inapt. For example, in *Bolton v Stone*, a cricketer hit a ball out of the ground, hitting a passing pedestrian.[40] The pedestrian brought a claim in the tort of negligence against the cricket club. The House of Lords denied the claim, holding that the club did not fall below the standard of care because 'the chance of a person ever being struck even in a long period of years was very small'.[41] The Law Lords did not describe the club's conduct as an 'error of judgment'. Indeed, it is difficult to describe the club's conduct as an 'error of judgment'; given the same situation the club could rightly choose to do the same thing again.

Furthermore, finding that a party made an error of judgment is not sufficient to escape a finding of negligence since there are many cases where an error amounts to negligence. This was made clear in *Whitehouse v Jordan*.[42] In an attempt to assist the delivery of a baby, a doctor repeatedly and forcefully used forceps to pull at the baby's head. The baby was born with brain damage. A majority of the Court of Appeal held that the doctor was not negligent. In the majority, Lord Denning MR said:

> We must say, and say firmly, that, in a professional man, an error of judgment is not negligent. To test it, I would suggest that you ask the average competent and careful practitioner: 'Is this the sort of mistake that you yourself might have made?' If he says: 'Yes, even doing the best I could, it might have happened to me', then it is not negligent.[43]

The House of Lords affirmed the result but was critical of Lord Denning MR's use of the 'error of judgment' phrase. Lord Fraser said that '[m]erely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent' depending on whether it was an error that a reasonable professional would make.[44]

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[40] *Bolton v Stone* [1951] AC 850 (HL). See also *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA); *Harris v Perry* [2008] EWCA Civ 907, [2009] 1 WLR 19.
[41] *Bolton supra* n 40 at 864 (Lord Reid).
[42] *Whitehouse* (HL) *supra* n 1.
[43] *Whitehouse* (CA) *supra* n 5 at 658e. See also 661j (Lawton LJ).
[44] *Whitehouse* (HL) *supra* n 1 at 263E. See also *The Schwan* [1892] P 419 at 429 (Lord Esher MR); *Whitehouse* (CA) *supra* n 5 at 662f-h (Donaldson LJ); *Whitehouse* (HL) *supra* n 1 at 257H-58A (Lord Edmund-Davies), 268C-E (Lord Russell).

Consequently, an 'error of judgment' is not synonymous with escaping a finding of negligence. Some but not all errors of judgments are non-negligent, and some but not all cases of non-negligence are errors of judgment.

(b) Rejecting some possible definitions of an error of judgment

One might think that the 'error of judgment' cases are cases where it was impossible to act differently and avoid making an error, and the rule is that unavoidable errors are not negligent. However, this does not fit the cases. In many of these cases, it was *possible* (if difficult) to act differently. It was possible for the Metagama to make a different manoeuvre, or for the jockey in *Wooldridge v Sumner* to slow his horse before the corner, or for the police driver in *Marshall v Osmond* to brake earlier. Indeed, the phrase 'error of judgment' implies that the party did have the time to make a judgment; they just made the wrong one. The error of judgment cases, then, go beyond merely saying that inevitable errors are not negligent.

Outside the law, an error is sometimes defined as a failure to achieve an intended outcome.[45] In light of this, one might think that these are cases of failure to achieve an intended outcome. Certainly, all the error of judgment cases are cases of failure to achieve an intended outcome: the ship master, jockey, and police driver all intended not to crash and they failed to achieve that intended outcome. However, not all cases of failure to achieve an intended outcome are error of judgment cases. For instance, in *Bolton*, the cricket club's intended outcome was that nobody would be hit by a cricket ball — that was why the ground was surrounded by a seven foot high fence — and they failed to achieve that intended outcome. Yet the House of Lords did not describe this as a case of error of judgment and it seems inapt to describe the case in this way, given that the club could rightly choose to do the same thing again. Thus, the courts use the phrase 'error of judgment' to describe some but not all cases of failure to achieve an intended outcome.

