

Saint Louis University Law Journal

Volume 45
Number 3 *Teaching Torts (Summer 2001)*

Article 6

5-1-2001

The Carroll Towing Company Case and the Teaching of Tort Law

Patrick J. Kelley
Southern Illinois University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 St. Louis U. L.J. (2001).

Available at: <https://scholarship.law.slu.edu/lj/vol45/iss3/6>

This Teaching Torts is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

THE *CARROLL TOWING COMPANY* CASE AND THE TEACHING OF TORT LAW

PATRICK J. KELLEY*

I. THE CASEBOOK METHOD AND ITS TEMPTATIONS

“Taught law is tough law,” they say, and law professors have no reason to demur. It stands to reason that most judges will accept without question those rules and principles they were taught as fundamental in law school. Torts professors in 2001 teach the judges of 2026. What we should teach, then, is not just an academic question.

Moreover, law professors in the United States who teach common law subjects with casebooks have an extraordinary degree of freedom in deciding what is fundamental in their subject and how to teach it. We have in this country fifty bodies of state tort law with fifty separate and unique histories, yet we profess to teach our students “tort law”—impliedly a single, unified body of law. The casebook method enables us to maintain this mirage of a univocal tort law because the casebook authors get to choose which cases to include as emblematic or significant.¹

* Professor of Law, Southern Illinois University School of Law. Thanks to Mark Grady for helpful comments.

1. This practice goes back to the first casebook—Christopher Columbus Langdell’s *Casebook on Contracts*, published in 1871. C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871). C.C. Langdell evidently believed that you could determine scientifically the true common law of contract, presumably applicable everywhere, by critical analysis of the meaning of doctrinal terms like offer, acceptance and consideration. Langdell avoided a number of messy problems in the application of this methodology by using primarily English cases. Grant Gilmore has speculated that Langdell must have engaged in some intellectual bludgeoning to get his students to see which meaning was the “true” meaning. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42-48 (1977). Langdell’s subsequently published essay index to the second edition of his casebook revealed a rigidly dogmatic approach to doctrine, probably essential to achieve a single true contract law out of a welter of different decisions by different courts. C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (2d ed. 1880).

When competing or conflicting decisions are considered, the standpoint for discussion is not that of comparative law, where we illuminate our law by comparing it to the law of others. Instead, because we do not accept any state law as standard, our standpoint is the search for the single best or most sensible law.

Use of the casebook method to teach a purely hypothetical univocal tort law allows us to leave out altogether the history of the law in that jurisdiction, both the cases leading up to the chosen case, as well as the cases after it. The casebook method further makes it easy for us to ignore altogether or scant the doctrinal and intellectual history of important tort terms and doctrines like negligence, duty and intent.

Thus, although the casebook method is wonderfully adapted to teaching the basic lawyering skills of case analysis and synthesis, it seems to present obstacles to the effective teaching of substantive law. The casebook method tempts us to give a vastly simplified picture of tort law, shorn of nuance and historical context. That picture may greatly distort the law of every state because it is the law of none. The picture may most accurately reflect just the theoretical or ideological commitments of the casebook authors.

Although this tendency may be built into the enterprise of using the casebook method to teach "tort law" in the United States, the tendency can be combated or minimized. One way to do so, not evidenced in any of the currently-published casebooks, is to use cases from just one state.² This would allow us to put individual cases into historical and doctrinal context. With adequate notes, this would allow our students to identify and explore differences between states by the comparative method, using the law of the standard state as the base for comparison.

The most common way to minimize the distorting tendency of the casebook method is to provide notes putting emblematic cases into historical context, both doctrinal and intellectual, and sketching the extent to which the case has influenced legal developments in its own and other jurisdictions. The extent to which this is done successfully, of course, differs from casebook to casebook.

II. *CARROLL TOWING COMPANY* IN THE CASEBOOKS

The *Carroll Towing Co.* case³ and its famous formula for deciding negligence issues has been designated as emblematic and significant by unanimous vote of the authors of currently-published casebooks: each casebook gives the *Carroll Towing Co.* formula a prominent place in its treatment of the standard of conduct in negligence cases.⁴ The casebook

2. In the original version of Marc Franklin and Robert Rabin's casebook, the authors used cases almost exclusively from New York and California. MARC A. FRANKLIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* (1971). That focus had become "less pronounced" by the fourth edition. See *Preface to* MARC A. FRANKLIN & ROBERT L. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES*, at xxi (4th ed. 1987).

3. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

4. VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 131-43 (10th ed. 2000); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 190-96 (7th ed. 2000); DAVID W. ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* 88-91

authors are not unanimous about the significance of the *Carroll Towing Co.* formula. Some present it as the usual or ordinary meaning of the standard of conduct in negligence cases;⁵ most present it as one of two or more ways of establishing the standard of conduct;⁶ and others present it as an interpretation based on economic theory of the ordinary reasonable person standard.⁷ Only one casebook mentions that some courts use the *Carroll Towing Co.* test to decide controverted questions of duty.⁸

In the materials surrounding the *Carroll Towing Co.* case, the casebook authors use notes and related cases in a number of different ways. Most commonly, the notes and surrounding cases are used to teach the students how to apply the Hand formula and to give examples illuminating one or more of the elements in the formula.⁹ Also common, the notes and surrounding cases

(2d ed. 1989); FRANK J. VANDALL & ELLEN WERTHEIMER, TORTS: CASES AND PROBLEMS 179-83 (1997); DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 137-53 (4th ed. 2001); DOMINIC VETRI, TORT LAW AND PRACTICE 64-79 (1998); GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 132-45 (3d ed. 1997); ROBERT E. KEETON ET AL., CASES AND MATERIALS ON TORT AND ACCIDENT LAW 10-11, 155-76 (3d ed. 1997); MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 31-40 (6th ed. 1996); JAMES A. HENDERSON, JR., ET AL., THE TORTS PROCESS 178-82 (5th ed. 1999); JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 232-39 (2d ed. 1997); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 223-33 (1994); MARSHALL S. SHAPO, TORT AND INJURY LAW 174-77 (2d ed. 2000); MARK F. GRADY, CASES AND MATERIALS ON TORTS 346-73 (1994); JOSEPH W. LITTLE & LYRISSA BARNETT LIDSKY, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY WRONGFUL ACT 76, 103-06, 222-29 (2d ed. 1997).

5. See GRADY, *supra* note 4, at 345; HENDERSON ET AL., *supra* note 4, at 179; KEETON ET AL., *supra* note 4, at 155-95, 254. Those of us who have used a casebook for years, only to later find new meanings and new depths of understanding in the materials, will obviously approach with trepidation the question of categorizing the authors' position on a question from the necessarily limited acquaintance with a casebook one does not teach. Adding to this trepidation is the realization that some casebook authors purport to include material simply as an invitation to critical analysis, without endorsing any particular position. Law professor lore has it that Professor Sturges at Yale put together and published a casebook comprised entirely of cases he thought were wrongly decided. See WESLEY A. STURGES, CASES AND MATERIALS ON THE LAW OF ADMINISTRATION OF DEBTORS' ESTATES (1933). The categorizations in this and subsequent footnotes are therefore presented tentatively and with apologies in advance to any author whom I have offended.

6. See DOBBS & HAYDEN, *supra* note 4; EPSTEIN, *supra* note 4; VANDALL & WERTHEIMER, *supra* note 4; VETRI, *supra* note 4; CHRISTIE ET AL., *supra* note 4; SCHWARTZ ET AL., *supra* note 4; FRANKLIN & RABIN, *supra* note 4; JOHNSON & GUNN, *supra* note 4, at 233; SHAPO, *supra* note 4.

7. PHILLIPS ET AL., *supra* note 4, at 232, 239; LITTLE & LIDSKY, *supra* note 4, at 76, 222-29.

8. LITTLE & LIDSKY, *supra* note 4.

9. See SCHWARTZ ET AL., *supra* note 4; VETRI, *supra* note 4; ROBERTSON ET AL., *supra* note 4; GRADY, *supra* note 4; DOBBS & HAYDEN, *supra* note 4; KEETON ET AL., *supra* note 4; JOHNSON & GUNN, *supra* note 4.

are used to compare and, perhaps, equate the Hand formula with the unreasonable foreseeable risk definition of negligence,¹⁰ as embodied in sections 291 through 293 of the Second Restatement of Torts.¹¹ Often the authors will put the formula into a theoretical context, explaining its affinity to the law and economics explanation of negligence law¹² (usually citing Posner's *Theory of Negligence*¹³ or Landes & Posner's *The Economic Structure of Tort Law*¹⁴). In the course of this, some authors explain the relationship between the formula and marginal analysis;¹⁵ some explain Mark Grady's critique that the formula does not explain the courts' recurring conclusion that inadvertence resulting in breach of a known safety standard is always negligence;¹⁶ and many point out the difficulty in quantifying the elements of the formula,¹⁷ citing Judge Hand himself in either *Conway v. O'Brien*,¹⁸ or *Moisan v. Loftus*¹⁹ or Judge Posner in *McCarty v. Pheasant Run*, or *United States Fidelity & Guaranty Co. v. Jadranska Slobodno Plovidba*.²⁰

The casebook authors generally do not attempt to put *Carroll Towing Co.* into historical context. No one suggests a possible source for or influence on the Hand formula. With two exceptions,²¹ the authors fail to give enough of

10. See SCHWARTZ ET AL., *supra* note 4, at 139-43; ROBERTSON ET AL., *supra* note 4; CHRISTIE ET AL., *supra* note 4, at 135-40; KEETON ET AL., *supra* note 4, at 172-76; HENDERSON ET AL., *supra* note 4, at 180; SHAPO, *supra* note 4, at 174-75.

11. RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965).

12. See JOHNSON & GUNN, *supra* note 4, at 228-30; EPSTEIN, *supra* note 4, at 191-96; DOBBS & HAYDEN, *supra* note 4, at 150; CHRISTIE ET AL., *supra* note 4, at 137-39; FRANKLIN & RABIN, *supra* note 4, at 36-37; PHILLIPS ET AL., *supra* note 4, at 237; GRADY, *supra* note 4, at 352-55.

13. DOBBS & HAYDEN, *supra* note 4, at 150; CHRISTIE ET AL., *supra* note 4, at 137-39; FRANKLIN & RABIN, *supra* note 4, at 36-37; PHILLIPS ET AL., *supra* note 4, at 237.

14. EPSTEIN, *supra* note 4, at 193-94; GRADY, *supra* note 4, at 352.

15. EPSTEIN, *supra* note 4, at 193; JOHNSON & GUNN, *supra* note 4, at 229; GRADY, *supra* note 4, at 353-55.

16. JOHNSON & GUNN, *supra* note 4, at 229-30; EPSTEIN, *supra* note 4, at 194-195; DOBBS & HAYDEN, *supra* note 4, at 151; VETRI, *supra* note 4, at 71; FRANKLIN & RABIN, *supra* note 4, at 38-39; GRADY, *supra* note 4, at 373-78 (quoting Landes and Posner).

17. See EPSTEIN, *supra* note 4, at 192; JOHNSON & GUNN, *supra* note 4, at 228; VETRI, *supra* note 4, at 65; SCHWARTZ ET AL., *supra* note 4, at 141; CHRISTIE ET AL., *supra* note 4, at 137; KEETON ET AL., *supra* note 4, at 11; FRANKLIN & RABIN, *supra* note 4, at 38; PHILLIPS ET AL., *supra* note 4, at 238; HENDERSON ET AL., *supra* note 4, at 181; LITTLE & LIDSKY, *supra* note 4, at 225.

18. JOHNSON & GUNN, *supra* note 4, at 228; VETRI, *supra* note 4, at 65; SCHWARTZ ET AL., *supra* note 4, at 141; CHRISTIE ET AL., *supra* note 4, at 137.

19. EPSTEIN, *supra* note 4, at 192; KEETON ET AL., *supra* note 4, at 11; HENDERSON ET AL., *supra* note 4, at 181; LITTLE & LIDSKY, *supra* note 4, at 225.

20. VETRI, *supra* note 4, at 72-76; FRANKLIN & RABIN, *supra* note 4, at 38; PHILLIPS ET AL., *supra* note 4, at 232-38; JOHNSON & GUNN, *supra* note 4, at 228; LITTLE & LIDSKY, *supra* note 4, at 226-29.

21. GRADY, *supra* note 4, at 346-47; CHRISTIE ET AL., *supra* note 4, at 135-36.

the opinion to show how Judge Hand applied the test to the facts of the *Carroll Towing Co.* case itself. With one exception,²² the authors fail to refer to any prior case in Learned Hand's court dealing with allegations of negligence on similar facts—the absence of a barge on board a barge moored to a pier. No author gives any indication of whether that court continued to adhere to the narrow holding in the case. Few authors try to tell the students whether the *Carroll Towing Co.* test is used frequently or infrequently. Those who do²³ often content themselves with a brief cite to Stephen Gilles's²⁴ lament that judges do not instruct juries to use the Hand formula in deciding negligence questions.

I believe that the failure of our casebooks to place the *Carroll Towing Co.* test in historical context persistently distorts the significance of the case and the Hand formula that it contains. The rest of this paper will try to put the *Carroll Towing Co.* case into its appropriate historical context.

III. THE *CARROLL TOWING COMPANY* CASE AS A COMMON-LAW PRECEDENT

The *Carroll Towing Co.* case arose out of the sinking of the barge, *Anna C*, on January 2, 1944, in the North River off a pier in Manhattan.²⁵ The *Anna C* had been moored to the end of Pier 52. Five other barges had been moored in a line outside her, the tier all held together by mooring lines. The fourth barge out was also connected by a line to the end barge in a similar tier of four barges extending out from the Public Pier immediately to the north. The tug *Carroll* was ordered by the harbor master to shift the second barge in the tier attached to that Public Pier. To get to the barge to be moved, they had to remove the line between the two tiers. The harbor master and a deckhand from the tug went onto the tier of barges extending from Pier 52, readjusted the lines between the barges, readjusted the two lines between the *Anna C* and Pier 52, and finally threw off the line between the two tiers. While the deckhand and the harbor master were readjusting these lines, the tug stayed at the end of the tier, pulling on a line made fast to the end boat to hold the tier in place. Shortly after all the lines were readjusted, the tug released its holding line and moved away from the tier. The *Anna C* then broke loose from the pier and the

22. GRADY, *supra* note 4, at 349-51 (explaining the Kathryn B. Guinan, 176 F. 301 (2d Cir. 1910) and O'Donnell Transp. Co. v. M & J Tracy, Inc., 150 F.2d 735 (2d Cir. 1945) [hereinafter *The Reno*]). See also MARK GRADY, PROBLEM SUPPLEMENT TO CASES AND MATERIALS ON TORTS 107-08 (1996), giving as a problem the facts of the *D.L. and W. No. 442*, 30 F.2d 250 (2d Cir. 1929).

23. CHRISTIE ET AL., *supra* note 4, at 139; JOHNSON & GUNN, *supra* note 4, at 229; FRANKLIN & RABIN, *supra* note 4, at 39.

24. Stephen Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1016 (1994), cited in CHRISTIE ET AL., *supra* note 4, at 139; FRANKLIN & RABIN, *supra* note 4, at 39.

25. The facts in this paragraph are taken from Judge Hand's opinion for the court, 159 F.2d 169, 170-71 (2d Cir. 1947).

whole tier of barges went adrift. The *Anna C* drifted into a Navy tanker berthed at a downwind pier. The collision punched a hole in the *Anna C* below the water line. The hole was not immediately discovered; the *Anna C* was pushed into the slip between the two piers by an assisting tug, and shortly thereafter sank.

The trial court, sitting in admiralty without a jury, found that the owner of the cargo on the *Anna C* could recover from the owner of the tug (Carroll Towing Co., Inc.) for the negligence of the tug captain and its deckhand, and from the employer of the harbor master (Grace Line, Inc.) for the harbor master's negligence in readjusting the mooring lines.²⁶ The trial court found that the owner of the barge (Connors Marine Co., Inc.) was not negligent in failing to have a bargee on board at the time of the accident.²⁷ In support of this conclusion, the court cited three reported²⁸ and two unreported prior²⁹ cases holding that the absence of a vessel's captain was not negligence when the vessel was left, at rest, adequately moored.

On appeal, the United States Court of Appeals for the Second Circuit reversed the trial court on the question of the barge owner's negligence.³⁰ In a famous opinion by Judge Learned Hand, the court found that the *Anna C* would still have broken loose even if the bargee had been on board, because the harbor master had the authority to readjust all the lines in the tier and any protest by the bargee would have been fruitless. A bargee on board, however, would have discovered the hole immediately after the collision and obtained help to keep the barge afloat long enough to beach her and save the cargo. The barge owner was therefore responsible, along with the tug owner and the harbor master's employer, for the "sinking damages"—the damage solely attributable to the *Anna C*'s sinking.³¹ The barge owner was not responsible for the damages caused immediately by the collision.

In discussing the barge owner's negligence, Judge Hand first canvassed the precedents dealing with the negligence of a barge or ship owner in leaving a moored vessel unattended. Hand added ten additional cases to the three published cases relied on by the lower court. Introducing these thirteen cases, Hand said, "we cannot agree that [the bargee's absence from his barge] is never ground for liability."³² Hand went on to give a brief statement of the

26. *Connors Marine Co. v. Pennsylvania R.R. Co.*, 66 F. Supp. 396, 398 (E.D.N.Y. 1946) [hereinafter *The Joseph F. Carroll*].

