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RESPONSE

MUST THE HAND FORMULA NOT BE NAMED?

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In response to Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. Pa. L. Rev. 2131 (2015).

Benjamin Zipursky's *Reasonableness In and Out of Negligence Law*¹ is a characteristically thoughtful, sensible, and learned discussion of the idea of reasonableness in and out of negligence law. As he rightly observes, his views are very similar to my own.² Except in one respect. For Professor Zipursky, the Hand Formula³ is the Lord Voldemort of negligence law. It looms over the law of negligence, but it must not be named. Indeed, it must be killed, or at least banished. We part ways on this point and I confess to finding Professor Zipursky's vendetta perplexing. Trying to write the Hand Formula out of negligence law at this late date is tantamount to repudiating one hundred years of tort law and theory. This revisionary theorizing is as unnecessary as it is quixotic. The Hand Formula is not only too deeply

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¹ Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131 (2015).

² We both believe that an ethic of mutuality or reciprocity is at the heart of negligence law. Compare Zipursky, *supra* note 1, at 2160-65, with Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 315-16 (1996).

³ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (stating the Hand Formula). See generally *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949) (explaining that the Hand Formula is not susceptible of quantification in practice); *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd*, 312 U.S. 492 (1941) (explaining that the three factors of the Hand Formula cannot in principle be quantified because they require the exercise of value judgment). The Hand Formula is anticipated in *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

embedded in negligence law to uproot; it is also unobjectionable. Indeed, the Hand Formula is one of modern negligence law's more important achievements. It frees the concept of due care from a disturbing identification with customary practice and ties due care more closely to the idea of justified conduct. By doing so, it gives negligence law an important critical dimension.

The Hand Formula draws its deep appeal from two sources. First, as Landes and Posner observe, it has the feel and smell of an exercise in making explicit what had long been implicit in negligence cases.⁴ Second, it strikes us as a cogent distillation of considerations that are plainly relevant to determining whether due care has been exercised. When we ask if a defendant should have acted as she did—or should instead have exercised more care—it is eminently sensible to inquire into the magnitude and probability of the harm that the defendant risked and the burden of avoiding that harm.⁵ Economic and philosophical theories of negligence are eager to claim the Hand Formula as their own because it is both a central construct of negligence law and independently attractive. If there were no Hand Formula, we would have to invent it. To be sure, the economic theory of the Hand Formula is a different matter. Professor Zipursky and I both think that it is deeply flawed. The economic interpretation, however, is not the Hand Formula itself. It goes well beyond the Hand Formula in important and questionable ways. The economic interpretation of the Hand Formula imposes a debatable theory of social choice on a conceptual tool. In so doing the economic interpretation makes claims about the commensurability of harms and the cost of their avoidance that Hand himself explicitly rejected.

I. THE IMPORTANCE OF THE HAND FORMULA

The depth of the Hand Formula's entrenchment in our law is shown by the history that Professor Zipursky recounts. Quite rightly, Professor Zipursky traces the prehistory of the Hand Formula to Henry Terry's

⁴ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW*, 85-86 (1987) (“[Judge]Hand was purporting only to make explicit what had long been the implicit meaning of negligence; . . . something like the Hand Formula has long been used to decide negligence cases.”).

⁵ Judith Thomson nicely illustrates this point while discussing the permissibility of imposing risks of harm. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 243-46 (1990). Without ever citing the Hand Formula by name, Thomson shows that the probability and the gravity of the harm risked, and the strength of the reasons for risking harm, play fundamental roles in our thinking about permissible risk imposition. *Id.*

Harvard Law Review paper published exactly one hundred years ago.⁶ Terry himself did not pluck the Hand Formula out of thin air in the manner of some mythical Legal Realist out to promote a political agenda. He worked in the usual manner of the turn of the twentieth-century “legal scientists”; Terry distilled his Hand Formula-like factors out of a close and careful study of the cases.⁷ The factors that he isolates are a carefully considered attempt to summarize the gist of negligence law. Terry’s summary took the form of a multi-factor test because negligence is, as Professor Zipursky rightly emphasizes, a standard-like body of law, not a rule-like one. Legal standards lend themselves to explication in terms of the factors that they make relevant to the decision at hand. What Terry did, then, was to abstract and distill out of the cases the essence of negligent conduct as he thought the cases conceived it. Terry was a common-law lawyer perfecting the law in good faith, not a Legal Realist slyly subverting it. His was an exercise in “working the common law pure.”⁸ Learned Hand followed in Terry’s footsteps in both respects. His contribution was to simplify and sharpen Terry’s list of factors.

