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THE UNFORESEEABLE CONSEQUENCES OF A NEGLIGENT ACT

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The recent case of *Palsgraf v. Long Island R. R.*¹ in the New York Court of Appeals is in such direct conflict with the dicta in *Smith v. London and South Western Ry.*,² the leading English case on the question of liability for the unforeseeable consequences of a negligent act, that a comparison of the two cases may be of interest. The *Smith* case is of peculiar importance for it has been cited with approval by Beven, Street, Bohlen, Jeremiah Smith and many other writers, and may be said to be the foundation stone of the doctrine that there is liability under such circumstances. Reference will also be made in this article to the well-known case of *In re Polemis*³ although the point at issue in that case differed slightly from that involved in the other two. It will be necessary to quote at some length from the opinions of the judges in these cases so as to determine as definitely as possible the exact *ratio decidendi* of each decision.

In the *Palsgraf* case a railway guard in assisting a passenger to board a train knocked a package from his arms. A violent explosion followed, the package having contained fireworks, of which fact the guard was ignorant. The concussion knocked over some scales standing a considerable distance away, and in falling they injured the plaintiff, a woman, who was an intending passenger. The judgment of the trial court in favor of the plaintiff, affirmed by the Appellate Division, was reversed in the Court of Appeals by a majority of four to three.

In speaking for the majority, Cardozo, C. J., emphasized the

¹ 248 N. Y. 339, 162 N. E. 99 (1928).

² L. R. 6 C. P. 14 (1870).

³ [1921] 3 K. B. 560.

fact that, although the guard was negligent as regards the holder of the package, he was not negligent in relation to the plaintiff because he could not have foreseen that his act might injure her:

"The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed."⁴

The plaintiff did not establish her case merely by proving that her injury was the consequence of the defendant's "wrongful" act for an act does not have the general quality of "wrongfulness." It may be a wrong in relation to one person without necessarily being a wrong as to some one else:

"The argument for the plaintiff is built upon the shifting meanings of such words as 'wrong' and 'wrongful,' and shares their instability. What the plaintiff must show is a 'wrong' to herself, *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one."⁵

Just as the word "wrong" is a term of relation between two persons, the plaintiff and the defendant, so is the word "negligence." An act is not negligent per se—it is only negligent in relation to those who are foreseeably within the risk of injury. There is no such thing as negligence in the air:

"Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all (Bowen, L. J., In *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694). Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended."⁶

In the instant case, therefore, the plaintiff did not have a

⁴ *Palsgraf v. Long Island R. R.*, *supra* note 1, at 341, 162 N. E. at 99.

⁵ *Ibid.* 343, 162 N. E. at 100.

⁶ *Ibid.* 345, 162 N. E. at 101.

cause of action, for, although the guard had been negligent in knocking the package out of the passenger's arms, and the direct consequence of this negligent act was the explosion and injury to the plaintiff, nevertheless, as a reasonable man in the position of the guard could not have foreseen that his act might injure the plaintiff, no wrong against her was committed.

When we turn to the view of the minority, as expressed in the opinion of Andrews, J., we find that it is based on a fundamentally different conception of what constitutes "negligence," and a "wrongful act." According to him, negligence is not merely a relation between particular individuals; it is also a wrong to any one who may be injured by the negligent act, even though the injury to him could not have been foreseen. There is a duty to the world at large not to be negligent, and therefore any injury caused by the breach of this duty gives a cause of action:

"The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger?"⁷

The result, therefore, is that a negligent wrongdoer is liable for all the consequences of his act whether he could have foreseen them or not. The only limitation to this rule is that "The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former."⁸

⁷ *Ibid.* 347, 162 N. E. at 102.

⁸ It is obvious that a man cannot be held liable for all the consequences of an act which has been found to be negligent, for the consequences may be infinite. Therefore, if the simple test of foreseeability is rejected some other must be substituted for it. This is found in the convenient phrase that the consequence must be proximate. Unfortunately it is difficult to define what is meant by "proximate," so the courts have adopted a series of metaphors and similes by means of which they hope to clarify the subject. The most popular metaphor is "chain of causation" in which a cause remains proximate until the chain is snapped. So in *Weld-Blundell v. Stephens*, [1920] A. C. 956, 986, Lord Sumner says:

"It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B. snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A. to C., no mere moving part in a transmission gear set in motion by A.; that, in a word, he insulates A. from C."