27. *Id.*

28. *Id.* (citing *The Kathryn B. Guinan*, 176 F. 301 (2d Cir. 1910); *United States Trucking Corp. v. City of New York*, 14 F.2d 528 (E.D.N.Y. 1926); *The Trenton*, 72 F.2d 283 (2d Cir. 1934)).

29. *Id.* (citing *Schmutz v. Pennsylvania R.R. Co.*, (1926); *The Baltimore*, (1934)).

30. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173-74 (2d Cir. 1947).

31. *Id.*

32. *Id.* at 172.

holding of each case.³³ Of the thirteen cases, the court had found the bargee or captain's absence to be negligence in seven of them,³⁴ and found no negligence, or at least no liability, in six of them.³⁵

33. Judge Hand's summary is as follows:

As early as 1843, Judge Sprague in *Clapp v. Young*, held a schooner liable which broke adrift from her moorings in a gale in Provincetown Harbor, and ran down another ship. The ground was that the owners of the offending ship had left no one on board, even though it was the custom in that harbor not to do so. Judge Tenney in *Fenno v. The Mary E. Cuff*, treated it as one of several faults against another vessel which was run down, to leave the offending vessel unattended in a storm in Port Jefferson Harbor. Judge Thomas in *The On-The-Level* held liable for damage to a stake-boat, a barge moored to the stake-boat "south of Liberty Light, off the Jersey shore," because she had been left without a bargee; indeed he declared that the bargee's absence was "gross negligence." In the *Kathryn B. Guinan*, Ward, J., did indeed say that, when a barge was made fast to a pier in the harbor, as distinct from being in open waters, the bargee's absence would not be the basis for the owner's negligence. However, the facts in that case made no such holding necessary; the offending barge in fact had a bargee aboard though he was asleep. In *The Beeko*, Judge Campbell exonerated a power boat which had no watchman on board, which boys had maliciously cast loose from her moorings at the Marine Basin in Brooklyn and which collided with another vessel. Obviously that decision has no bearing on the facts at bar. In *United States Trucking Corporation v. City of New York*, the same judge refused to reduce the recovery of a coal hoister, injured at a foul berth, because the engineer was not on board; he had gone home for the night as was apparently his custom. We reversed the decree, but for another reason. In *The Sadie*, we affirmed Judge Coleman's holding that it was actionable negligence to leave without a bargee on board a barge made fast outside another barge, in the face of storm warnings. The damage was done to the inside barge. In *The P.R.R. No. 216*, we charged with liability a lighter which broke loose from, or was cast off, by a tanker to which she moored, on the ground that her bargee should not have left her over Sunday. He could not know when the tanker might have to cast her off. We carried this so far in *The East Indian*, as to hold a lighter whose bargee went ashore for breakfast, during which the stevedores cast off some of the lighter's lines. True, the bargee came back after she was free and was then ineffectual in taking control of her before she damaged another vessel; but we held his absence itself a fault, knowing as he must have, that the stevedores were apt to cast off the lighter. The *Conway No. 23* went on the theory that the absence of the bargee had no connection with the damage done to the vessel itself; it assumed liability, if the contrary had been proved. In *The Trenton*, we refused to hold a moored vessel because another outside of her had overcharged her fasts. The bargee had gone away for the night when a storm arose; and our exoneration of the offending vessel did depend upon the theory that it was not negligent for the bargee to be away for the night; but no danger was apparently then to be apprehended. In *Bouker Contracting Co. v. Williamsburgh Power Plant Corporation*, we charged a scow with half damages because her bargee left her without adequate precautions. In *O'Donnell Transportation Co. v. M. & J. Tracy*, we refused to charge a barge whose bargee had been absent from 9 A.M. to 1:30 P.M., having "left the vessel to go ashore for a time on his own business."

Id. at 172-73 (citations omitted).

34. *Clapp v. Young*, 5 F. Cas. 819 (D. Mass 1843); *Fenno v. The Mary E. Cuff*, 84 F. 719 (E.D.N.Y. 1897) [hereinafter *The Mary E. Cuff*]; *The On-The-Level*, 128 F. 511 (E.D.N.Y. 1903); *New York Cuba Mail S.S. Co. v. Fulton Lighterage Co.*, 57 F.2d 908 (S.D.N.Y. 1932)

In the seven cases in which the absence of the captain or bargee was held to be negligence, three captains had left their vessel untended in a storm or with warnings of an approaching storm threatening danger;³⁶ one captain left his barge moored to a stake-boat in open waters;³⁷ one bargee left his scow without taking precautions against a danger he knew about,³⁸ and two lighter captains left their lighters moored to a ship they were unloading,³⁹ knowing in one case that the ship might cast the lighter off during the time he was gone⁴⁰ and in the other case⁴¹ that the stevedores might rearrange the lines during unloading. In both cases, the lighter's captain could not be sure that those who were not primarily responsible for the lighter would remove her adequately.

In the six cases of no liability, two bargees⁴² had left their barges, adequately moored, overnight, and one who had moored his vessel adequately was onboard but asleep overnight without a watchman.⁴³ One captain had left his power boat moored in a marine basin without a watchman and mischievous boys maliciously cast her loose.⁴⁴ One captain was not on board his vessel while it was being towed, but there was no evidence that a captain on board would have prevented the damage.⁴⁵ In one case—*The Reno*⁴⁶—the bargee had been gone “on his own business” from 9:00 a.m. to 1:30 p.m. on the day the barge sank, but had sounded the barge just before he left and determined that the water in the hold had not risen since the night before.⁴⁷ The damage to the barge from its being jammed against another barge as it was being towed earlier that morning could not have been detected before the bargee left, then, as the court found that the hole which sunk the barge was caused by ice that

[hereinafter *The Sadie*]; *Christie Scow Corp. v. Pennsylvania R.R. Co.*, 56 F.2d 604 (2d Cir. 1932) [hereinafter *The P.R.R. No. 216*]; *The East Indian*, 62 F.2d 242 (2d Cir. 1932); *Bouker Contracting Co. v. Williamsburgh Power Plant Corp.*, 130 F.2d 96 (2d Cir. 1942) [hereinafter *The 73-H*].

35. *The Kathryn B. Guinan*, 176 F. 301 (2d Cir. 1910); *The Beeko*, 10 F.2d 884 (E.D.N.Y. 1925); *United States Trucking Co. v. City of New York*, 14 F.2d 528 (E.D.N.Y. 1926); *The Conway No. 23*, 64 F.2d 121 (2d Cir. 1933); *The Trenton*, 72 F.2d 283 (2d Cir. 1934); *O'Donnell Transp. Co. v. M & J Tracey*, 150 F.2d 735 (2d Cir. 1945) [hereinafter *The Reno*].

36. *Clapp*, 5 F. Cas. at 820; *The Mary E. Cuff*, 84 F. at 720; *The Sadie*, 57 F.2d at 908.

37. *The On-The-Level*, 128 F. at 511-12.

38. *The 73-H*, 130 F.2d at 97-98.

39. *The P.R.R. No. 216*, 56 F.2d at 604; *The East Indian*, 62 F.2d at 243.

40. *The P.R.R. No. 216*, 56 F.2d at 604.

41. *The East Indian*, 62 F.2d at 244.

42. *United States Trucking Corp. v. City of New York*, 14 F.2d 528, 528 (E.D.N.Y. 1926); *The Trenton*, 72 F.2d 283, 285 (2d Cir. 1934).

43. *The Kathryn B. Guinan*, 176 F. 301, 301-02 (2d Cir. 1910).

44. *The Beeko*, 10 F.2d 884, 884-85 (E.D.N.Y. 1925).

45. *The Conway No. 23*, 64 F.2d 121, 121 (2d Cir. 1933).

46. *The Reno*, 150 F.2d 735 (2d Cir. 1945).

47. *Id.* at 736.

had been jammed against the port stern of the barge, which stoppered the hole it had caused until the ice gradually melted.⁴⁸

Judge Hand concluded from this review of the relevant precedent that no general rule existed on the issue of whether the absence of a bargee from a moored barge constituted negligence. Instead of distinguishing or extending the specific holdings of the prior cases, Judge Hand purported to derive a general liability test from the cases taken as a whole:

It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.⁴⁹

In applying this test to the facts, Judge Hand started sensibly enough, focusing on “the likelihood that a barge will break from her fasts and the damage she will do.”⁵⁰ He concluded that the danger is greater when the barge (as here) “is in a crowded harbor where moored barges are constantly being shifted about.”⁵¹ This obviously goes to the probability of harm and the gravity of harm parts of the formula. But Judge Hand then went on to an extended discussion of the bargee's excuse for his absence from the barge. Judge Hand started by asserting that “the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times.”⁵² He might not need to be aboard at night at all, Hand continued, and if the custom is to go ashore at night, that might be controlling.⁵³ Here, however, the accident took place during working hours and the bargee had been ashore for the preceding twenty-one hours, with no good excuse. The court concluded that, under the circumstances (barges constantly being drilled in and out in a wartime crowded harbor, in winter with limited daylight hours), it was “not beyond reasonable expectation” that the work of drilling the barges in and out might be done negligently.⁵⁴ The court therefore held that “it was a fair requirement that the

48. *Id.* at 736-37.

49. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 172-73 (distinguishing, implicitly, *United States Trucking Corp. v. City of New York*, 14 F.2d 528 (D.C. Cir. 1926); *The Trenton*, 72 F.2d 283 (2d Cir. 1934); and *The Kathryn B. Guinan*, 176 F.2d 301 (2d Cir. 1949)).

54. *Carroll Towing Co.*, 159 F.2d at 174.

Conners Company should have a barge aboard (unless he had some excuse for his absence), during the working hours of daylight.”⁵⁵

The court’s emphasis on the bargee’s unexcused absence has troubled Professor Richard Epstein.⁵⁶ In the context of Judge Hand’s announced formula for deciding the case, the bargee’s excuse seems relevant only in determining the extent of the burden on the defendant to keep the barge manned. Professor Epstein pointed out that the defendant is the barge owner, however, not the bargee.⁵⁷ He argued that the burden on the barge owner would be about the same to keep a bargee on board at all times during working hours, or to keep a bargee on board during working hours except when he has a good excuse for his absence.⁵⁸ Since there were living quarters on board, it could not be much more expensive to the barge owner to pay a bargee to stay on board without going ashore at all during working hours, than to pay a bargee to stay on board during working hours except when he had a good reason for going ashore.

Judge Hand’s emphasis on the bargee’s unexcused absence is understandable if we take the case out of the context of his announced test and put it back into the context of the Second Circuit’s specific precedents on the negligence of an absent captain or bargee. We can then read Judge Hand’s discussion of the application of his test to the facts of this case as *both* an application of his formula *and* a way of distinguishing the prior relevant cases.

When Judge Hand concluded that, under the circumstances, it was reasonably foreseeable that the work of drilling the barges in and out might be done negligently, that seemed to bring the facts of this case squarely within the negligence holdings of the two lighterage cases. The lighterage cases, though, both share a fact that make them clearly distinguishable: in both those cases,⁵⁹ the lighter’s captain, had he been aboard, would have had clear authority to control the remooring of the lighter after her lines had been cast off or rearranged. In the *Carroll Towing Co.* case, the harbor master had that authority. Moreover, since the *Anna C* broke loose while the harbor master was still in the process of drilling out a barge, there was no time after the harbor master had remoored the *Anna C* and before the *Anna C* broke loose that a bargee aboard could have reassumed authority and responsibility for her moorings. So the question then becomes whether the absence of the bargee was negligence in relation to the risk that the barge might sink after collision with the Navy tanker. That question, however, seems to identify *The Reno* as

55. *Id.*

56. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 155-56 (1973).

57. *Id.* at 155.

58. *Id.*

59. *The P.R.R. No. 216*, 56 F.2d 604 (2d Cir. 1932); *The East Indian*, 62 F.2d 242 (2d Cir. 1932).

the controlling authority. In that case, the Second Circuit had held that the absence of a bargee ashore on his own business for four and a half hours during working hours, while his barge was sinking, was not negligence.⁶⁰ The only eligible distinction between *The Reno* and *Carroll Towing*, then, seems to be that the bargee in *The Reno* had a good excuse to be gone while the *Anna C*'s bargee did not.

But is that really a persuasive way to distinguish *The Reno*? If we follow *The Reno* holding and assume in *Carroll Towing* that it is not negligent for a bargee to leave a properly-moored barge to pursue his own legitimate concerns during working hours, the obvious issues in this case would be alternative questions of proximate cause and cause-in-fact. The cause-in-fact problem is this: The bargee was absent without a good excuse. His presence could have prevented the harm—at least the “sinking damages.” So, from one perspective, his absence was a cause-in-fact of the harm. But if he had had a good excuse, he could have been absent at the time of the collision without being negligent, and the harm would still have occurred. So, from another perspective, his absence without a good excuse was not a cause-in-fact of the harm. It all depends on which way you change the bargee's conduct to make it non-negligent in applying the “but-for,” or necessary condition test for cause-in-fact.⁶¹

The problem can be recast in proximate cause terms. Under the practice held to be due care by the court in *The Reno*, bargees may be absent without negligence for extended periods of time during working hours when they have a good excuse. If that is so, the purpose of the practice cannot be to prevent every kind of harm. Since the bargee was not on the barge all the time, any safety purpose for the bargee's presence when he was there would have to be a secondary, back-stopping purpose. The practice of allowing bargees to leave at times shows that the barge owner expected the harbor master and the tugs at his direction to take primary responsibility for the safety of moored barges in these flotillas. In holding that the barge owner was not responsible for “collision” damages, Judge Hand recognized this allocation of primary responsibility to the harbor master: since the harbor master would have ignored

60. *The Reno*, 150 F.2d 735, 736 (2d Cir. 1945).

61. In applying the “but-for” or necessary condition test for cause-in-fact, the courts ordinarily construct a hypothetical in which all the other facts of the case are the same, but the negligent party's conduct is changed just enough so he would not be negligent. Then you ask whether, in that hypothetical, the injury would still have occurred. In the *Carroll Towing Co.* case, the bargee's conduct could be changed in two different ways to make it non-negligent, under the court's assumptions: (1) you could make the bargee non-negligent by having him on the barge at all relevant times, or (2) you could give the bargee a good excuse to be gone from the barge at the relevant time. Obviously, in the second hypothetical, the same injury would have happened in exactly the same way, so the bargee's negligence in being gone without a good excuse is not a cause-in-fact of the injury here.

any bargee's protests while the harbor master was reworking the mooring lines, the barge owner is not liable for damages caused just by the harbor master's bungled remooring. Judge Hand therefore limited the barge owner's liability to the "sinking" damages, which could have been avoided had a bargee been on board during the collision. This limited liability seems to reflect the secondary, back-stopping role of the bargee when he is on board a moored barge, but it leaves out of account the fact that, according to the practice, the bargee could at any time be ashore. The harbor master, therefore, in fulfilling his role could only rely on the bargee's backstopping role to avoid harm of gradual onset, such as an improperly remoored line that over the course of a day or two wore away. The bargee, even if he were away for excused excursions ashore, should discover that kind of a problem. Here, however, the barge drifted off immediately after the harbor master removed the lines. In these circumstances, then, the sinking would have occurred even if the bargee had been ashore just briefly on an excused errand. From the harbor master's viewpoint, it is simply fortuitous in a case like this whether the bargee is ashore with or without a good excuse. Under these circumstances, the subsidiary, back-stopping safety purpose of having a bargee aboard some of the time has no relevance to the liability question here. Put a different way, this argument shows that the sinking of the *Anna C* here did not come about from the hazards the practice of keeping a bargee on board some but not all of the time was intended to prevent.⁶²

Judge Hand's emphasis on the bargee's excuse in the *Carroll Towing Co.* case suggests that in applying the negligence calculus he deferred to the good practice norm recognized in *The Reno*. Unfortunately, by not focusing on the purpose of the customary norm he deferred to, he missed the crucial issue in the case, and reached a result that seems unsupportable in light of prior precedent and the coordination in practices they had recognized as acceptable.

IV. INTELLECTUAL ORIGINS OF THE HAND FORMULA

Judge Hand's famous formula for determining negligence, announced in the *Carroll Towing Co.* opinion, bears repeating here:

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function

62. The bargee's negligence in being absent without an excuse would therefore not be a proximate cause of the sinking damages, under either the "hazard prevented by the social rule" test, or the "within the unreasonable foreseeable risk that made the party negligent in the first place" test for proximate causation. See generally Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and The Present Darkness*, 69 WASH. U. L.Q. 49, 87-90, 99-101 (1991) (explaining overlap between "hazard" test of proximate cause and "within the foreseeable risk" test of proximate cause).

of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.⁶³

Where did this formula come from? It seems to explain the absent bargee cases summarized by Judge Hand in his preceding paragraph, but none of the opinions in those cases mentioned these factors in justifying the court's decision, and any number of other lower-level generalizations could plausibly explain this set of cases.⁶⁴ Moreover, Judge Hand had expressed this same understanding of the appropriate test of negligence, without the algebraic notation, over six years before in *Conway v. O'Brien*,⁶⁵ an automobile accident case. There, Judge Hand had said: "The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk."⁶⁶ Judge Hand's explanation of the negligence standard in *Conway* and *Carroll Towing* was not that ordinarily given by judges in the 1940s. Most judges at that time explained the negligence standard in terms of the conduct of the ordinary reasonable man.⁶⁷

Where, then, did Judge Hand get his formula? We know from his biographers that Learned Hand was an intellectually ambitious and progressive judge, alive to the latest currents of thought in the legal community.⁶⁸ This found expression in many ways, including Judge Hand's early membership in the American Law Institute (ALI) and his vigorous support for its project of restating the common law.⁶⁹ This suggests that a likely source for Hand's description of the negligence standard would be the Restatement of the Division of the Law Relating to Negligence,⁷⁰ approved by the ALI at its annual meeting in 1934. Sure enough, when we turn to that Restatement we find negligence explained as conduct posing an unreasonable foreseeable risk

63. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

64. One might say the cases stand for the following generalization: when a vessel is not in operation, but adequately moored at a place of rest, the absence of the vessel's captain is negligence only when a warned-of storm threatening the safety of the moored vessel would have led a prudent captain, following ordinary good practice, to stay or return to keep the vessel and those around it safe during the storm.

