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## Teaching Tort Myths

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# TEACHING TORT MYTHS

*Peter M. Gerhart*<sup>†</sup>

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## INTRODUCTION

Undoubtedly, when we teach the torts course we teach the law of torts. We also teach how to think like a lawyer. But these are contested concepts. What, exactly, are we teaching when we teach tort law: the restatement, various doctrinal categories, the law as it is or as it is perceived to be, the law as it ought to be seen and understood, the law as we wish it to be seen and understood? And what, exactly, does “thinking like a lawyer” mean when it comes to torts? Is it reasoning from the restatement, from various categories that judges use to explain their results, from the concept that we think the law stands for, or from an analytical framework that identifies the determinants of law?

I raise these questions because I have grave doubts about whether the doctrine and categories the law uses to organize tort law are accurate reflections of the way tort law really operates. And because of those doubts, I have grave doubts about whether thinking in terms of those categories—and only those categories—really helps our students think like lawyers—or at least like good lawyers. Thinking about the law in terms of categories, concepts, and doctrines that do not seem to reveal the factors that motivate courts to do what they are doing—and concentrating only on those categories—seems to rob students of the opportunity to understand the forces that we can identify as shaping tort law and, therefore, the normative basis of tort law.

Of course, legal categories and definitions are important. Students must learn to work within the established categories of the law, even if they are going to undermine the categories by making persuasive arguments that change the accepted meaning of a traditional category or that result in reform of the categories themselves. As important as doctrinal thinking may be, working within doctrinal categories is

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<sup>†</sup> Late John Homer Kapp Professor of Law, Case Western Reserve University. This essay was not in final form at the time of the author’s passing, but we share it here to provide a sense of his approach to teaching.

different from understanding the dynamics of the case that the judge will find persuasive. Making arguments that depend only on tort categories and definitions may be necessary if a lawyer has no other persuasive reasons for asking the judge to decide the case in her client's favor. But most persuasive arguments, while made within the structure of traditional categories and definitions, are persuasive precisely because they give judges a non-doctrinal basis for deciding a case.

A lawyer's skill set is not confined only to doctrinal arguments or to applying doctrine to facts. They look for, and argue from, the empirical and normative factors that are likely to influence a legal decision maker—the skill of identifying and evaluating the determinants of tort law. If we do not teach our students how to identify and evaluate the non-doctrinal determinants of law, I fear that we do our students a disservice. Skimming the doctrinal surface will not equip our students to dive below the surface and analyze the forces that matter when judges are applying or refining law in the light of new circumstances and arguments. Conversely, if we teach our students to understand how to identify the forces that seem to be at work in shaping doctrine and influencing judges—that is, the determinants of law—we will give our students a methodological skill of great value.

In this essay, I will illustrate these points by examining what we teach our students when we teach tort doctrines that are thought to reflect the law.<sup>1</sup> I hope to show that, in fact, our understanding of tort doctrines, and the way we present it to students, does not reflect what courts are really doing; nor does that understanding reflect the kinds of considerations that courts find to be persuasive. In academic circles, the theories and concepts that animate tort doctrine are hotly contested—consequential and deontic thought vie for supremacy, but understanding these theoretical contests misses the more important task of understanding the kinds of considerations that are, and ought to be, persuasive in settling private disputes between injurer and victim.

In this essay, I distinguish between two kinds of analytical skills. One analytical skill is to use doctrine to argue for the result that one thinks is right or that advances the client's interests. This doctrinal analytical skill uses the words of tort doctrine and cases to try to persuade a judge that a case should come out a particular way. This analytical skill allows students to make the following kind of argument: auto manufacturers are strictly responsible for the harms the defects in their products cause; a person driving while knowing of the risk of epilepsy is a defective driver; therefore, the defective driver should be

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1. I have not attempted to make a quantitative or comprehensive qualitative study of how casebooks and study guides portray tort law. This essay reflects my teaching from two torts casebooks and my review of other casebooks to get a sense of their approach. My apologies if I missed any casebooks that are built around the ideas expressed in this essay.

held strictly liable for the harm he causes.<sup>2</sup> It allows students to write that homeowner liability depends on a three-part test and to make arguments about why the test is, or is not, met.<sup>3</sup>

The other kind of analytical skill is the skill of identifying the factors that courts take into account when determining whether there is a defect in the automobile. This second analytical skill—which we might call the skill of evaluating the determinants of how cases come out—views the idea of a defect in an automobile to be a conclusion that is supported by a framework for thinking about how auto manufacturers ought to make decisions concerning the products they sell, and then evaluating whether auto manufacturers have made their decisions carefully enough. This second mode of analysis understands the concept of defect not as a concept that is self-defining but as a concept whose content must be defined. Analysis seeks to identify the factors that are relevant to that concept and thereby to identify the factors that are likely to be persuasive to judges.