Unfortunately chains, conduit pipes, transmission gears, and insulations do not appeal to Lord Shaw, for in *Leyland Shipping Co. v. Norwich Fire Insurance Society*, 118 L. T. 120, 126 (1918), he says: "Causation is not a chain, but a net. At each point influences, forces, events,

Apart from that, the inquiry is simply as to the relation between cause and effect:

"The proposition is this. Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain."⁹

Judge Andrews then cites¹⁰ with approval *Scrutton, L. J.*'s statement in the *Polemis*¹¹ case that the dropping of the plank was negligent, for it might injure "workman or cargo or ship," and because of either possibility the owner of the vessel was to be made good for his loss. The act being wrongful the doer was liable for its proximate results. He also cites the *Smith* case as laying down this principle.

The difference in view between Cardozo, C. J., and Andrews, J., can be conveniently summed up as follows: According to the former, negligence is a relation between particular individuals. It is not a wrong to third persons, and therefore they cannot recover even though they may have been injured by the act. According to the latter, negligence is not only a wrong to the particular individual foreseeably endangered by the act, but also to any one who may be injured by it. A, who is

precedent and simultaneous, meet, and the radiation from each point extends infinitely."

To Judge Andrews proximate cause is neither a chain nor a net, but a river. In the *Palsgraf* case, *supra* note 1, at 352, 162 N. E. at 103, he says: "Should analogy be thought helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last, inevitably no trace of separation remains. They are so commingled that all distinction is lost."

To the present writer proximate cause is neither a chain nor a net nor a river, but is a labyrinthine maze. With all respect, may we not question the validity of a legal concept which cannot be defined in precise and accurate terms but which must be described by a series of conflicting analogies?

⁹ *Palsgraf v. Long Island R. R.*, *supra* note 1, at 350, 162 N. E. at 103.

¹⁰ *Ibid.*

¹¹ The facts in this case are given *infra* at 464.

negligent in relation to *B*, by the same act injures *C* in an unforeseeable manner. The majority in the *Palsgraf* case hold that *A* is not liable to *C*. The minority hold that he is.

When we turn to the famous *Smith* case we find it more difficult to determine the exact principle on which it was decided, for the facts are less clearcut and the reasons given by the different judges in their opinions are conflicting. The importance of the case, however, is based not on the conclusion reached, for this may be explained on a number of different grounds, but on the dicta in three of the opinions, these dicta having been quoted again and again by English and American writers. Before discussing the judgments themselves, it is necessary to consider the facts. During an exceptionally hot summer the defendant's workmen trimmed a hedge bordering the railway line and allowed the trimmings to remain in heaps. A fire, probably ignited by a spark from an engine, broke out in the heaps, spread across a stubble field and over a road, and was carried 200 yards by a high wind to the plaintiff's cottage which was destroyed. On the trial a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict or a nonsuit. After argument the rule was discharged,¹² Bovill, C. J., and Keating, J., holding that there was sufficient evidence of negligence on the part of the defendant in relation to the plaintiff. Bovill, C. J., said:

"I think it is impossible to say that there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were was the natural consequence of their negligence."¹³

Brett, J., dissented on the ground that the defendant had not been negligent in regard to this particular plaintiff, although the act of leaving the inflammable heaps might have been negligent in relation to others:

"But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage. It seems to me that no duty was cast upon the defendants, in relation to the plaintiff's property, because it was not shown that the property was of such a nature and so situated that the defendants ought to have known that by permitting the rummage and hedge-trimmings to remain on the banks of the railway they placed it in undue peril."¹⁴

¹² Reported in L. R. 5 C. P. 98 (1869-70).

¹³ *Ibid.* 107.

¹⁴ *Ibid.* 103.

At p. 104 he said: "We read of such fires in the American prairies;

So far the case involved only a simple question of fact, the majority holding that on the evidence the defendant was negligent in relation to the plaintiff, as it should have foreseen the possibility of injury to him, while Brett, J., dissented on the ground that no reasonable man could have foreseen such injury.