(c) The reasonable person is only human

The error of judgment cases are best understood as reflecting that the reasonable person is only human. It is trite law that, in determining whether a defendant's conduct was negligent, the court considers the probability of that conduct causing harm, the potential severity of that harm, the cost of taking further precautions against the harm, and the social utility of the conduct.[46] A party who made an 'error of judgment' is a party who, weighing these factors with the benefit of hindsight and time for calm reflection, ought to have acted differently. In *Wooldridge v Sumner*, with the benefit of hindsight we can say that if the jockey took the corner more slowly then they would have avoided the collision, reducing the probability of harm at no cost. Weighing the four factors in a cold scientific calculus, this is what the jockey ought to have done. In this sense, failing to slow down was an 'error of judgment'.

But of course, human beings never act with the benefit of hindsight[47] and rarely with the opportunity for calm reflection. This is reflected in a concept in behavioural science called

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[45] J Reason, *Human Error* (Cambridge, CUP, 1990) at 9; Merry and Brookbanks *supra* n 6 at 109.

[46] *Watt supra* n 40 at 838 (Denning LJ); *Bolton supra* n 40; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] AC 617 (HL) at 642 (Lord Reid).

[47] *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's LR 172 (Ch) at 185 (Megarry J); *Whitehouse* (CA) *supra* n 5 at 662f–g (Donaldson LJ); *Luxmoore-May supra* n 11 at 1020E–F (Slade LJ); *Henry supra* n 3 at [56] (Pill LJ); *Robinson supra* n 4 at [121] (Lord Hughes).

bounded rationality.[48] Bounded rationality is the idea that humans have various cognitive limitations which constrain how they act.[49] The human brain has limited processing power[50] and so we cannot consciously think about every action that we take. If we made a conscious decision to take each breath, and a conscious decision about how deeply to inhale each breath, we would have little processing power left to do anything else. In *Thinking, Fast and Slow* Kahneman suggests that humans deal with this by operating

> two systems in the mind, System 1 and System 2. System 1 operates automatically and quickly, with little or no effort and no sense of voluntary control. System 2 allocates attention to the effortful mental activities that demand it, including complex computations.[51]

System 1 preserves the brain's limited processing power by allowing most thinking to be done automatically, such as the decision to take a breath, while System 2 deals with more complex decisions. Both systems have their disadvantages: System 2 is slow while 'System 1 has biases … systematic errors that it is prone to make'.[52] Merry and Brookbanks describe this as the 'price of success'.[53] In spite of their limited cognitive resources, humans are able to complete complex tasks, but only by dividing tasks between System 1 and System 2, and thus relying on the automatic and error-prone thinking of System 1. The concept of bounded rationality captures this: it says that humans only act rationally within the constraints of being only human.

Consequently, humans do not always act as they ought to, in hindsight and with the benefit of calm reflection. The error of judgment cases show the law taking this into account; they are the law's concession to human fallibility. They establish that that the reasonable person is only human, and therefore fallible and sometimes fails to act as they ought to.[54] This gives judges a power to find that suboptimal conduct was nevertheless reasonable and not negligent. In particular, suboptimal behaviour has been described as an 'error of judgment' in the following situations:

- The vast majority of cases concern acting under time pressure, such as the ship master in *The Bywell Castle*, the jockey in *Wooldridge v Sumner*, and the police driver in *Marshall v Osmond*.
- Another common category comprises industrial accidents where a party performs a repetitive task leading to inattention, such as the mine worker in *Caswell* and the crane loader in *Jones*. As Merry and Brookbanks explain, humans are only able to

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[48] I take no view on whether reasonableness and rationality are synonymous: cf G C Keating, 'Reasonableness and Rationality in Negligence Theory' (1996) 48 Stanford LR 311; J Gardner and T Macklem, 'Reasons' in J L Coleman, K E Himma, and S J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, OUP, 2004) 474–75. I refer to the idea of bounded rationality merely for the point that cognitive constraints restrict human behaviour.