Both analytical skills are ones that lawyers must master, but based on my reading of various casebooks and study guides, I fear that most tort courses emphasize the skill of doctrinal analysis. In this essay, I argue that emphasis of the second kind of analytical skill—a methodology of analyzing the determinants of tort decisions—is just as (or more) valuable.

To be clear, I am not arguing that we should not teach law; I am questioning what mix of doctrine and normative policy is necessary to understand the law. I am not arguing that we should not teach doctrine; I am arguing that doctrine is the vessel by which we make arguments that determine the content of those vessels.

I proceed by discussing three areas of tort law in which the gap between doctrinal analysis and determinate analysis is especially wide—areas where I believe determinate analysis can add a dimension to a student’s education that would otherwise be missing. The three areas are strict liability, the concept of duty, and the idea of proximate cause.

## I. STRICT LIABILITY

It is important, of course, that students understand and evaluate the idea of strict liability—the idea that a person may be responsible for harms she has caused, even if her behavior is not faulty. The choice between a negligence regime and a strict-liability regime raises philosophical, moral, and economic questions that underscore and challenge the central characteristics of our tort regime. Strict liability also offers

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2. See *Hammontree v. Jenner*, 97 Cal. Rptr. 739, 741–42 (Ct. App. 1971) (rejecting that argument but acknowledging that it has “some degree of logic”).
  3. See RESTATEMENT (SECOND) OF TORTS § 342 (AM. L. INST. 1965) (explaining the three-part test for premises liability).

a potent alternative when the legislature wants to abandon the negligence regime and enact a no-fault regime, as has been done in workman's compensation and no-fault auto-accident regimes. Thinking about the central characteristics of each regime and the implementation problems that each regime presents gives our students valuable insight into institutional design and the relative roles of courts and legislatures. Such thinking also allows students to confront the question of whether tort law is an incentive system, a compensation system, or an inter-personal justice system.

Although the idea of strict liability ought to be an important part of a torts course, teaching the doctrine of strict liability is, in my view, largely teaching a myth. To be sure, at a doctrinal level we can teach cases that on the surface appear to endorse a strict-liability regime, we can teach about the relevant section of the restatement of torts, and we can teach cases that purport to be strict-liability cases. But when we do, we are missing that larger story—namely, that cases appearing to be based on a strict-liability regime are in fact better explained analytically as cases founded on a different dimension of negligence liability. As I have argued at greater length elsewhere,<sup>4</sup> strict liability, as it has been worked out in the common law, is actually a species of negligence liability.

In what way are the strict-liability cases, when their determinants are understood, really negligence cases? Those cases address a species of unreasonable behavior characterized by unreasonable choices about where, when, how, and how often a person does an activity. As has been known for some time, although “normal” negligence cases address the question of whether a person has thought reasonably about the precautions she ought to take, the faux “strict liability” cases address a different question: whether the defendant should have reduced the harm to others by changing the method, location, timing, or frequency of activity. When the defendant makes an unreasonable decision along one of those dimensions, the defendant is, from an analytical standpoint, responsible in negligence—not in strict liability—because the defendant has failed to make decisions that are reasonable as to that dimension of their activity.

The idea is illustrated by *Sullivan v. Dunham*,<sup>5</sup> a 1900 case in which the defendant needed to remove trees from his property and hired two men to dynamite the trees.<sup>6</sup> The resulting blast sent a piece of wood 412 feet onto an adjacent highway, killing the plaintiff.<sup>7</sup> The court held

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4. See, e.g., Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245 (2008); PETER M. GERHART, TORT LAW AND SOCIAL MORALITY 150–78 (2010).

5. 55 N.E. 923 (N.Y. 1900).

6. *Id.* at 923.

7. *Id.*

that the plaintiff did not have to prove that the blasting was not done reasonably carefully,<sup>8</sup> which makes the case look as if the judgment for the plaintiff rested on strict liability. Is that what students ought to learn from the case? The most common approach to cases like this, in casebooks and doctrinal circles, is that this outcome represents a strain of strict liability that runs through the negligence regime and that good lawyers must confront that strain—a boon to plaintiff’s lawyers and a bane to defense lawyers.