When the case reached the Exchequer Chamber¹⁵ the question of law involved became a more difficult one, for, although the seven judges were unanimous in affirming the judgment, they differed in the reasons given. Some of them held, as the majority had held in the court below, that on the evidence the defendant should have foreseen that the fire might spread to the plaintiff's house. Thus Pigott, B., said:

"... when once in the field there was no way to stop it till it burned the plaintiff's cottage, and this, as it seems to me, was nothing but what a reasonable man might have anticipated."¹⁶

On this view of the facts the case is of no especial interest. Three of the judges, however, held that even if the defendant could not have foreseen that the fire might injure the plaintiff, and therefore was not negligent as to the plaintiff himself, nevertheless it was liable, as the injury to the plaintiff was the natural consequence of its negligent act. Kelly, C. B., accepted the statement in the dissenting judgment of Brett, J., in the court below "that no reasonable man would have foreseen that the fire would get to the plaintiff's cottage," but held the defendant liable because:

"I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed."¹⁷

Channell, B., said:

"I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not,—but when it has been

but it would never occur, as it seems to me, to the mind of the most prudent person that such an extraordinary conflagration could be caused in this country in the manner here spoken of by the witnesses. I think the defendants cannot reasonably be held responsible for not having contemplated such an extraordinary combination of circumstances, or such a result."

¹⁵ L. R. 6 C. P. 14 (1870).

¹⁶ *Ibid.* 23.

¹⁷ *Ibid.* 20.

once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."¹⁸

Blackburn, J.'s judgment is, perhaps, the one which has been most frequently quoted:¹⁹

"I also agree that what the defendants might reasonably anticipate is . . . only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."²⁰

These three dicta therefore laid down the rule that the defendant, having acted negligently in leaving the trimmings, was liable to the plaintiff even though, owing to the distance of the plaintiff's cottage, no reasonable man would have foreseen that he might be injured. In the *Palsgraf* case the defendant, having acted negligently in knocking the package out of the passenger's arms, was held not liable to the plaintiff standing far away because "nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed." In both cases there were negligent acts, viz., leaving the heaps of trimmings and knocking the package from the passenger's arms; in both cases the plaintiffs were injured as a consequence of those acts; in both cases the defendants could not foresee

¹⁸ *Ibid.* 21.

¹⁹ *Ibid.*

²⁰ *Ibid.* 22.

The following passage in Blackburn, J.'s judgment has also been frequently quoted:

" . . . if the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits someone, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so and kills a man who is in receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not reasonably have expected to have injured any one but a labourer."

But all that Blackburn, J., is proving here is that damages are not limited to those "reasonably expected." They may, however, be foreseeable even though not reasonably expected, for there is sometimes a great difference between foresight and expectation. The same rule applies in determining the existence of negligence itself. If the law permitted the shooting of labourers but not that of men with large incomes, then the person firing across the road would be guilty of negligence if he hit a man with a large income although he could only "reasonably expect" to hit a labourer.

any injury to the plaintiffs themselves but were negligent as to others. Judge Andrews was, therefore, correct in pointing out that the minority view in the *Palsgraf* case was in accordance with the rule laid down in the *Smith* case while the majority view was in conflict with it. This conflict will be referred to again later in this article but it is of value to remember it while considering the further history of the *Smith* case.

The importance of the *Smith* case was first stressed by Thomas Beven in his famous work on *Negligence*. He refers to it as "the leading case on the matter we are now dealing with,"²¹ he devotes three pages to its analysis, and cites it five times in the text and five times in the footnotes. He gives it as the authority for his often quoted statement that:

"It has been pointed out before that there are two inquiries in the application of the test of what is a natural and reasonable consequence: 1st, an inquiry whether the act causing injury was wrongful; that being established, then, 2nd, what are the actual continuous consequences of the wrongful act? The liability is determined by looking *a post* not *ab ante*. The defendant's view of the possibilities of his act is very material to determine whether his act is negligent or not; it is utterly immaterial to limit liability when once negligence has been established."²²

Later, in referring to Kelly, C. B.'s statement that "no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble field and so get to the plaintiff's cottage," he says, "The effect of this is that, negligence being found, it is not necessary to find, in addition, an antecedent probability of damage to *any given property or person*."²³ Compare this with Cardozo, C. J.'s statement that, "what the plaintiff must show is a 'wrong' to herself, *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one."²⁴

Beven's theory was accepted in full by Street in his *Foundation of Legal Liability*, and thus its influence on American legal thought was increased. He refers to it as follows:

"Two important principles are involved in this [Beven's] theory, namely, (1) that foresight of harm is an essential antecedent condition of liability, and (2) that when negligence is shown the defendant's conduct thereby becomes tortious, or, as it were, unlawful *per se*, and he is then chargeable with all

²¹ 1 BEVEN, NEGLIGENCE (3d ed. 1908) 87.

