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The Baseline Problem

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In March 1928, two tugs, the Montrose and the T.J. Hooper, left Hampton Roads, Virginia, for New York, each towing coal barges up the Atlantic coast. Off the New Jersey shore they met a gale the tugs could not survive. Two barges, the Northern 17 and the Northern 30, went down with their cargoes.

The storm had been announced. Weather reports were broadcast by radio along that coast, and the district judge later found that those reports induced at least three other tugs traveling the same waters to put in at the Delaware Breakwater and ride the weather out. The Montrose and the Hooper pressed on. Their masters never heard the forecast. There were receiving sets aboard, privately owned, and they were not in working order.

What did not exist was any requirement. No statute obliged a tug to be equipped with a radio, no regulatory body had issued a rule, and the court found it was not fair to say the coastwise trade had any general custom of owners furnishing their tugs with sets. Receivers were inexpensive, dependable enough for the work if maintained, and common enough that many masters bought their own. The owners had simply never made them equipment. When the barge and cargo interests sued, the defense was built on exactly that ground: an owner's duty is measured by the standard of the calling, and the calling required no radios.

The case, *The T.J. Hooper*, reached the federal appeals court in New York in 1932, and Judge Learned Hand answered the defense directly. He granted custom its usual weight: in most cases, reasonable prudence is in fact common prudence. Then he refused to let the trade define its own obligation. Strictly, he wrote, custom is never the measure of prudence, because "a whole calling may have unduly lagged in the adoption of new and available devices." And then the sentence the doctrine has been anchored to since: "Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." The tugs were held unseaworthy. The practice of their industry was no shelter.

Consider what did not happen in this record. No legislature acted, and no standards body issued a rule. No trade association recommended anything. Nothing was promulgated for anyone to adopt, and no adoption event occurred anywhere before the loss. On the

ordinary model of how requirements come to bind, where a rule is issued first and compliance follows, nothing had happened at all. Yet the decision established that the absence of an industry requirement did not end the inquiry, and that the omission of an available precaution could be judged unreasonable on its own terms.

The force ran through a specific structure, and every part of it is visible in the record. The precaution was available, and its low cost and utility could be demonstrated. The loss landed on parties with standing to bring it somewhere. The forum was empowered to compare what was done against what was available, instead of only against what was customary. Remove any one of these and the outcome changes. An unavailable precaution binds no one. A loss that lands only on parties without standing produces no case. A forum that defers to custom reproduces the trade's own lag and calls it reasonableness. The baseline moved because a route existed by which the available precaution could be placed in front of a decision-maker empowered to make the comparison.

That is the inversion worth keeping. Most accounts of how standards work assume force flows downhill from adoption: a rule is issued, institutions comply, and where no rule was issued there is nothing to comply with. The Hooper record runs the other way. Availability, joined to a route from loss to a forum empowered to judge reasonableness, was enough to defeat the claim that non-adoption ended the inquiry. The trade discovered its obligation inside the loss.

The opinion became one of the most cited formulations in American negligence law, and the mechanism it describes did not retire with the tugboats. Notice, too, what the radios were not: nobody had published them as a criterion. What acquired consequence that day was an available precaution whose reasonableness a court could establish from the evidence in front of it. Elsewhere on this site, the Baltimore fire shows the opposite face: a criterion published, sound, endorsed, and inert for decades. Between those two records is a question about structure. The laboratory has opened a research program on how published criteria acquire practical force. The record in this essay is at the edge of that question, and the program is built to notice when its edges move. The blueprint is published ahead of the results.

[Making Standards Matter →](#)

This essay describes what a court did and the structure through which its ruling operated. It makes no legal claims and offers no legal conclusions; adjudication belongs to courts.