Putting aside the incoherence that such an understanding interjects into the law of torts, there is a better understanding of the case that fits comfortably within the negligence regime. The landowner had options when deciding how to remove the two trees from his land. Axes and saws come to mind. No matter how careful the dynamiters were with their explosive, the choice to use an explosive rather than a saw may well have been unreasonable. A reasonable person when choosing between various options for achieving its ends will choose the one with the appropriate cost-benefit ratio. The obligation to be reasonably careful in taking down a tree required the defendant to be reasonably careful in the choice of the method he used to get rid of those trees. If he cannot do the job reasonably safely with dynamite, he ought to go to the expense of having the tree chopped down. The defendant’s choice was unreasonable. And how do we know that the defendant was unreasonable in his choice? Because the trees were next to a highway and the blasted tree killed a passerby. The act seems to speak for itself.

Showing students how the *Sullivan* case is determined by the unreasonable choice of methods the defendant used to get rid of that tree exposes the real basis of the strict-liability cases. It allows students to understand that care has more than one dimension, and therefore raises their antennae to the possibility that their clients must take care not only in how they conduct their affairs, but also in where, when, how frequently, and by what method they conduct their affairs. It also allows students to make more persuasive arguments that liability should be imposed. Proving that an activity is “abnormally dangerous” (the current restatement standard)<sup>9</sup> is notoriously difficult, precisely because the more dangerous the activity is, the greater the precautions that must be taken. Indeed, the best that the current restatement can do is to point to the blasting cases as an example of an abnormally dangerous activity—and the drafters of the restatement had to qualify even this conclusion.<sup>10</sup>

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8. *See id.* at 926 (“We think the courts below were right in holding the defendants liable as trespassers, regardless of the care they may have used in doing the work.”).

9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. e (AM. L. INST. 2010).

10. *See id.* § 20 cmt. g (noting that courts may choose not to impose liability in blasting cases if blasting is done away from people and valuable property).

By contrast, proving that an activity is “abnormally (read ‘unreasonably’) dangerous” because it was taken with unreasonable frequency, in an unreasonable place, by an unreasonable method, or at an unreasonable time, relies upon the same kind of cost-benefit analysis and evidence that judges are used to processing—evidence of how a reasonable person would think about other ways of achieving her goals with less risk of harm to others.

I have not been able to find one “strict liability” case that is not determined by the defendant’s unreasonable decisions. Perhaps there is one, I admit, but perhaps we just have not been viewing these cases from the correct perspective. No doubt many scholars would like the tort regime to be based on strict liability, and I am not taking issue with that preference. A strict-liability regime has much to offer. But the principled preference for strict liability should not keep us from trying to identify the determinants of torts cases; nor should it allow us to gloss over the aspects of cases that would deny the idea of strict liability in tort.

In this regard, it is important to understand the difficulty of knowing from judicial opinions what principle the opinion endorses. *Rylands v. Fletcher*<sup>11</sup> is generally understood to be the ultimate (and perhaps original) strict-liability case, and virtually every casebook uses *Rylands* to introduce the concept of strict liability. The defendant built a cotton mill in coal country and when the water reservoir constructed to run the mill collapsed into the mine below, the defendant was held responsible for the resulting property damage.<sup>12</sup> The near-universal assumption that strict liability drove the decision in *Rylands* is belied by the fact that the announced basis of liability was the defendant’s “non-natural use.”<sup>13</sup> Whether strict liability was the determinant of the decision depends entirely on the definition of “non-natural use,” but no definition was given. Whether the case should represent the possibility of strict liability depends on how the court viewed the concept of “non-natural” use. If non-natural use means any dangerous use, then the case looks like strict liability. But this interpretation would then run headlong into the many cases that refuse to impose liability merely because one used one’s land for dangerous activities. Isn’t the better reading of the case that it is unreasonable (“non-natural”) to put a cotton mill reservoir in the middle of coal country and allow the water to invade the coal mines? After all, the coal mines can locate only where the coal was found; the cotton miller could have picked from many locations that would have met its need without threatening the mines. Under the analysis I am advocating, as in nuisance law, if you pick an

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11. [1868] 3 LRE & I App. 330 (HL) (Eng.).

12. *Id.* at 331–32.

13. *Id.* at 339.

unreasonable location and cause harm, you should compensate the victim for the harm.