65. 111 F.2d 611 (2d Cir. 1940).

66. *Id.* at 612.

67. See generally WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 224-55 (1941); 38 AM. JUR. *Negligence* § 30, at 676-78 (1941).

68. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 190-415 (1994).

69. *Id.* at 410-15.

70. RESTATEMENT OF THE LAW OF TORTS, vol. 2, NEGLIGENCE (1934) [hereinafter RESTATEMENT].

of harm to another.⁷¹ The Restatement defined an unreasonable risk as “one of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”⁷² The Restatement went on to list factors to be considered in determining the utility of the actor’s conduct,⁷³ as well as factors considered in determining the magnitude of the risk.⁷⁴

Judge Hand’s statements in *Carroll Towing Co.* and *Conway v. O’Brien* of the factors relevant to a negligence determination could be seen as an elegantly, concise summary of the Restatement’s more elaborate cost-benefit standard for determining whether a foreseeable risk is an unreasonable one. There are differences between the Hand formula and the Restatement’s formula, however, and while those differences are subtle they may nevertheless be significant. The Restatement says that an act is negligent if “a reasonable man would recognize [that it] involve[s] a risk of harm to another” when the “risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”⁷⁵ The Restatement goes on to identify the three factors important in determining the utility of the actor’s conduct: “(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct; (b) the extent of the chance that this interest will be advanced or protected by the particular course of the conduct; and (c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.”⁷⁶ Judge Hand’s test does not refer to the utility of the actor’s conduct or to these three factors for determining that “utility.” Instead he refers to “[t]he burden of adequate precautions.”⁷⁷ The Restatement formula also identifies factors important in determining the magnitude of the risk: “(a) the social value which the law attaches to the interests which are imperiled; (b) the extent of the chance that the actor’s conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member; (c) the extent of the harm likely to be caused to interests imperiled; and (d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.”⁷⁸ Judge Hand’s test does not use the magnitude of the risk phrase or the four factors the Restatement says are relevant to determining that magnitude. Instead, he refers to the probability of harm and the gravity of the resulting injury.

71. *Id.* § 291.

72. *Id.*

73. *Id.* § 292.

74. *Id.* § 291(1).

75. *Id.*

76. *Id.* § 292.

77. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

78. RESTATEMENT § 293.

Is there any significance to the apparent differences between the Hand formula and the Restatement formula? The only thing in the Restatement's unreasonable foreseeable risk test clearly missing from Hand's simplified reformulation is the initial requirement that the risk of harm to another be one that a reasonable man would recognize.⁷⁹ One could argue that Judge Hand formulated his test as a simplified version of the second part of the Restatement test, and assumed that the question of whether there was a foreseeable risk of harm to another would already be answered before the court proceeded on to the Hand formula for determining whether that risk is unreasonable. Certainly, in the *Carroll Towing Co.* case itself, Judge Hand could be seen as predicating the application of his formula on the prior determination that there was here a foreseeable risk of harm: "It is not beyond reasonable expectation,"⁸⁰ Hand said, that in the course of drilling barges in and out, in winter, in war time, in a crowded harbor, a barge will break loose because of negligence by those charged with the job of drilling them in and out. This statement could alternatively be interpreted as an application of the probability part of Hand's formula, however, and the omission of foreseeable risk from Judge Hand's formal statement of the formula both in *Carroll Towing Co.* and in *Conway v. O'Brien*, as well as in the later case of *Moisan v. Loftus*,⁸¹ suggests that Hand intended to exclude foreseeable risk from a formula he intended to be the complete statement of the test for negligence.

Is there any significant difference between the Restatement's formula for determining whether the utility of the actor's conduct is outweighed by the magnitude of its risk of harm to others and Hand's test of whether the burden of taking precautions is greater than the probability multiplied by the gravity of the threatened harm? The factors the Restatement lists as relevant to determining the utility of the actor's conduct can just as reasonably be seen as factors relevant to determining the burden of adequate precautions because the burden of adequate precautions is equivalent to the foregone utility of the actor's risk-threatening conduct. Similarly, the factors the Restatement lists as relevant in determining the magnitude of the risk could all fit within Judge Hand's reference to probability of harm multiplied by the gravity of the resulting injury. Surely, the elegantly general "gravity of resulting injury" could reasonably be understood to refer to the value of the interests threatened with harm, the extent of the threatened harm to those interests and the number of persons whose interests could be harmed. All these elements could no doubt be considered in any careful attempt to determine the "gravity" of harm. Similarly, the Restatement's "extent of the chance" that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which

79. *Id.* § 291(1).

80. *Carroll Towing Co.*, 159 F.2d at 174.

81. 178 F.2d 148, 149 (2d Cir. 1949).

the other is a member seems to be succinctly summarized by Judge Hand's "probability of harm."

The difference between the two tests thus seems to be a difference only in the level of generality at which the test is formulated. But there may be a significant rhetorical advantage in pegging the test at Judge Hand's higher level of generality. In the Restatement's balance, reference is made to "the value the law attaches" to the different interests on either side of the balance. The form of the test itself thus raises the recurring problem with utilitarianism or any other form of consequentialist reasoning. That is the problem of identifying a scale that can be used to assign values to different interests or outcomes so that those interests or outcomes can be compared rationally.⁸² Judge Hand's formula, by rising to a higher level of generality than the Restatement, does not so much solve that problem as submerge it.

If we conclude that the Hand formula is a simplified version of all or part of the unreasonable foreseeable risk test of negligence adopted in the First Restatement of Torts, our search for the full pedigree of the Hand formula continues, for we must ask where the First Restatement's test came from. After all, courts explaining the negligence standard in the 1920s and 1930s ordinarily referred to the conduct of the ordinary reasonable man, not to the conduct that poses an unreasonable foreseeable risk of harm to another.⁸³ The unreasonable foreseeable risk test thus seems like a theoretical description of the ordinary judicial standard for negligence, not a statement of the standard itself. Where did this theoretical redescription come from?

The origin of the Restatement's unreasonable foreseeable risk of harm test can be identified with a fair degree of certainty. It seems to have come from Henry Taylor Terry's 1915 article in the *Harvard Law Review* entitled, *Negligence*.⁸⁴ In that article, Terry argued that negligence was conduct that posed an unreasonable foreseeable risk of harm to others.⁸⁵ He identified five factors on which the reasonableness of a given risk may depend, including the magnitude of the risk; the value of that exposed to the risk; the value of the actor's object in acting as he did; the probability that the actor's object will be obtained by the conduct threatening the risk; and the probability that the actor's object would not have been obtained without taking the risk.⁸⁶ Terry's

82. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 111-18 (1980).

83. See generally PROSSER, *supra* note 67, at 224-55; 38 AM. JUR. *Negligence* § 30, at 676-78 (1941).

84. Henry Taylor Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

85. *Id.* at 42.

86. *Id.* at 42-43.

(1) The magnitude of the risk. A risk is more likely to be unreasonable the greater it is.

(2) The value of importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principal object.

five factors are described in language substantially the same as that later adopted in the First Restatement.

Henry Taylor Terry evidently arrived at his unreasonable foreseeable risk test of negligence by meditating on Holmes's theory of negligence in *The Common Law*, published in 1881.⁸⁷ There, Holmes had equated the old, inevitable accident defense at common law with the developing negligence standard.⁸⁸ He then explained that the test of "inevitable accident" in the old common law cases was whether harm from defendant's act was foreseeable at the time defendant voluntarily acted; if danger was not foreseeable, or if defendant did not act voluntarily, the result was inevitable accident.⁸⁹ Holmes's explanation of the negligence standard, then, was simply whether danger from the defendant's conduct was foreseeable at all. That test, however, seemed to be inconsistent with the cases which had consistently held that conduct such as riding a horse carefully⁹⁰ was not negligent even though it threatened a foreseeable risk of harm to others, as the horse could be spooked, and run away with the rider, and cause harm to others.