²² *Ibid.* 89, n. 2.

²³ *Ibid.* 496. Italics mine.

²⁴ Cited *supra* at 450.

injurious consequences which proximately follow and which are not too remote."²⁵

According to Street it is not necessary in determining the question of liability to show that a reasonable man in the position of the defendant should have been able to foresee the harm which befalls the person injured. "It is enough if an ordinarily prudent person should be able to see danger or harm of some sort ahead. Harm in the abstract, not harm in the concrete, is the idea."²⁶ Compare with this Judge Cardozo's statement that, "negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all."

We next find the *Smith* case, and Beven's interpretation of it, used by Professor Bohlen as the basis of his frequently quoted article, *The Probable Or The Natural Consequence As The Test Of Liability In Negligence*.²⁷ He refers to Beven as follows: "He [Beven] it was who first drew attention to the different rule of cause and effect applicable to the existence of negligence and the liability for the consequences thereof, between probable and natural consequences."²⁸ He also quotes²⁹ with approval the judgment of Blackburn, J., in the *Smith* case. There is no indication that he does not accept the full implication of the doctrine of natural consequences. In his own words the rule is stated in these broad terms:

"Where such a rule of conduct established by public policy for the good of all is violated, the wrongdoer should answer for all the consequence brought about by the working out of the injurious tendency of his wrongful act until the ordinary natural³⁰ laws of cause and effect are diverted by some outside agency."³¹

This duty of care of the defendant to the plaintiff not to violate "a rule of conduct established by public policy for the good of all" is similar to Judge Andrews' rule that "every one owes to the world at large the duty of refraining from those acts that

²⁵ 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY (1906) 91.

²⁶ *Ibid.* 104.

²⁷ (1901) 49 AM. L. REG. (N. S.) 79, 148. Reprinted in STUDIES IN THE LAW OF TORTS (1926) 1.

²⁸ *Ibid.* 8, n. 11.

²⁹ *Ibid.* 7.

³⁰ It is not clear to the writer what is meant by "ordinary natural." If by "ordinary" is meant "usual," then Professor Bohlen's rule is more restricted than is the rule that all damages must be foreseeable, which he claims is too narrow. "Natural" is meaningless, for as Lord Sumner says in *Weld-Blundell v. Stephens*, [1920] A. C. 956, 983, "Everything that happens, happens in the order of nature and is therefore 'natural.'"

³¹ STUDIES IN THE LAW OF TORTS (1926) 2.

may unreasonably threaten the safety of others."³² Professor Bohlen's statement can, therefore, be quoted in support of the minority view in the *Palsgraf* case, for the guard in that case was a wrongdoer who had violated a rule of conduct established by public policy for the good of all, and the ordinary natural effect of his act was to cause the plaintiff's injury.

Whether Professor Bohlen intended to follow to its full extent the doctrine laid down in the dicta in the *Smith* case and accepted as correct by Beven is, however, doubtful, for in a note to his article he says:

"Practically the same view is taken by Sir Frederick Pollock in his valuable treatise on the Law of Torts: 'The kind of harm which in fact happened might have been expected, though the precise manner in which it happened was determined by an extraneous accident.'"³³

But Pollock is the most strenuous opponent of Beven's "subtle interpretation," and of the dicta in the *Smith* case.³⁴ According to him "the accepted test of liability for negligence in the first instance is . . . also the proper measure of liability for the consequences of proved or admitted default." The correct test can be simply phrased: "Is this damage such as the defendant could reasonably be expected to anticipate?" This depends upon foresight. Of course the foresight need not be of the "precise manner," for if it were men would rarely be liable for negligence. If I negligently set my house on fire I can foresee that the conflagration may spread to the houses of my neighbors A, B, or C, although the precise manner will depend upon the prevailing wind. But if the fire spreads to oil in a stream, and burns a house a mile away, I cannot foresee the manner at all.³⁵ We are, therefore, left in some doubt as to Professor

³² Cited supra at 452.

³³ BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) 8, n. 15.

³⁴ See Pollock, *Liability for Consequences* (1922) 38 L. Q. REV. 165.