Once we shift our focus from the concept of dangerousness to the concept of reasonableness, the change in analytical focus opens up new insights that we should introduce to our students. The approach I recommend would show students that apparent outliers to general concepts of responsibility may not be outliers at all, that there is a coherence to tort law because it is built around the negligence principle, and that the search for the determinants of the law might reveal that coherence. It would also show students that judges make sound decisions without always being able to articulate the determinants of those decisions. Finally, it would allow students to understand the difference between the outcome (which side won) and the reasoning given for the outcome of the case. If judicial reasoning does not identify the non-doctrinal basis for the decisions or why a decision is on all fours with a precedent, students should be encouraged to think harder about the problem the judge addressed and try to determine what factors must have influenced the case's outcome.

## II. DUTY

The concept of duty holds an ambiguous position in tort law. It is sometimes an issue, and sometimes not. It can be conceived as a defense (I owed the plaintiff no duty) or an essential element of the plaintiff's case that is sometimes assumed to be met. And for some, duty can just be made a part of the reasonableness determination: an injurer who acts reasonably has fulfilled her duty to her victim. We know that duty pivots on something about the relationship between the injurer and the victim, but we are not quite sure what features of a relationship are relevant to the concept of duty.

Casebooks generally fail to provide students with the tools to address these mysteries. One casebook tells students that there are easy cases in which duty is not a litigated issue, without explaining how one recognizes those "easy cases." Casebooks that emphasize affirmative duties struggle to explain why the driver of an auto must put on her brakes when a child darts into the street but why a person taking a walk need not, at least hypothetically, pick up a baby from the path of an oncoming train.

It is important that our students be able to identify the determinants of duty and to be able to understand the social forces that put pressure on those determinants to expand or contract. But academic debates about duty seek more generalized, conceptual approaches to duty, and those conceptual approaches do not reach the level of analysis or understanding that students need. Important in this connection is the distinction between a concept and its content. The concept of duty, like any concept, is important because it stands as a structural placeholder for the elements of a cause of action in an area of law. It

tells us, as the duty advocates have long told us, that a key structural feature of tort law is relational, and that the importance of relationships to tort explains why we cannot just replace the tort system with a system of incentives for safety. Something is lost if I cannot seek justice from the person who harmed me in a defined way. Having the students confront that loss by understanding the relationships that give rise to the loss is an important part of understanding tort law.

The importance of duty as a concept is structural; it is doctrinal but is not relevant to determinant analysis. Although it is often unrecognized, the concept of duty does not determine the content of the concept of duty. Hardline conceptualists do not understand this, but knowing that duty is an essential element of a tort cause of action (even if it is sometimes conclusively presumed) and knowing why it is important do not reveal what students need to know about the factors that determine the existence and scope of the duty. Without an analytical framework for understanding the content of the concept of duty, the concept remains a structural and doctrinal feature of tort law but cannot be applied with any justificational certainty.

The mystery, as I said, is why duty seems not to be an element of the plaintiff's lawsuit in some instances, while in other instances it is the decisive element. Our student materials do not deal well with this mystery. They all beg the question of whether it makes sense to treat duty as a concept distinct from reasonableness.

For me, the concept of duty is important because it articulates an important structural dimension that our students must grasp if they are to understand tort law. Only by identifying that structural dimension can students understand the major premise of the theory of responsibility that undergirds the tort system—namely, the idea that in the absence of some meaningful relationship with the victim, a person has no responsibility to offer help to the victim. This is the idea of no affirmative duties: the fact that I have no obligation to pick up a baby from the tracks, even if an oncoming train is surely going to kill the baby, unless I am responsible in some way for the baby being on the tracks. Because the tort system is founded on the premise that I am not my brother's keeper (whether we like that principle or not), it is essential that students begin to grasp how and why tort law creates exceptions to that principle. If we cannot lead students to the line that defines no-duty and duty, and if they do not develop a feeling for the determinants of that line, we will lead them to make arguments about duty that are either superfluous (claiming the defendant had no duty when the defendant did) or overly broad (claiming that the defendant's duty came from the victim's harm).