When Holmes published *The Common Law*, Henry Taylor Terry was stuck over in Tokyo with an inadequate library.⁹¹ He obtained a copy of *The Common Law*, however, and later clearly identified the problem with Holmes's simple foreseeability test of negligence. In his 1884 treatise on Anglo-American law, Terry said this:

[After stating an objective reasonableness standard under the test of negligence] This I understand to be substantially the same conclusion reached by Judge Holmes in his remarkable book on *The Common Law*, as to the nature of what is generally called legal negligence and intention. He finds the unlawful character of the conduct in such cases to depend upon the fact that it is likely to cause damage to others rather than upon its having been done with

(3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct,—is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.

(4) The probability that the collateral object will be attained by the conduct which involves risk to the principal; the utility of the risk.

(5) The probability that the collateral object would not have been attained without taking the risk; the necessity of the risk.

Id.

87. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Mark DeWolfe Howe ed., Belknap Press 1963) (1881).

88. *Id.* at 74-77, 86-88.

89. *Id.* at 74-75.

90. *Gibbons v. Pepper*, 91 Eng. Rep. 922 (1695).

91. See *Preface to HENRY T. TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884).

any bad state of mind. But, probably because the purpose of his work did not call for it, he does not discuss, at least at any length, the question what degree of likelihood of damage is sufficient to make the conduct unlawful, there being many sorts of conduct which have and are well known to have more or less tendency to cause harm to others which are yet perfectly lawful so long as this tendency is not too great. The criterion here is reasonableness.⁹²

Terry evidently mulled over what the precise test of reasonableness should be for the next thirty-one years, publishing his ultimate conclusions in 1915, three years after he had returned to the United States from his professorship in Tokyo.

The brilliance of Terry's achievement can hardly be overemphasized. He preserved Holmes's basic consequentialist ethic and deterrence rationale for negligence liability, provided a theory that was more consistent with the negligence rules than Holmes's theory, and further preserved the legislative function of the courts by avoiding a test of negligence in terms of the conduct of the ordinary reasonable man.

So, where did Holmes get his simple foreseeable harm test of inevitable accident, and hence of negligence? The ordinary judicial explanation of the negligence standard at the time Holmes wrote was the conduct of the ordinary reasonable man.⁹³ There were scattered references in the cases to foreseeability,⁹⁴ but the word was ordinarily used to mean "prudence" or "foresight."⁹⁵

The most likely source for Holmes's focus on simple foreseeable harm as the test for negligence is the Comtean positivist philosophy Holmes had imbibed in his exhaustive readings of John Stuart Mill's technical writings in philosophy and scientific method.⁹⁶ Under Comte and Mill's epistemology:

We have no knowledge of anything but Phænomena; and our knowledge of phænomena is relative, not absolute. We know not the essence, nor the real mode of production, of any fact, but only its relations to other facts in the way of succession or of similitude. These relations are constant; that is, always the same in the same circumstances. The constant resemblances which link phænomena together, and the constant sequences which unite them as

92. *Id.* at 180-81.

93. The leading cases are *Vaughan v. Menlove*, 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (C.P. 1837) and *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850). See generally MELVILLE MADISON BIGELOW, *THE LAW OF TORTS* 664 (1878); THOMAS M. COOLEY, *A TREATISE OF THE LAW OF TORTS* 668 (1880).

94. See, e.g., *Brown*, 60 Mass. (6 Cush.) 292; *Harvey v. Dunlop*, Hill & Den 193, 194 (N.Y. Sup. Ct. 1843), quoted in HOLMES, *supra* note 87, at 76. Foreseeable harm was, however, used by courts in the mid-nineteenth century as one of the tests for proximate cause. See generally Kelley, *supra* note 61, at 75-82.

95. See the analysis of *Harvey v. Dunlop* in Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L.Q. 681, 723-74 n.135 (1983).

96. See generally *id.* at 697-98.

antecedent and consequent, are termed their laws. The laws of phænomena are all we know respecting them.⁹⁷

Luckily for us, however, these laws are all we ever need or want to know:

[T]he knowledge which mankind, even in the earliest ages, chiefly pursued, being that which they most needed, was *foreknowledge*: “savoir, pour prévoir.” When they sought for the cause, it was mainly in order to control the effect, or if it was uncontrollable, to foreknow and adapt their conduct to it. Now, all foresight of phænomena, and power over them, depend on knowledge of their sequences, and not upon any notion we may have formed respecting their origin or inmost nature. We foresee a fact or event by means of facts which are signs of it, because experience has shown them to be its antecedents. We bring about any fact, other than our own muscular contractions, by means of some fact which experience has shown to be followed by it. All foresight, therefore, and all intelligent action, have only been possible in proportion as men have successfully attempted to ascertain the successions of phænomena.⁹⁸

Holmes’s foreseeability explanation of the negligence standard perfectly embodies this positivist notion of foresight based on scientific laws of antecedence and consequence. The negligence question is left to the jury, Holmes said, in order to consult the experience of mankind with the danger of certain conduct under certain circumstances⁹⁹—that is, to find out the relevant laws of antecedence and consequence that allow us to foresee danger to others under certain circumstances.¹⁰⁰ The general test of foreseeability by the ordinary reasonable person, then, should continually be giving way to more specific rules of conduct that embody the law of antecedence and consequence the jury or the legislature has learned from the common experience of mankind.¹⁰¹ These specific rules are preferred to the general foreseeability standard.¹⁰² Specific rules are more fixed, definite and certain than the test of danger foreseeable by the ordinary reasonable man. Those specific rules are therefore more knowable and hence more effective at deterring dangerous conduct.¹⁰³ The critical question for Holmes, then, was not simple foreseeability by the ordinary reasonable man, but the specific laws of antecedence and consequence that enable us to foresee harm from certain conduct under certain circumstances.

The origin and peculiarly evanescent place of the foreseeability test in Holmes’s theoretical description of the negligence standard perhaps explains

97. JOHN STUART MILL, *AUGUSTE COMTE AND POSITIVISM* 6 (Ann Arbor Paperbacks, University of Michigan Press 1961) (1865).

98. *Id.* at 6-7 (emphasis in original).

99. HOLMES, *supra* note 87, at 119-20.

100. *Id.* at 127-29.

101. *Id.* at 88-103, 118-29.

102. *Id.* at 88-90.

103. *Id.* at 88-90, 42-43.

Judge Hand's refusal to include foreseeability in his simplified reformulation of the unreasonable foreseeable risk test. Learned Hand was a friend and admirer of Holmes.¹⁰⁴ In addition, Hand was imbued with the progressives' respect for progress through "scientific" decision-making.¹⁰⁵ The Hand formula, deleting foreseeability from the unreasonable foreseeable risk test, makes that test more scientific: you do not need to use that weaselly creature, the ordinary reasonable man, with his penchant for sentiment and outmoded custom, who may upset the purely objective calculation of costs and benefits. Although Judge Hand admitted in *Conway*¹⁰⁶ and *Moisan v. Loftus*¹⁰⁷ that one could not quantify precisely all the elements in his formula, at least the elements are objective facts that can be estimated within ranges with more or less accuracy to guide rational decision-making. Holmes's dream of scientific judicial decision-making could thus perhaps be achieved. And what better place to start than in admiralty cases in the Second Circuit, where negligence decisions dealing with all those engaged in a single industry, in a definite geographic area, are made by trial judges and reviewed by a single court. Repeated applications of the Hand formula would result in an objective, scientific set of holdings that could provide effective guidance to those in maritime transportation. This in turn could serve as a guide to rational decision making in negligence cases in other fields.

Alas, if those were Judge Hand's goals, it was not to be, as the subsequent history of the Hand formula in factually-similar Second Circuit cases and in negligence cases elsewhere suggest.

V. THE INFLUENCE OF THE HAND FORMULA

A. *Factually Similar Cases in The Second Circuit*

The *Carroll Towing* case was decided in 1947. In 1948 and 1949 the United States Court of Appeals for the Second Circuit decided two remarkably similar cases in ways more consistent with the underlying practices and their purpose.

In 1948 in *New York Trap Rock Corp. v. Christie Scow Corp.*,¹⁰⁸ the owner of a scow sued in admiralty for damages caused by the sinking of its scow after it was struck by floating ice while moored in an exposed position at a pier on the Hudson River. At that time the river had large fields of floating ice in its course. There were safer, less exposed moorings available nearby; the decision to moor at the exposed pier was made by the tugmaster. The tugboat company

104. See GUNTHER, *supra* note 68, at 126, 165, 167, 345, 348-49, 675, 386-87, 403-04.

105. See *id.* at 107-23, 190-269.

106. 111 F.2d 611, 612 (2d Cir. 1940).

107. 178 F.2d 148, 149 (2d Cir. 1949).