³⁵ The following illustrations taken from Professor Bingham's admirable article, *Legal Cause at Common Law* (1909) 9 COL. L. REV. 16, are apposite here:

"Plaintiff owns two houses, A and B, near the bank of a stream. A is on a lot next below one belonging to defendant. B is a mile farther down. Defendant negligently builds a fire on his lot so near A as to put it in peril from sparks. However, A is saved by vigorous efforts. The fire unavoidably spreads through the grass to a stream and ignites oil floating on the surface. The oil has been spilled into the stream in large quantities by accident. This was unknown to defendant; and he was not negligent in not knowing or foreseeing that the oil was there. The oil carries the fire down-stream and B is burned.

"I suppose that we shall agree that plaintiff cannot recover from defendant for the loss of B, though the building of the fire constituted

Bohlen's exact position as he seems to accept the conflicting views of both Beven and Pollock.

The same doubt arises when we read the famous articles by Judge Jeremiah Smith entitled *Legal Cause in Actions of Tort*.³⁶ He cites with approval the *Smith* case which he terms "the leading English case in this direction,"³⁷ and gives quotations from the judgments of Channell, B., and Blackburn, J.³⁸ He also endorses without any qualification the views expressed by Beven and Street. He states his conclusion in the following broad terms:

"The probability that some harm will ensue may sometimes be a legal test of the tortiousness of defendant's conduct. But if it be once established that his conduct was tortious, and throughout this discussion we are proceeding upon the supposition that this has been established, then we submit that the probability or improbability of a result does not furnish a *legal* test of the existence of causative relation between defendant's tort and plaintiff's damage."³⁹

This, apparently, would support the minority view in the *Palsgraf* case for the defendant's conduct in that case was tortious and the plaintiff's damage was a result of the conduct.

But in a later passage he limits this statement as follows:

"The answer is, that the harm which was foreseeable and the specific harm which actually resulted need not be absolutely identical. Undoubtedly they must both relate to the same persons or class of persons, and to the same subject matter, *i.e.* to an infringement of the same right in the plaintiff; but these requirements are consistent with wide variations as to the mode of bringing about the harm, and the precise nature and extent of the harm. If there is a substantial likelihood that certain conduct, when pursued by the defendant, will result in some appreciable harm to the plaintiff's person, then the defendant,

a breach of legal duty owed plaintiff and B was burned as a consequence of the wrongful act. . . .

"Now assume that A caught fire, not directly, but through the ignition of the oil. Defendant should not be held responsible for the loss. The case is analogous to the one just discussed. There has been an act which was 'legal' negligence towards plaintiff because it endangered A, and A has been destroyed as a consequence of the act; but the avoidance of the contingency through which A was destroyed was not within the scope of the duty which defendant has infringed. Not knowing of the presence of the oil on the stream, he committed no 'legal' wrong towards plaintiff in causing it to ignite. His wrong consisted only in imperiling A by sparks direct from the fire where he started it." *Ibid.* 26.

³⁶ Reprinted in *SELECTED ESSAYS ON THE LAW OF TORTS* (Harvard Law Review Association 1924) 649.

³⁷ *Ibid.* 673.

³⁸ *Ibid.* 698.

³⁹ *Ibid.* 678.

if he so conducts (sic), cannot escape liability on the ground that he could not foresee the precise manner in which the harm would occur, nor the exact nature of the harm, nor the full extent of such harm. What must be foreseen in order to establish negligence is 'harm in the abstract, not harm in the concrete.'"⁴⁰

It is difficult to understand how Judge Smith reconciles this limitation with the *Smith* case, which he approves so wholeheartedly, for in that case the whole point was that there was no "substantial likelihood"—nor, for that matter, any likelihood—of harm to the plaintiff. The fact that fire would burn a house was obviously foreseeable; that it would burn the *plaintiff's* house was the one fact which was unforeseeable in the case. Nor can any trace of this limitation be found in either *Beven* or *Street* with whom Judge Smith seems to think that he agrees and whose reasoning he adopts. The odd result is that it would be possible to quote different passages from Judge Smith's articles to show that he was in accord with the views expressed in both the majority and minority opinions in the *Palsgraf* case.