Interestingly enough, in drawing the line between duty and no-duty, the Restatement (Third), despite the academic fuss that it created, drew the line appropriately, once we interpret the restatement

sympathetically.<sup>14</sup> Consider two cases. In the first, the defendant is driving unreasonably fast. In the second, the defendant fails to pick up the baby from the path of an oncoming train. What distinguishes the two cases? Our teaching ought to lead students to the realization that in the first case, the risk exists because of the injurer's decisions. The defendant is the source of the underlying risk. In the second case, the risk to the baby exists quite apart from anything the defendant has done. That is the dividing line: the line between people who impose risks on the world and people who come upon a risk that someone else has imposed. For a person who is the source of the risk, duty attaches automatically from the creation of the risk; one who creates a risk ought to accept responsibility for the harm that flows from the risk. But for a person who is not the source of the risk—the person who did not put the baby on the tracks—additional analysis must be done to determine whether, on relational grounds, that person should have an obligation of beneficence—to intervene by addressing the risk that someone else has created. That is why hotels must take reasonable efforts to protect their guests, universities their students, and fast-food restaurants their customers.

The line that divides those who have created a risk (where duty vests upon the creation of the risk) from those who have not (where the existence and scope of the duty must be analyzed) is straightforward. But until students appreciate this line and the no-duty rule that requires the line to be drawn, they will not be able to make meaningful and persuasive arguments about duty. Moreover, once students see the line, the content of the concept of duty becomes pellucid—duty comes either from creating risks or from standing in relation to the risk so that it would be unreasonable not to address the risk. Students can then begin to think about the factors that induce courts to impose a duty when the defendant is not the source of the risk. And students will be able to see that defining the scope of the duty (that is, whether the defendant acted reasonably with respect to the risk that another created) and cause in fact take on a different quality when the defendant created the risk.

### III. PROXIMATE CAUSE

Because we do not understand proximate cause, and because it responds to no known doctrine, we tend to teach proximate cause as a kind of “black box” that holds mysteries waiting to be discovered. We often see the discussion of proximate cause as an unsolvable riddle: why should a person who has acted negligently and caused harm not be

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14. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. L. INST. 2010) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”).

responsible for the harm she caused? But we present the mystery as a story without a known ending, as a kind of morality play that ends before the final act.

As I see it, we are directing, unsuccessfully, our students to search for a doctrinal anchor for proximate cause that is not there. Sometimes foreseeability seems to work; at other times, it fails us, and we talk about whether the negligence directly caused the harm. Sometimes we talk about crushing liability, at other times about over-deterrence, or fundamental fairness. But none of these justifications seem to explain the fundamental foundation of proximate cause, and none are understandable in terms of the determinants of proximate-cause outcomes.

Our approach to proximate cause may reflect a faculty member's political leanings. Those who favor recovery for injured victims undoubtedly greet unwelcomely a doctrinal device that cuts off liability. Those who believe that people ought to be responsible for their own well-being may find the attempt to press responsibility beyond natural boundaries to be counterproductive. But, as in other areas, looking for an ideological basis for evaluating law distracts students from the challenge they face—namely, to be able to analyze the law in a way that allows them to discipline their political intuitions with a reasoned basis for understanding what factors ought to determine the outcome of torts cases and why. If we leave students with the impression that proximate cause is only political or ideological, without also telling them that the function of thinking like a lawyer is to discipline our political intuitions with reasoned analysis, we do them a disservice and breed cynicism about the randomness of the law that is harmful to their career as lawyers and to the profession itself.

The doctrinal problem is highlighted by the inability of the drafters of the Restatement (Third) to come up with a unifying doctrine for the proximate cause inquiry. The basic rule is sensible enough but hard to apply: the defendant is responsible for the “harms that result from risks that made the actor's conduct tortious.”<sup>15</sup> But this basic rule is supplemented by specialized rules to cover specialized cases that have been decided under the proximate-cause rubric. This mish-mash of general and specific rules, with no clear indication of the meaning of the general rule, suggests (and ought to suggest to students) that we have not yet found the appropriate analytical structure for understanding proximate cause.

How might we think about proximate cause in a more fruitful way? First, we might lead students to consider what role proximate cause plays in addressing tort problems. We might do that by asking students what all proximate-cause cases have in common. When they think about it enough, the students will see that in every proximate-cause case an unexpected circumstance has arisen. Once they see that

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15. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. L. INST. 2010).

proximate cause is about unexpected circumstances, we can ask them why a negligent defendant might not be responsible for the harm from unexpected circumstances. If our students are conditioned to think about how human beings make decisions, they will come to realize that some circumstances are simply outside the purview of the considerations that people in the defendant's position ought to take into account. That series of questions unlocks a discussion of the basis of tort responsibility, which will allow students to see (if they have not seen it earlier in the course) that tort law is about the decisions for which people will be held responsible, and then to see that people might not be held responsible for circumstances they could neither foresee nor protect against (the "harm within the risk" idea).