Whatever one might think of the accuracy of Terry’s and Hand’s backwards-looking gaze, their influence going forward has been both immense and undeniable. As Professor Zipursky observes, “Terry’s work . . . has been embraced by the First, Second, and Third Restatements of Torts.”⁹ While the Hand Formula is not found in jury instructions, it is easy to find it in appellate cases either by name or in fact. Indeed, the Hand Formula comes close to being an exercise in naming a mode of analysis which was already pervasively present. In articulating it, Judge Hand offered a rule of thumb summary of the fundamental factors at issue in an important class of negligence cases. He boiled down the considerations which determine what due care requires,¹⁰ distilling out the key variables, and stating the basic relations among them. The cases that his formula illuminates are those where a practice of risky conduct is at issue

⁶ Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

⁷ See *id.* at 43 (citing *Eckert v. Long Island R.R. Co.*, 43 N.Y. 502 (1871)).

⁸ “The common law works itself pure and adapts itself to the needs of a new day.” LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940). Fuller was echoing Lord Mansfield: “The common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.” *Omychund v. Barker*, (1744) 26 Eng. Rep. 15 (Ch.) 23 (Murray, Solicitor General, later Lord Mansfield).

⁹ Zipursky, *supra* note 1, at 2151.

¹⁰ The multifactor tests of the *Restatement (Second) of Torts*, for example, often have a laundry list quality. See *RESTATEMENT (SECOND) OF TORTS* §§ 292-93 (1965).

and where there is time to contemplate the proper course of action—usually because the conduct in question is recurring.

Hand Formula cases are quite different from reasonable person cases. Reasonable person cases tend to involve one-time risk impositions by natural persons. In reasonable person cases, the correct precaution is usually evident enough; the question is whether we could fairly have expected the defendant to take that precaution.¹¹ Surely, Menlove should not have stacked his hay as he did.¹² In that sense, the justifiability of his conduct is not at issue; he did the wrong thing. What is at issue is whether we may reasonably demand that he stack his hay safely given his allegedly limited intellect and poor judgment. Hand Formula cases, by contrast, tend to involve repeated risk impositions.¹³ The safety practices of seafaring barges transporting goods up and down the eastern seaboard is a classic example.¹⁴ In these cases, the Hand Formula factors all but bubble up from attention to the issue at hand. When we ask if the defendant took adequate precautions we are asking about the structure of a course of conduct. It is natural and sensible to inquire into the gravity and probability of the harm risked by the conduct at issue (e.g., by not equipping barges with two-way radios), and about the cost of avoiding that harm (e.g., about the cost of equipping barges with radios). Inquiring in this way is a kind of ordinary moral and legal reasoning, not a foray into economics or philosophy.

Hand's articulation of his formula is of a piece with his repudiation of custom as the master test of due care. Although Hand's opinion in *The T.J. Hooper* precedes his articulation of his formula, the doctrine of *The T.J. Hooper* is intimately related to the Hand Formula. More than any other doctrinal development that I can think of, the Hand Formula pivots tort law away from the nineteenth-century idea that due care is *customary* care—the care that people *do, in fact*, exercise—and towards the modern idea that due care is *reasonable* or justified care—the care that people *should* exercise. *Titus v. Bradford, Bordell & Kinzua Railroad Co.*¹⁵ nicely epitomizes the nineteenth-century idea. For *Titus*, conformity to custom is a complete shield against negligence liability. “[T]he unbending test of negligence . . . is the ordinary usage of the business,” or “the usual and ordinary way.”¹⁶ A

¹¹ See, e.g., *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490; *Myhaver v. Knutson*, 942 P.2d 445 (Ariz. 1997).

¹² *Vaughan*, 132 Eng. Rep. at 491.

¹³ See, e.g., *Davis v. Consol. Rail Corp.*, 788 F.2d 1260 (7th Cir. 1986), *Bhd. Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323 (7th Cir. 1993).