In saying that "the harm which was foreseeable and the specific harm which actually resulted need not be absolutely identical," Judge Smith was stating an obvious truism. There is no reported case, so far as the writer knows, which has ever required absolute foresight as to the specific harm. If there were such a rule then the law of negligence would be unworkable and meaningless. If a man driving down a street at a furious pace runs down a pedestrian he will be held liable because a reasonable man under the circumstances would have foreseen that he might injure someone on the street. The foresight required here is not the foresight that a specific person will be injured in a specific way, viz., by being struck by the left wheel and having his right arm broken, but that someone will be struck in some way and suffer some bodily injury. This is, however, entirely different from saying that the driver is negligent as to *all the consequences of his fast driving*. It is conceivable that the friction produced by his speed might set off a hidden mine under the road, but he could not have foreseen that type of consequence and therefore would not be negligent in relation to it.

There is a clear distinction between (1) foresight as to specific consequences produced in a specific manner; (2) foresight as to consequences of a general kind produced in any one of a number of foreseeable manners; and (3) no foresight as to either the kind of consequence or the manner in which it has been pro-

⁴⁰ *Ibid.* 690.

duced. It is the second kind of foresight which is required in determining negligence, and it is only this second kind of foresight which ought to be required in determining liability for the consequences of that negligence.⁴¹

Professor Beale in his article *The Proximate Consequences of An Act*⁴² adopts an original line of approach to the question so that it is not surprising to find that no reference is made to Beven, Street, or Bohlen. He does, however, cite the *Smith* case with approval.⁴³ His doctrine is that to hold the defendant liable the force he has created "must (a) have remained active itself or created another force which remained active until it directly caused the result; or (b) have created a new active risk of being acted upon by the active force that caused the result."⁴⁴ The *Smith* case would fall under (b), for the defendants in leaving the dry heaps created an active risk which was acted upon by the active force that caused the result. The facts of the *Palsgraf* case would seem to bring it within (a), for the active force of the guard in knocking down the package created the explosion which remained active until it injured the plaintiff. The majority opinion in that case is therefore in conflict with Professor Beale's doctrine.

Beven, Street, Bohlen, Judge Smith and Beale may be said to be the classical authorities on this subject, and have therefore been discussed at length. Shorter references must be made to a number of recent articles which are of importance.

Professor Green in his book on *Rationale of Proximate Cause* cites the *Smith* case with marked approval, giving lengthy quotations from the judgments of Channell, B., and Blackburn, J.⁴⁵ He suggests that cases conflicting with their views are "legal atrocities." But in a recent article he also approves the result

⁴¹ This is all that was laid down in the often quoted case of *Hill v. Winsor*, 118 Mass. 251 (1875), in which Colt, J., said, ". . . it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen." *Ibid.* 259.

That case also illustrates how impossible it is to draw a line between the question as to whether the defendant was negligent and the question as to what were the consequences of his negligence. The case is usually cited to prove that there need not be foresight as to consequences, when in fact the point at issue was whether there was any negligence on the part of the defendant in running into the fender. Thus Colt, J., said: "It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence. . . ." *Ibid.* 258.

⁴² Reprinted in *SELECTED ESSAYS ON THE LAW OF TORTS*, *op. cit. supra* note 36, at 730.

⁴³ *Ibid.* 739, n. 29.

⁴⁴ *Ibid.* 755.

⁴⁵ GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927) 88.

reached in the *Palsgraf* case.⁴⁶ It would be interesting to see how he reconciles these cases.

Professor Levitt in his article *Cause, Legal Cause and Proximate Cause*,⁴⁷ discards the test of foreseeability because it is "not only psychologically impossible but is practically not employed by the jury."⁴⁸ In its place he offers the doctrine of forbidden causal action which "simply asks: *Did* the defendant do or fail to do that which was forbidden. Then it asks: Is this act or omission so connected causally with the injury complained of that the forbidden act or omission can be said legally to be a proximate cause of the injury?" He approves of the *Smith* case because "the defendant's activity results in the creation of the force which produces the injury of the plaintiff."⁴⁹ He doubtless would disapprove of the conclusion reached in the *Palsgraf* case as in it the plaintiff's injury was the result of the defendant's activity.