[49] J Bendor, 'Bounded Rationality' in J D Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences* (2nd edn, Oxford, Elsevier, 2015) at 773; G Wheeler, 'Bounded Rationality' in E N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford, Stanford University, 2020).

[50] H A Simon, 'Invariants of Human Behavior' (1990) 41 Annual Review of Psychology 1 at 7.

[51] D Kahneman, *Thinking, Fast and Slow* (New York, Farrar, Straus and Giroux, 2011) at 20–21.

[52] *Ibid* at 25. See also A Tversky and D Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124.

[53] Merry and Brookbanks *supra* n 6 at 101–02.

[54] H T Terry, 'Negligence' (1915) 29 Harvard LR 40 at 48; W A Seavey, 'Negligence: Subjective or Objective?' (1927) 41 Harvard LR 1 at 9; Merry and Brookbanks *supra* n 6 at 390; R Bagshaw, 'What is "Reasonable Foreseeability"?' in K Burns, J Gardner, J Morgan, and S Steel (eds), *Torts on Three Continents: Honouring Jane Stapleton* (Oxford, OUP, 2024) at 152-53.

complete complex tasks by 'rely[ing] heavily on automatic skills for the undertaking of several activities simultaneously, while counting on human distractibility to identify and respond to unexpected or new developments'.[55] Thus, 'at some stage in any prolonged or often-repeated activity, distraction is inevitable'.[56]

- Another group of cases are those where a party makes an evaluative judgment informed by a wide range of inputs, such as predicting how much the market will pay for a particular good, working out what the law is on a novel or difficult point, or deciding how to exercise a discretionary power.[57]
- In *Hippolyte v London Borough of Bexley*, a school pupil suffered an asthma attack causing brain damage which would have been avoided had an ambulance arrived four to five minutes earlier.[58] Steyn LJ said that the teacher's failure to call for help sooner was no more than an 'error of judgment'.[59] In part this was because of the time pressure, and in part this was because, when the accident occurred, 'awareness of the dangers of asthma was less than now' and so a reasonable person would not foresee the risk of injury.[60] The latter is another way of expressing the principle in *Roe v Ministry of Health*, summed up in Denning LJ's dictum that '[w]e must not look at the 1947 accident with 1954 spectacles'.[61] Again, this shows that the language of an 'error of judgment' is used to capture the idea that the standard of care takes account of the limits of being human: a human can only act on information available to them at the time of acting.

Just because one of these factors are present does not necessarily mean a judge will find a mere error of judgment falling short of negligence. What is reasonable is a notoriously fact-specific question, and so judges have some leeway to determine which errors are reasonable. Brandon LJ said that the 'borderline between error of judgment which is not negligent and error of judgment which is negligent is an extremely difficult one to define'.[62] The standard of care is objective[63] so, at one extreme, an error which only the defendant would make is not an error the reasonable person would make, and so is negligent. At the other extreme, the reasonable person is not a 'superman' and so would make an error that only the most astute and capable person would avoid.[64] Between these extremes, judges have some leeway to determine which errors a reasonable person would make, and which errors are negligent. Parties who have clearly made a mistake are therefore well-advised to plead that their mistake was a mere error of judgment falling short of negligence.

In summary, the error of judgment cases reflect the law making allowance for human fallibility. Humans are fallible, the reasonable person is only human, and so sometimes the reasonable person acts in a way that is suboptimal. Thus, even if the probability and severity of harm 'outweighs' the cost of further precautions and social utility of the conduct, a judge

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[55] Merry and Brookbanks *supra* n 6 at 116.
[56] *Ibid* at 114.
[57] *Barrett supra* n 4 at 591C–D (Lord Hutton).
[58] *Hippolyte supra* n 36.
[59] *Ibid* at 313.
[60] *Ibid* at 313 (Steyn LJ)
[61] [1954] 2 QB 66 at 84 (Denning LJ) cited by *Hucks supra* n 36 at 396 (Lord Denning MR); *Whitehouse* (CA) *supra* n 5 at 658 (Denning LJ), 662 (Donaldson LJ).
[62] *Rawson supra* n 21.
[63] *Nettleship v Weston* [1971] 2 QB 691 (CA); *Dunnage v Randall* [2015] EWCA Civ 673, [2016] QB 639.
[64] *Laird Line* supra n 17 at 292 (Lord Shaw).

can excuse a party from negligence by saying that they made a mere error of judgment falling short of negligence.