To be more concrete, if a trolley is going unreasonably fast and a tree falls on it, the owner of the trolley is not responsible because the driver of the trolley is not charged with thinking about falling trees when deciding how fast to go, and therefore is not responsible for that harm (even though the speed of the trolley caused the harm).<sup>16</sup> And if a train conductor is helping a man get on a train, the conductor is not charged with thinking about whether the package the man was carrying contained fireworks.<sup>17</sup> Some circumstances, being outside the range of circumstances a decision maker ought to be considering, cannot be the source of responsibility because responsibility for the well-being of others depends on some human agency.

But if proximate cause is about limiting responsibility when a person is not obliged, in her decisions, to account for certain circumstances, why does the foreseeability test not work? The reason is that the determinate of proximate cause is not whether an event or harm was reasonably foreseeable, but whether the defendant, to be reasonable, should have taken the circumstance into account when deciding how careful to be. It is foreseeable that a tree might fall on the tracks, and it is foreseeable that a package might contain fireworks, but if a reasonable person is not required to take that circumstance into account when making decisions—if the circumstance would not have affected the decision—then the decision cannot lead to responsibility to the victim.

But how is a student to know what circumstances are relevant to a decision? The student has to turn the test of foreseeability into a question. Doctrine will not help students because the analytical exercise is to determine how the injurer should have made decisions and what circumstances the person should have taken into account when making decisions. Let me put this statement in the context of this essay.

One characteristic of the kinds of analysis I am advocating is that it proceeds not from doctrine to conclusion—a top-down approach—

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16. See *Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899).

17. See *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928).

but from the relevant determinants called for by tort concepts to a conclusion grounded on those determinants. It is bottom-up. One way to approach the analysis, once the determinants have been identified, is to turn the determinants into questions, and to let the conclusion about the application of doctrine flow from the conclusions founded on the kind of responses we get from the determinants. We have already seen this methodology in action. For strict liability, I recommended that students be led to understand that they should inquire whether the defendant had made unreasonable decisions about where, when, by what method, and how frequently they should engage in their activities. For the concept of duty, I recommended that the students be led to the understanding that the first foundational question is whether the defendant was the source of the risk or whether the source of the risk was some other person or agency. The responses to these questions determine whether the defendant is under a duty or has violated a standard of care with respect to all the relevant dimensions of conduct.

As with these examples, turning the analysis into a meaningful question helps unlock the mystery of proximate cause. The relevant question for evaluating the determinants of proximate cause is to ask whether the circumstances that connected the defendant's conduct to the plaintiff's harm were circumstances that a reasonable person would have taken into account when determining how safe to be. If the circumstance in question could not have been accounted for by a reasonable person, or if the circumstance is not relevant to the safety decision the injurer made, the defendant is not responsible for the harm he caused.

### CONCLUSION

In this essay I have hoped to show that what tort law is—and therefore what we ought to be teaching our students—is not as simple as the doctrinal outline of tort law that casebooks and study aids present. I have argued that what we think is tort law is not a helpful way of understanding the determinants of law and that we shortchange our students if we do not help them understand those determinants. What is going on below the doctrine in terms of determinants and ideas is what students have to be able to figure out if they are going to be successful in practice. And I have also argued that doctrine is often a misguided way of understanding the law. The idea of proximate cause cannot be captured by a rule or a test; it must be captured by a question and by addressing the crucial question in all its ramifications.

We are wedded to the idea that we should teach doctrine, rather than the determinants of doctrine, because we are wedded to the idea that we can reason from doctrine to reach concrete conclusions. We are, in other words, wedded to the idea that if students know of liability for ultrahazardous activities, foreseeable harms, and duty, they will be able to use that knowledge to practice law. The law, however, is not known

by its doctrine but by the determinants that judges use to apply doctrine. Those determinants are rarely given by the doctrine itself.

My plea is not to make legal education more practical; it is to make legal education in torts more analytical in the ways that I have described. To me, “thinking like a lawyer” is not being able to manipulate or work within a system of doctrine. It is to develop the ability to understand the determinants of judicial decisions—the factors and ideas that led to the outcomes—and therefore to allow us to understand the meaning and import of the precedents.