Professor McLaughlin in his article on *Proximate Cause*⁵⁰ suggests that, "The idea is that the man who 'starts something' should be responsible for what he has started. . . . As here delimited in the interests of comparative certainty, the 'something' to which the legal rule applies is an active force, continuously producing change."⁵¹ He cites⁵² with approval Beven, Street, Bohlen, Judge Smith, and Lord Justice Banks' judgment in the *Polemis* case⁵³ which he quotes at some length. Later in his article he suggests a radical limitation of the doctrine of "direct consequences" which cannot be found in the authorities he cites:

"As already suggested, some courts state that only probable or foreseeable results are proximate. If this view be rejected, and it be admitted that all direct results are proximate and that consequently the sweep of an active force as defined in that connection may carry proximate causation to an unforeseeable result, it is entirely consistent to hold that what must be appreciably probable or foreseeable is not the result, but the forces which intervene between the defendant's act and the harm."⁵⁴

⁴⁶ *The Duty Problem In Negligence Cases* (1928) 28 COL. L. REV. 1014, 1031.

⁴⁷ (1922) 21 MICH. L. REV. 34.

⁴⁸ *Ibid.* 52.

⁴⁹ *Ibid.* 57. This is hardly an accurate summary of the *Smith* case. The defendant did not create the force—the fire—which produced the injury. It negligently allowed heaps to remain which were accidentally set on fire.

⁵⁰ (1925) 39 HARV. L. REV. 149:

⁵¹ *Ibid.* 164.

⁵² *Ibid.* 163, n. 50.

⁵³ Discussed *infra* at 464.

⁵⁴ McLaughlin, *op. cit. supra* note 50, at 179.

But this requirement that the *forces* must be foreseeable is in absolute conflict with the *Polemis* case, for the whole point of that case was that the intervening force—the explosion—was unforeseeable. Once given the force, then the result which followed—the destruction of the ship—was inevitable. As Professor McLaughlin, therefore, seems both to approve and disapprove of the primary authority which he cites, it is difficult to determine his exact position.

Professor Edgerton in his article on *Legal Cause*⁵⁵ says that "Except only the defendant's intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result as its foreseeability";⁵⁶ but "As Professor Bohlen, Professor Smith and Professor Beale have shown, it is not always necessary."⁵⁷ He cites with approval the *Smith* case, but suggests that there was a "slight chance of harm" to Smith which, taken together with the negligence to others, made the act negligent as to him. The difficulty with this particular refinement is that it does not seem to have occurred to any of the judges in the *Smith* case, and is in direct conflict with the language there used. The whole point of the dicta in the case was that the defendant was liable to the plaintiff even though it could not foresee any injury to him.⁵⁸

⁵⁵ (1924) 72 U. OF PA. L. REV. 211, 343.

⁵⁶ *Ibid.* 352.

⁵⁷ *Ibid.* 354.

⁵⁸ Professor Edgerton also objects to the rule which requires foreseeability because it is "highly indefinite." He says, *ibid.* 233:

"For example, if, from the point of view of a reasonable man (an indefinite idea) with D's information, D's act produced a substantial risk (an indefinite idea) that a force of the general character of that which intervened (an indefinite idea) would cause harm of the general character of that which occurred (an indefinite idea), D's act is a legal cause of the harm; otherwise it is not."

This has been answered by Professor McLaughlin in his article, *op. cit. supra* note 50, at 190:

"In like style, the following may be stated: If A communicates with B (an indefinite idea) so as to give B a reasonable impression (an indefinite idea) that A is offering to enter into a contract with him, and if B then within a reasonable time under the circumstances (an indefinite idea) does acts which should give a reasonable man in A's situation (an indefinite idea); to understand that he accepts this offer, or if A otherwise receives good or valuable consideration (an indefinite idea) for a promise he makes B, then he becomes bound to B, and B can recover the damages in the contemplation of the parties (a very indefinite and fictitious idea) if A does not perform his promise, though A may be discharged from duty to perform if B makes a breach going to the essence of the contract (an indefinite idea). Still it cannot be fairly said that there is no law of contracts or that no definite rules can be established, or that a contract case should be handed over to a jury with an instruction to do justice with a view to certain 'tendencies' in the decisions."