(d) Why does the law make allowance for human fallibility?

Justifying why the law makes allowance for human fallibility is more difficult than it first appears. In *Merry and McCall Smith's Errors, Medicine, and the Law,* the authors argue that the standard of care 'must make allowance for occasional human errors. … We know empirically that such errors are inevitable, and it would therefore be unrealistic to set an expected (or normative) standard that we knew to be unattainable'.[65] On its own, however, this argument is insufficient to justify the law. Sometimes the law of torts imposes a standard regardless of a party's ability to comply with it. This is most obvious in torts of strict liability but, even in the tort of negligence, the objective standard of care can have this effect.[66] The learner driver is held to the standard of a reasonable qualified driver, even if it is impossible for the learner to meet this standard.[67] Conceivably, the law could deal with the error of judgment cases in the same way. All errors could be treated as falling below the standard of care, even though this would make the standard 'unattainable' and compliance 'unrealistic'.

An alternative explanation is that taking account of human fallibility is implicit in the standard of reasonableness. These cases could be decided without taking into account human fallibility, without conceding that the reasonable person is only human, and holding that all errors are negligent. But then the standard of care would no longer be set by what was reasonable. The standard would then be set by what was optimum, or how a computer would have acted, or how Hercules would have acted.[68] The error of judgment cases and the reasonableness standard are therefore tied together; justifying the error of judgment cases therefore requires justifying the reasonableness standard. The reasonableness standard is controversial[69] and defending it beyond the scope of this article.[70]

It is perhaps easier to justify the allowance made for human fallibility in the doctrines of contributory negligence and novus actus interveniens. In the doctrine of contributory negligence, when apportioning the damage between the claimant and defendant, judges have regard to the parties' relative blameworthiness and the causal potency of their actions.[71] In the 'error of judgment' cases, human fallibility is to blame for the claimant's conduct, and so the claimant is not sufficiently blameworthy to justify a reduction in their damages. In the novus actus cases, it is to be expected that the claimant is only human, and so will sometimes

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[65] Merry and Brookbanks *supra* n 6 at 230.
[66] T Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530 at 531–37.
[67] *Nettleship supra* n 63.
[68] cf J Goudkamp and D Nolan, *Winfield and Jolowicz on Tort* (20th edn, London, Sweet & Maxwell, 2020) at para 6-005.
[69] eg R Martin, 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 Anglo-American LR 334; M Moran, *Rethinking the Reasonable Person* (Oxford, OUP, 2003) at chs 7-8.
[70] There is a vast literature: eg R A Posner, 'A Theory of Negligence' (1972) 1 Journal of Legal Studies 29; Wright 'The Standards of Care in Negligence Law' *supra* n 30; Keating, 'Reasonableness and Rationality in Negligence Theory' *supra* n 48; E J Weinrib, *The Idea of Private Law* (rev edn, Oxford, OUP, 2012) at 147-52; A Ripstein, *Private Wrongs* (Cambridge Massachusetts, HUP 2016) at 102-16; J Gardner, *Torts and Other Wrongs* (Oxford, OUP, 2019) at chs 7-9; J Gardner, 'Reasonable Person Standard' in H LaFollette (ed), *International Encyclopedia of Ethics* (Chichester, Wiley, 2019).
[71] *Stapley v Gypsum Mines Ltd* [1953] AC 663 (HL) at 682 (Lord Reid); *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884 at [44] (Lord Walker), [48] (Lord Mance).

act suboptimally under pressure, and so this not necessarily a novel event breaking the chain of causation.[72]

(e) A distraction?