¹⁴ *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

¹⁵ 20 A. 517 (Pa. 1890).

¹⁶ *Id.* at 518.

defendant “performs his duty when he furnishes [appliances] of ordinary character and reasonable safety, and the former is the test of the latter.”¹⁷ The *Titus* court’s rhetoric sets up a contrast between “reasonable care” and “ordinary care” and chains the former to the latter.¹⁸ The decision’s animating worry is that the idea of reasonable care, untethered from custom, might disrupt the settled practices of risky businesses.¹⁹ “Juries,” the court instructs us, “must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs, or control the business, of the community.”²⁰ *The T.J. Hooper* is a watershed case because it overthrows this identification of reasonable care with customary care:

There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.²¹

The Hand Formula, among other things, is a device for taking the measure of custom, a device for determining if customary care is reasonable care. We may as well quote its canonical statement, which comes fifteen years after *The T.J. Hooper*, in *United States v. Carroll Towing Co.*²²:

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 $B < PL$. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (internal citations omitted).

²² 159 F.2d 169 (2d Cir. 1947).

and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about.²³

The importance of this passage has nothing to do with economics, or with either utilitarian or deontological philosophy. The importance of the passage is that it dethrones customary care as the master measure and test of due care and replaces it with an abstract criterion of justified conduct. Actual practice may—or may not—measure up to the demands of that criterion. Hand's influence is shown by the fact that we now treat ordinary (that is, non-professional) custom merely as evidence of due care, not as due care itself.²⁴ That fact alone bears witness to the Hand Formula's enormous impact on our law of negligence. It also suggests that Professor Zipursky is treading on thin ice when he insists that ordinary care is as much the master concept of negligence law as it ever was.²⁵

II. THE HAND FORMULA ITSELF IS NOT UTILITARIAN OR ECONOMIC

Professor Zipursky is rightly annoyed by the economic interpretation of the Hand Formula. It is, as he thinks, a kind of hijacking of negligence law.²⁶ The economic interpretation of the Hand Formula recasts reasonable care as socially rational care.²⁷ According to the economic interpretation, due care is the care that a single rational actor would take if she were to bear both the costs and the benefits of the risk imposition at issue. This way of formulating the matter obliterates something utterly fundamental to negligence law. The question at the heart of the law of negligence is a question of interpersonal morality. "What do we owe to each other in the way of precaution against harm?"²⁸ Responsibility for the economic interpretation of the Hand Formula should, however, be laid at Judge Posner's feet, not at Judge Hand's feet. Hand himself thought that it was impossible—in both practice and principle—to turn the Hand Formula's loose algebra into an economic calculus of social welfare. In *Moisan v.*

²³ *Id.* at 173.

²⁴ See DAN B. DOBBS ET AL., THE LAW OF TORTS § 178 (2d ed. 2011) ("[In negligence], custom is only evidence of negligence; it is not conclusive because the standard of care remains that of the reasonable person under the circumstances.").

²⁵ See, e.g., Zipursky, *supra* note 1, at 2153-54.

²⁶ See Keating, *supra* note 2.

²⁷ See *id.* at 360-82.

²⁸ Professor Zipursky has done important and illuminating work in this regard, by showing the centrality of duty to negligence law, and that duty is a relational concept. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).

Loftus,²⁹ Hand explained the *practical* impossibility of using the Hand Formula to make precise quantitative calculations:

[O]f [the factors in the Hand Formula,] care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory, and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation.³⁰

For Hand, the significance of his formula was conceptual. The Hand Formula is a heuristic device that isolates the elements of due care and the relations among them.

Hand went further in an earlier opinion.³¹ He declared that it was *in principle* impossible for the Hand Formula to function as a utilitarian or economic calculus, *in principle* impossible for his formula to function as a formula.³² The determination of due care, he wrote, always “involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.”³³ In short, it is impossible in practice to apply the Hand Formula with quantitative precision because we can, at best, estimate only the cost of care and the magnitude and probability of harm risked. It is impossible to do so in principle because the Hand Formula requires the exercise of moral judgment with respect to the relative importance of the interests at stake. We must decide, for example, whether a child’s interest in having a more realistic toy action figure whose spinning blade can inflict serious injury is worth vindicating at the price of peril to the interests of other children in avoiding such injury.³⁴ The economic interpretation of the Hand Formula can acknowledge the first of these difficulties (the imperfection of our information) and muddle along as best it can, but it must deny Hand’s second claim that the exercise of evaluative moral judgment is inescapable. Contemporary economic analysis supposes that welfare is a master value and that other values must be reduced to

²⁹ 178 F.2d 148 (2d Cir. 1949).