108. 165 F.2d 314 (2d Cir. 1948).

urged that the scow owner was at fault as well, because the bargee had left the scow unattended on the Sunday that she was sunk. The court decided for the scow-owner in an opinion by Augustus Hand for a panel that included Learned Hand and Jerome Frank, another judge who had been on the *Carroll Towing Co.* panel. Judge Augustus Hand recognized that “the tugmaster was a much better judge of what—because of stress of weather—was a safe berth for the [scow] than the bargee.”¹⁰⁹ He went on, with a nod to the *Carroll Towing Co.* case, to conclude: “we cannot hold that the danger of injury to the scow from floating ice was so evident to one of the limited experience and skill of a bargee as to render him or [his employer] responsible for leaving the vessel at [the exposed dock][citing *Carroll Towing Co.*].”¹¹⁰ The court thus couched its opinion in language of foreseeable danger, consistent with the *Carroll Towing Co.* holding, if not with Learned Hand’s formula, which excluded foreseeability altogether. The foreseeability test used by the court in *New York Trap Rock*, moreover, was the danger evident to the bargee of “limited experience and skill [as compared to the tugmaster].”¹¹¹ Thus the court built into the foreseeability test the customary pattern of coordination, in which the bargee relies on the experience and expertise of the tugmaster to choose safe berths for the barge.

In 1949 the Second Circuit, by a panel comprised of Judges Swan, Chase and Smith, decided the case of *Burns Brothers v. Long Island Railroad Co.*¹¹² Judge Chase had been on the panel that decided the *Carroll Towing Co.* case, and he wrote the opinion in *Burns Brothers*. Four carfloats owned by different railroads were moored in a tier out from a rack maintained by the Long Island Railroad. Tugs operated by the Erie Railroad and the Long Island Railroad cooperated to remove the last carfloat from the tier. Shortly after this, the second carfloat in the tier broke loose, and it and the carfloat attached to it floated away, eventually smashing into libellant’s downstream coal barge. The appellate court held that the Central Railroad, which owned the carfloat that broke loose from the flotilla, was not negligent in failing to have a floatman on board. Judge Chase distinguished the *Carroll Towing Co.* case as follows:

[The carfloat here] is to be distinguished from . . . the barge in *United States v. Carroll Towing Co.*, . . . on which living quarters for a bargee were maintained and a bargee was ordinarily present; his absence during a considerable part of his customary working hours was held inexcusable under the circumstances and to be negligence attributable to the barge owner. In contrast, no living quarters are provided on a float and it is not customary to keep a man aboard; there was therefore no reason for the Long Island to rely upon the presence of

109. *Id.* at 317 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)).

110. *Id.*

111. *Id.*

112. 176 F.2d 406 (2d Cir. 1949).

a floatman in conducting its operations or for the Central to anticipate that the Long Island would conduct its operations in such a manner as to make the presence of a floatman necessary.¹¹³

The *Burns Brothers* court thus reinterpreted the *Carroll Towing Co.* holding solely in terms of customary practices and their related reliance and expectation relationships. *Burns Brothers* was distinguished on the basis of lack of custom to keep a floatman on board a moored carfloat, and the carfloat owner's consequent reliance on the drilling-out tugs and the custodian of the floats that moored at the custodian's rack to keep the carfloat from breaking loose. Nowhere, of course, was Judge Hand's negligence calculus mentioned. *Burns Brothers* authoritatively reinterpreted the *Carroll Towing Co.* holding in terms of customary standards.

B. *Other Courts in Other Times*

Admiralty cases in the Second Circuit provided the best opportunity for Judge Hand to get his formula adopted as law. Federal judges try admiralty cases without a jury. The judge both finds the facts and makes judgments about whether on those facts, a party was negligent. These decisions may be reviewed on appeal, and appellate decisions in admiralty become precedent on what constitutes negligence under particular circumstances. A different procedure altogether exists for determining the law of negligence at the common law in the United States. Juries, not judges, determine the facts of the case and make the judgment about whether on those facts a party was negligent. Juries do not write opinions and their decisions are not reviewed on appeal; only the trial court's decisions are reviewable and those decisions are necessarily on the periphery of the central negligence issue. All that can be appealed are decisions on whether to dismiss a negligence complaint for failure to state a good claim, to take the negligence issue from the jury, to instruct the jury on the elements of a negligence determination or to rule on the admissibility of evidence in a negligence action. In none of these rulings except the rare directed verdict do either the trial or appellate courts decide that the defendant was or was not negligent on the facts. In the common law system, then, it is much more difficult for the Hand formula to become law as the legal test for determining whether a party was negligent. The clearest way for it to become law would be for judges to instruct the jury that they are to use the Hand formula to determine whether a party was negligent. Stephen Gilles¹¹⁴ has confirmed what this author had earlier suggested:¹¹⁵ judges ordinarily instruct juries on the negligence issue to determine whether the actor

113. *Id.* at 408.

114. Gilles, *supra* note 24.

115. Patrick J. Kelley, *Who Decides: Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 383 n.248 (1990) [hereinafter Kelley, *Who Decides*].

behaved as a “reasonably prudent person” or an “ordinary reasonable person.” Judges do not ordinarily instruct juries on the negligence issue to balance the costs and benefits of greater care.

So how can some casebook authors and other academics claim that the Hand formula is the legal standard for determining negligence? Here, too, Stephen Gilles has supplied us with an answer. In reviewing trial judges’ rulings on the periphery of the ultimate negligence decisions by juries, appellate courts sometimes explain their decisions by invoking the Hand formula or some variant of the unreasonable foreseeable risk test as the real meaning of the negligence standard.¹¹⁶ Often, the court citing the Hand formula will equate it with the unreasonable foreseeable risk test. In some of those Hand-citing cases the court rules that certain conduct is not negligence as a matter of law, or that certain conduct is negligent as a matter of law. Those cases, of course, are rare. But one may question whether even those cases make the Hand formula the legal standard of negligence. As long as the trial judges in those states continue to instruct juries that negligence is the failure to act as an ordinary reasonable person, the appellate courts’ use of the Hand formula to explain or justify its decision may be seen as a theoretical description of the negligence standard, or as a summary of the significant factors relevant to a negligence judgment, or as one way, on certain kinds of facts, to determine what an ordinary reasonable person would do or not do. Moreover, if one looks closely at judicial reasoning in cases purporting to apply the Hand formula or an unreasonable foreseeable risk version of the Hand formula, one sees the courts subtly equating the conduct required by the community’s pre-existing safety conventions with the precautions required by the Hand formula.¹¹⁷

We can see this tendency at work in the leading opinion of our most brilliant judicial advocate of the Hand formula, Judge Richard Posner. In a series of opinions for the United States Circuit Court of Appeals for the Seventh Circuit,¹¹⁸ Judge Posner has suggested repeatedly that the only barrier to a wholly quantified application of the Hand formula in a negligence case is the repeated failure of attorneys to present the appropriate evidence. Judge Posner in *McCarty v. Pheasant Run*,¹¹⁹ a case sometimes cited in the casebooks,¹²⁰ even coached attorneys about what evidence they should

116. Gilles, *supra* note 24, at 1018.

117. See Kelley, *Who Decides*, *supra* note 115, at 382-87. See also *supra* Section V.A.

118. *United States Fidelity & Guaranty Co. v. Jadranska Slobodus Plovidba*, 683 F.2d 1022 (7th Cir. 1982); *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260 (7th Cir. 1986); *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554 (7th Cir. 1987).

119. 826 F.2d 1554 (7th Cir. 1987).

120. See casebooks cited *supra* note 4.

introduce if they wanted negligence determined as a matter of law by a judge using the Hand formula.¹²¹

Even Judge Posner, however, tacitly defers to customary practice in his application of the Hand formula, as we can see by analyzing another of Judge Posner's opinions beloved by the casebook authors¹²²—*United States Fidelity & Guarantee Co. v. Jadranska Slobodna Plovidba*.¹²³ In that case, Judge Posner wrote the opinion in an appeal from a trial court judgment for a ship-owner. Plaintiff sued for the death of a longshoreman who had worked on defendant's ship and was found dead at the bottom of a darkened hold, having fallen twenty-five feet through an open, unlighted hatch in the upper 'tween deck. The longshoreman had worked in that area earlier in the day when it was lit and the hatch was closed. After the longshoreman crew had finished and gone to work in another hold, the ship's crew opened the hatch in the upper 'tween decks, as well as the hatch directly below in the lower 'tween deck, and then closed the hatch above in the weather deck, plunging the hold and its open hatches into darkness. This was done pursuant to a customary practice of opening the 'tween deck hatches before sailing to expedite unloading upon reaching the next destination. The doomed longshoreman evidently reentered the upper 'tween decks from an open doorway. Cases of liquor were stored in the forward area, beyond the open hatch. The longshoreman's body was found below the forward part of the open hatch. The obvious inference was that he had reentered the darkened 'tween decks area to steal some liquor, skirted to the side of the open hatch until he was close to the liquor, and then stumbled into the hatch opening to his death below. Plaintiff sued under the Longshoreman and Harbor Worker's Act, which excludes the defenses of contributory negligence and assumption of the risk.¹²⁴

In ruling on the various procedural questions on appeal, Judge Posner recognized the *Carroll Towing Co.* negligence formula as "a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors"¹²⁵ even though "the formula does not yield mathematically precise results in practice, [since the burden of precautions, the probability and potential gravity of harm have never all been quantified] in an actual lawsuit."¹²⁶ Applying the formula to resolve Plaintiff's claim that the facts established the ship-owner's negligence as a matter of law, Judge Posner found that the projected loss if an accident occurred was large, as a twenty-five-foot fall through the open hatch to the bottom of the hold was

121. 826 F.2d at 1557.