In light of this, the use of the 'error of judgment' phrase can be defended against the criticism that it is a distraction. An 'error of judgment' may or may not be negligent, depending on whether the error was a reasonable one to make.[73] In light of this, the House of Lords in *Whitehouse v Jordan* said that the phrase 'tells us nothing'[74] and is 'unacceptab[le]' as a response to a negligence claim.[75] For the same reason, in *Henry v Chief Constable of Thames Valley Police*, the Court of Appeal said that the phrase is 'capable of giving rise to confusion',[76] 'does not assist clarity of thought',[77] and so it 'may be wise to avoid any argument about whether there has been an error of judgment'.[78]

Certainly, the standard of care is set by what is reasonable, and so an error of judgment may or may not be negligent depending on whether it was a reasonable one to make. However, when judges invoke the language of a *mere* error of judgment *falling short of negligence*, they appeal to the idea that the reasonable person is only human, and so sometimes makes errors and acts suboptimally. Thus, the language of a mere 'error of judgment' should not be understood as offering a competing test for negligence. Instead, the language of a mere 'error of judgment' is a conclusory label, used in cases where a party acted suboptimally – the probability and severity of harm 'outweighed' the cost of further precautions and the social utility of their conduct – but this was reasonable given human fallibility. As a conclusory label and not a test, the phrase does tell us something and the courts have consistently recognised it as an acceptable response to a negligence claim.

4. Implications

(a) Reappraising the standard of care

The error of judgment cases have at least three important implications. First, these cases show that the standard of care is not as stringent as is sometimes assumed. The authors of *Merry and McCall Smith's Errors, Medicine, and the Law* write that '[a]ll too often the yardstick is taken to be the person who is capable of meeting a high standard of competence, awareness, care, etc. all the time'[79] and so 'there is often a tendency to set the standard at too high a level'.[80] However, the only error of judgment case they cite is *Whitehouse v Jordan*,[81] and the authors acknowledge that *Whitehouse* allows that 'some mistakes will be permissible'.[82]

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[72] *Morris supra* n 21 at [16] (Schiemann LJ).
[73] *Whitehouse* (CA) *supra* n 5 at 662e–g (Donaldson LJ); *Whitehouse* (HL) *supra* n 1 at 257H–58A (Lord Edmund-Davies), 263E–F (Lord Fraser), 268C–E (Lord Russell); *Henry supra* n 3 at [42] (Smith LJ).
[74] *Whitehouse* (HL) *supra* n 1 at 263E (Lord Fraser).
[75] *Ibid* at 257H (Lord Edmund-Davies).
[76] *Henry supra* n 3 at [42] (Smith LJ).
[77] *Ibid* at [56] (Pill LJ).
[78] *Ibid* at [43] (Smith LJ).
[79] Merry and Brookbanks *supra* n 6 at 229
[80] *Ibid* at 232.
[81] *Ibid* at 228 citing *Whitehouse* (CA) *supra* n 5.
[82] *Ibid* at 229.

This article has shown that, despite the criticisms in *Whitehouse*, a large number of cases before and since excuse behaviour as a mere error of judgment falling short of negligence, seemingly contradicting the authors' claim. Interestingly, however, few of these cases are medical cases. There are medical cases which state that not all errors are negligent, but then go on to find that the error on the facts was negligent.[83] In *Whitehouse* itself, the doctor was found not negligent, but the House of Lords depreciated the description of his conduct as an 'error of judgment'.[84] A rare example of a medical case which expressly excuses a practitioner for a mistake is *Huggins v Southmead HA*, where the Court of Appeal found that the defendant made 'a mistake which any competent obstetrician might make in these circumstances' and so was not negligent.[85] As such, *Merry and McCall Smith*'s claim that the standard of care makes insufficient allowance for error may be accurate for medical cases, but it seems unfair as a description of the negligence standard more generally.

(b) Rejecting the Learned Hand formula and *Shirt* calculus

A second implication is that the error of judgments cases are inconsistent with the so-called Learned Hand formula or *Shirt* calculus. To explain: in deciding whether conduct was negligent, a court considers the probability of that conduct causing harm, the potential severity of that harm, the cost of taking further precautions against the harm, and the social utility of the conduct.[86] This is sometimes called the Learned Hand formula (after a judgment given by Learned Hand J[87]) or, in Australia, the *Shirt* calculus (named after a decision of the High Court of Australia[88]).