³⁰ *Id.* at 149.

³¹ *Conway v. O’Brien*, 111 F.2d 611 (2d Cir. 1940), *rev’d*, 312 U.S. 492 (1941).

³² *Id.* at 612.

³³ *Id.*

³⁴ See *Lugo v. L.J.N. Toys, Ltd.*, 539 N.Y.S.2d 922 (App. Div. 1989), *aff’d mem.*, 552 N.E.2d 162 (N.Y. 1990).

welfare before they can be permitted to guide legal decisionmaking.³⁵ Economic analysis can concede the practical impossibility of actually measuring all welfare effects in dollars. It cannot concede that welfare is just one value among many incommensurable values, and that social decisions involve inescapable evaluative judgments. Yet this is the very thesis that Hand asserts in *Conway*.

To be sure, it remains to be shown that the Hand Formula can be given a place within an account of negligence law that understands it to embody an ethic of reciprocity and mutual accountability. I believe that this can be done, but I cannot pursue the project here. Let me instead close with three suggestions. The first is that the Hand Formula is important, but for a reason that Professor Zipursky may not have pondered sufficiently. With the Hand Formula, negligence law pivots away from its nineteenth-century commitment to conceiving of customary care as the master incarnation of due care and towards its present commitment to justified care. This is a deep and momentous change in negligence law. My own belief is that this has been a change for the better; it enables negligence law to upend embedded but unjustifiable practices.³⁶ But, even if Professor Zipursky disagrees, the Hand Formula remains deeply embedded in our law. Its formulation did change the common law. By stating the essential idea of negligence in a more abstract way, the Hand Formula made a criterion of justified care the master test of negligence law. That change, however, is now one hundred years in the making and deeply instituted in our law. Moreover, the Common Law lives and grows by such changes; it is an object in motion and it works itself pure in just this way.³⁷ Second, the Hand Formula identifies factors that any sensible approach to reasonable care will consider in cases where the way in which ongoing, planned activity is conducted is at issue. Third, the Hand Formula itself is not incipiently utilitarian or economic. It becomes so only when it is linked to an

³⁵ LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 3 & *passim* (2002) ("Our central claim is that the welfare-based normative approach should be exclusively employed in evaluating legal rules."); *see also id.* at 5 ("[T]he design of the legal system should depend solely on concerns for human welfare."). For a clear summary of just how other values should be reduced to welfare, *see* Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1523-24 (2003).

³⁶ *See, e.g., Snyder v. Am. Ass'n of Blood Banks*, 676 A.2d 1036 (N.J. 1996) (holding that the practices of the vast majority of blood banks in the early 1980's were negligent because they failed to screen adequately for blood infected with HIV).

³⁷ Negligence law itself was born from a transformation in the meaning of "unavoidable accident." The term went from meaning an accident which could not be avoided to one which should not be avoided. *See* Joshua Getzler, *Richard Epstein, Strict Liability, and the History of Torts*, 3 J. TORT L., issue 1, art. 3 (2010).

assumption about the commensurability of value that Hand himself rejected. That economic assumption, moreover, is rejected by the law of negligence itself.³⁸ Our law of negligence singles out the physical integrity of the person as an especially urgent interest and seeks to secure that interest against harm wrongly inflicted.³⁹ Our law of negligence thus denies that all costs and all benefits are fungible at some ratio of exchange. In so doing, it denies the economic interpretation of the Hand Formula.

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³⁸ It is also rejected by basic norms of federal risk regulation, which enjoin “feasible” and “safety-based” standards of precaution against various grave risks. *See* Gregory C. Keating, *Pricelessness and Life: An Essay for Guido Calabresi*, 64 MD. L. REV. 159, 180-81 (2005).

³⁹ *See* Keating, *supra* note 2, at 342-49.