122. See casebooks cited *supra* note 4.

123. 683 F.2d 1022 (7th Cir. 1982).

124. *Id.* at 1028.

125. *Id.* at 1026.

126. *Id.*

very likely to cause serious injury or death.¹²⁷ The burden of precautions was relatively small, though, as the shipowner could have avoided such an accident easily and cheaply by lighting the hold, locking the entrance doorway, roping off the open hatch or waiting until all longshoremen were ashore before opening the 'tween deck hatches and closing the weather deck hatch.¹²⁸

But, Judge Posner found that the probability of such an accident was "probably" low.¹²⁹ It was unlikely that a longshoreman would go back into a darkened area for any legitimate purpose without a light, since he could easily ask for one. As to the probability of longshoremen entering for illegitimate purposes, the plaintiff failed to meet its burden of proving that "it is common for longshoremen to try to pilfer from darkened holds."¹³⁰ Moreover, the relevant probability was not that a longshoreman would enter a darkened hold but that he would fall into an open hatch in a darkened hold, and this probability is even smaller, since the darkness in the hold together with any entering longshoreman's knowledge of a hatch that might be open, limits this probability to cases of reckless entering longshoremen. Finally, the shipowner knew that the stevedoring company had a work rule forbidding its longshoremen from wandering away from the stevedoring operation. This further reduced the foreseeable probability of accident, as "[t]he shipowner was entitled to rely on the stevedore to enforce this rule, if not 100 percent at least enough to make [an accident under all the circumstances] highly improbable . . ."¹³¹

Finally, Judge Posner recognized that defendant's compliance with customary practice was relevant to a determination of whether the conduct was cost-justified under the *Carroll Towing Co.* formula. This was so, according to Judge Posner, because stevedoring companies are strictly liable for any work-related injury to their employees. If the ship-owner's practice of leaving hatches open in darkened holds costs the stevedoring companies significant sums in compensation payments, they would raise their charges to ship-owners. If the cost to the ship-owners of foregoing the practice was less than these additional charges, they would forego the practice. The fact that ship-owners as a group persist in the practice is, therefore, "some evidence, though not conclusive, that the practice is cost-justified, and not negligence."¹³²

Judge Posner's opinion in the *United States Fidelity & Guarantee Co.* case is a brilliant *tour de force*, but a close look suggests there is less here than meets the eye. First of all, Judge Posner's economic argument for the

127. *Id.* at 1027.

128. *United States Fidelity & Guarantee Co.*, 683 F.2d at 1027.

129. *Id.* at 1028.

130. *Id.*

131. *Id.*

132. *Id.* at 1029.

relevance of industry custom seems unrealistic, for it assumes that the increased accident costs falling on the strictly-liable stevedores will directly influence the practices of ship-owners. Posner's argument conjures up a vision of a stevedoring bill, broken down into its various components, with worker's compensation costs categorized by type of accident. But that bill is a pipe dream of economists. However unrealistic, Posner's argument strikes a responsive chord because we already know that customary practices are relevant to a determination of negligence simply because negligence is a breach of a social norm,¹³³ and customs usually embody the relevant norm.

Judge Posner's arguments on the probability of accidental injury are similarly transparent, revealing the underlying practices and expectations that make his conclusion obviously correct. The probability that someone working around liquor will pilfer it is relatively high: ask any bar owner or caterer about the "tote" problem. Posner's argument on the low probability of a longshoreman's attempt to pilfer the liquor here seems contrary to facts about human weakness that a judge is entitled to notice. If he had wanted to reach a different result, he could easily have taken judicial notice of this high probability; relying instead on plaintiff's failure to meet his burden of proof seems an artful way to make the *Carroll Towing Co.* test come out with the obviously correct result. The reason why the defendant is not negligent here is that we do not expect people to take precautions solely to protect thieves from accidental injury, and we therefore do not develop safety practices to protect those attempting to steal from us. Thieves are not within the class that the defendant ship-owner owed a duty to protect against accidental injury; the jury could reasonably find the doomed longshoreman was attempting to steal liquor from the hold; even though this attempt was highly probable, the ship-owner had no duty to light areas holding pilferable cargo to ensure that a thief could steal safely.

Judge Posner's arguments are unpersuasive when considered as arguments on probability; as partial and incomplete fragments of the above argument, however, they form part of a coherent whole in which we perhaps unconsciously place them. Judge Posner's arguments themselves appeal to that whole: he points out that the only real hazard here is a hazard to thieves; he suggests that a thief would be on notice of the possible danger and would have to be reckless to be hurt; he tells us that the ship-owner is "entitled to rely" on the stevedore enforcing its relevant work rule—a rule that is at least in part aimed at preventing longshoremen from pilfering cargo. These implicit references to a totally different basis for decision help persuade us that the decision is correct.

133. See generally Kelley, *Who Decides*, *supra* note 115.

VI. CONCLUSION

Assume, if you will, that the Second Circuit Court of Appeals is the highest appellate court in the independent country of Secundum Circuitum. Assume further that you are preparing a casebook to teach torts in the year 2001 to young law students preparing to practice law in that country. Would you include the *Carroll Towing Co.* case in that casebook? I submit that you would not, for the following reasons. The court in *Carroll Towing Co.* derived a test from the prior relevant cases pitched at too high a level of generalization. That, in turn, led the court to attempt to distinguish the controlling prior precedent—*The Reno*—in an unreasonable way. Moreover, the result flatly contradicts currently accepted doctrines of cause-in-fact and proximate cause. The overly-general test the court announced in the *Carroll Towing Co.* case was given lip-service by the same court in subsequent cases, while it *sub silentio* equated the test with accepted customary conduct. Thus, the case was wrongly decided *ab initio* and had no significant influence. It is not a leading case in the country of Secundum Circuitum. Including it in a torts casebook would give students a false impression of its significance and might undermine one's ability to teach the cause-in-fact and proximate cause doctrines in negligence law.

If you would not include the *Carroll Towing Co.* case in a torts casebook for the independent country of Secundum Circuitum, why is it given such a prominent place in American torts casebooks? It goes back, I think, to the extraordinary power casebook authors have in the United States. Without the discipline that comes from having to teach the substantive law of a single jurisdiction, casebook authors can pick and choose: a dab of this, a little of that. So the *Carroll Towing Co.* case, and its "Hand formula" get included, not because it is the law anywhere, but because it is an elegant theory about the negligence standard, written by a respected progressive judge. The *Carroll Towing Co.* opinion is includible in a casebook because it meets the minimum requirement that it be an opinion in an actual case. But most casebook authors take it out of its context in a series of cases developing the law in a particular jurisdiction and edit it down so the real issues in the case are almost impossible to recognize. In the form in which it is presented in most casebooks, then, *Carroll Towing Co.* is simply theory masquerading as law. Yet only two casebooks¹³⁴ present the Hand formula as simply a theory about the negligence standard.

The way the *Carroll Towing Co.* case is presented in most casebooks contributes to the recurring confusion in the United States between the law of negligence and descriptive theories of negligence. This goes back to Holmes, who first redescribed the ordinary reasonable man standard in terms of

134. PHILLIPS ET AL., *supra* note 4, at 232, 239; LITTLE & LIDSKY, *supra* note 4, at 135-40.

foreseeable danger to others. It can be traced through Henry Taylor Terry, who remodeled Holmes's foreseeable danger theory into the unreasonable foreseeable risk theory; it came down to Hand, who left out the foreseeability requirement altogether to adopt a purely utilitarian balancing theory. Hand's test, gussied up as marginal analysis, is now the delight of the law and economics school. But none of it started out as law. Each test started as a descriptive theory of the negligence standard. Only later did Terry's test have an influence on the decisions of judges, and then its influence was spotty, sporadic and peripheral. So it has been with the Hand formula as well.¹³⁵

135. I have argued elsewhere, extensively and perhaps *ad nauseum*, that these theories are inadequate as descriptive theory and pernicious as normative theory. See Kelley, *A Critical Analysis of Holmes's Theory of Torts*, *supra* note 92, at 724-44; Kelley, *Who Decides*, *supra* note 115.