The idea that negligence can be reduced to a 'formula' or 'calculus' has been extensively criticised by both courts and commentators. They observe that that the things being weighed are incapable of quantification,[89] incommensurable,[90] and reasonableness is not wholly determined by balancing costs and benefits.[91] Thus, in *Mulligan v Coffs Harbour CC,* Gleeson CJ and Kirby J said:

> A calculus is a method of calculation. What is involved in [determining negligence] is not a calculation; it is a judgment. … to treat what was said in *Shirt* as an inflexible formula could produce a distinctly unreasonable result.[92]

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[83] *Hucks supra* n 36 at 396 (Lord Denning MR); *Wilsher supra* n 37 at 749D–E (Mustill LJ); *X v Bedfordshire CC supra* n 36 at 662D (Lord Bingham MR).
[84] *Whitehouse* (HL) *supra* n 1 at 257H-58A (Lord Edmund-Davies), 263E (Lord Fraser), 268C-E (Lord Russell).
[85] *Huggins supra* n 37 at [16] (Latham LJ).
[86] *Watt supra* n 40 at 838 (Denning LJ); *Bolton supra* n 40; *The Wagon Mound (No 2) supra* n 46 at 642 (Lord Reid).
[87] *United States v Carroll Towing Co Inc* 159 F 2d 169 (2d Cir 1947) at 173 (Learned Hand J).
[88] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (HCA) at 47–48 (Mason J).
[89] *New South Wales v Fahy* [2007] HCA 20, (2007) 232 CLR 486 at [125] (Kirby J); R Stevens, *Torts and Rights* (Oxford, OUP, 2007) at 94.
[90] *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 (NSWSC) 523F–G (McHugh J); *Fahy supra* n 89 at [6] (Gleeson CJ); Stevens, *Torts and Rights supra* n 89 at 94.
[91] *Fahy supra* n 89 at [57] (Gummow and Hayne JJ); Wright, 'The Standards of Care in the Tort of Negligence' *supra* n 30; R W Wright, 'Justice and Reasonable Care in Negligence Law' (2002) 47 American Journal of Jurisprudence 143; R W Wright, 'Hand, Posner, and the Myth of the Hand Formula' (2003) 4 Theoretical Inquiries in Law 145; Stevens, *Torts and Rights supra* n 89 at 95.
[92] *Mulligan v Coffs Harbour CC* [2005] HCA 63, (2005) 223 CLR 486 at [2] approved *Fahy supra* n 89 at [6] (Gleeson CJ).

The error of judgment cases confirm this. They show that negligence is not is not wholly determined by the Learned Hand formula or *Shirt* calculus: even if behaviour is suboptimal according to the calculus, that behaviour may be a reasonable error of judgment falling short of negligence.

This also has broader theoretical implications. Some writers equate negligence with failing to act as one ought.[93] The error of judgments cases seem inconsistent with such a view. Failing to act as one ought may be necessary for negligence, but the error of judgment cases show that is not sufficient.[94] According to the balance of reasons, the master of the Bywell Castle ought to have made a different manoeuvre, the jockey in *Wooldridge v Sumner* ought to have slowed his horse before the corner, and the police driver in *Marshall v Osmond* ought to have braked earlier. Each of them could have done so. Yet, according to the courts, none of them were negligent. Either these cases are wrong, or negligence cannot be reduced to failing to act as one ought.

(c) Personification of the standard of care

A third implication of the error of judgment cases is that they show that the reasonable person is not redundant. The standard of care is set by a how a reasonable person in the defendant's position would act.[95] But the reasonable person acts reasonably, so at first glance personifying the standard appears redundant. Why bother asking 'how would the reasonable person in defendant's position have acted?', rather than cutting to the chase and asking 'did the defendant act reasonably?'[96]

The error of judgment cases provide an answer. They show that the standard of care makes allowance for human fallibility. This can be concisely summarised by saying that the standard is set by a reasonable person. It is intuitive that the reasonable person, like any human person, is fallible and makes errors. Personifying the standard of care is therefore helpful in accurately describing the standard. Seavey recognised this a century ago: '[t]he personification of a standard person helps us realize that the actor's conduct is to be compared with that of a human being with all of the human failings.'[97]

By contrast, if the standard of care were not personified, it would be set by asking 'did the defendant act reasonably?'. It might be thought that 'human error is never reasonable'[98] and so all errors are negligent. Indeed, Merry writes:

> there is nothing reasonable about error. It is not the action, but the person carrying out the action, that needs to be considered. For example, it is well established that anaesthetists regularly administer the wrong drug. This is

[93] J Gardner, 'The Mysterious Case of the Reasonable Person' (2001) 51 U Toronto LJ 273; Gardner and Macklem *supra* n 48 at 474-75; J C P Goldberg and B C Zipursky, 'Seeing Tort Law from the Internal Point of View' (2006) 75 Fordham LR 1563.

[94] L Boonzaier 'Is a Tort a Failure to do What One Ought? in F Bettini, M Fischer, C Mitchell, and P Saprai (eds), *New Directions in Private Law Theory* (London, UCL Press, 2023) at 174.

[95] *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at 784; 156 ER 1047 at 1049 (Alderson B); *Dunnage supra* n 63 at [123]–[124] (Vos LJ), [149] (Arden LJ).

[96] M King, 'Against Personifying the Reasonable Person' (2017) 11 Criminal Law and Philosophy 725; Gardner, 'Reasonable Person Standard' *supra* n 70.

[97] Seavey *supra* n 54 at 9. See also H M Hurd and M S Moore, 'Negligence in the Air' (2002) 3 Theoretical Inquiries in Law 333 at 259; Merry and Brookbanks *supra* n 6 at 390.

[98] A F Merry, 'How Does the Law Recognize and Deal with Medical Errors?' (2009) 102 Journal of the Royal Society of Medicine 265 at 269.

> not a reasonable thing to do, but it clearly is something done by reasonable doctors.[99]

Consequently, abandoning the personification of the standard might suggest a change to the content of the standard. True, the test 'did the defendant act reasonably?' could be qualified by saying that reasonableness makes allowance for human fallibility. But this is clumsy compared to simply personifying the standard in a reasonable person.

In short, personifying the standard of care plays an important descriptive role. The standard of care makes allowance for human fallibility and so the standard is accurately described by a reasonable person who is fallible like any human person.

5. Conclusion

This article surveyed cases where the court describes a party as making a mere 'error of judgment' falling short of negligence. This phrase used in determining whether a defendant was in breach of duty, as well as determining whether a claimant was contributorily negligent or whether their conduct was a novus actus interveniens breaking the chain of causation.

Judges use the phrase to describe behaviour which is, in hindsight and with calm reflection, suboptimal. However, humans are fallible, the reasonable person is only human, and so sometimes the reasonable person acts in a way which is suboptimal and thus makes an error. This gives judges a power to characterise suboptimal behaviour as a reasonable error of judgment falling short of negligence. Understood in this way, the phrase is not a competing test for negligence or distraction, but a helpful conclusory label.

The error of judgment cases deserve attention. They show that the standard of care is not as demanding as is sometimes supposed. They show that the standard cannot be reduced to a formula or calculus or the question of how one ought to act. Perhaps most importantly, they show that that personifying the standard of care in a reasonable person performs an important descriptive function. The reasonable person is only human and so, like all of us, sometimes makes errors of judgment.

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[99] A F Merry, 'Mistakes, Misguided Moments, and Manslaughter' (2009) 41 Journal of ExtraCorporeal Technology 2 at 4. See also Merry, 'How Does the Law Recognize and Deal with Medical Errors?' *supra* n 98 at 269; Merry and Brookbanks *supra* n 6 at 231.