This formidable list of textbook authorities has been collected not for the purpose of showing that in the *Palsgraf* case the majority of the Court of Appeals was wrong in its conclusion, but, on the contrary, to point out that probably the strongest court in the United States, has, after prolonged consideration and in a case which clearly presented the problem, reached a conclusion in direct conflict with the *Smith* case which Beven, Street, Bohlen, Jeremiah Smith, and Beale cited in support of their views. The Court of Appeals has repudiated the argument which is "built upon the shifting meanings of such words as 'wrong' and 'wrongful' and shares their instability." To this list of shifting words might be added "negligent act" (Beven); "conduct unlawful per se" (Street); "wrongful act" (Bohlen); "tortious conduct" (Judge Smith); and "harmful act" (Beale). With⁵⁹ all respect, the writer believes that the majority of the Court of Appeals reached the correct solution when it held that "the plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." It is not sufficient to show that the act was negligent; it is necessary to prove that a reasonable man in the position of the defendant should have foreseen that the *plaintiff* might be injured thereby.

So far we have been discussing the question whether *A* who has been negligent in relation to *B* can be held liable to *C* who has been injured unforeseeably by the same act. This must not be confused with the further question whether *A* who has done an act which might injure *B* in a foreseeable manner is liable to *B* if the act injures him in an unforeseeable manner. As Judge Cardozo has pointed out, the answer to these two problems is not necessarily the same.⁶⁰ It is unfortunate that this distinction has not been made as clearly by other writers who have dealt with the subject. But although the two questions are distinct, nevertheless they are analogous, and it may therefore be of value to discuss the second question here.

The second question was the one involved in the *Polemis* case.⁶⁰ A workman, employed by the defendants, dropped a plank into the hold of the plaintiff's ship, thereby causing an explosion of petrol vapor which destroyed the ship. The arbitrators found that the workman could not have anticipated the explosion but should have foreseen other possible injury. The

⁵⁹ "The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability." *Palsgraf v. Long Island R. R.*, *supra* note 1, at 346, 162 N. E. at 101.

⁶⁰ The writer has attempted to analyze this case in his article, *LIABILITY FOR THE CONSEQUENCES OF A "NEGLIGENT ACT,"* CAMBRIDGE LEGAL ESSAYS (1926).

Court of Appeal held the defendants liable even though the damage caused could not have been foreseen. Does this conclusion conflict with that reached in the *Palsgraf* case?

As far as authority is concerned there is a conflict, for each of the three Lord Justices in the *Polemis* case cited the dicta in the *Smith* case as the primary authority for their judgments, and they assumed, without any question, that the principle of both cases was the same. Beven's interpretation of these dicta was also approved. It is, therefore, reasonable to suggest that if the Lord Justices had felt themselves to be bound by such a principle as was laid down in the *Palsgraf* case, instead of that of the *Smith* case, they would have reached an opposite conclusion.

As far as logic is concerned it is submitted that the problem in the *Polemis* case, although different from, is so similar to the one at issue in the *Smith* and *Palsgraf* cases, that the same *ratio decidendi* should be followed, and that the conclusion which a court faced with such a problem will reach will depend upon whether it considers the reasoning of the *Smith* or of the *Palsgraf* case correct. The only reason for holding a person liable for unforeseeable consequences is that his act has the quality of wrongfulness, and that where one of two persons must lose, it is the wrongdoer who ought to suffer. This, in substance, is the argument advanced by the minority and rejected by the majority in the *Palsgraf* case. But if we once reject the idea that an act has a general quality of wrongfulness where different persons are concerned, it would seem to follow logically that we must also reject the idea that an act has a general quality of wrongfulness where different consequences are concerned. "Negligence," says Judge Cardozo, "is thus a term of relation," but the relation is one to consequences as well as to persons. *A* is negligent in relation to *B* because he may injure him in a certain manner. *A* cannot be negligent to *B* "in the air." To hold *A*, who has been negligent to *B* in relation to certain foreseeable consequences, liable to *B* for unforeseeable consequences is no more reasonable than to hold *A* liable for such consequences if they happen to *C*. If a distinction is to be drawn between these two cases some illogical results may follow, as the following illustration will make clear.

The ship *Clara*, belonging to *B*, is loaded with cargo belonging to *C*. *A* negligently drops a plank which might foreseeably dent the hull of the ship but cannot foreseeably injure the cargo. In an unforeseeable manner the falling plank starts a fire which destroys the ship and the cargo. According to the reasoning in the *Palsgraf* case, *A* is not liable to *C* for the destruction of the cargo, for nothing in the situation gave notice that the falling plank had in it the potency of peril to *C*'s cargo. On the

other hand, if we accept the *ratio decidendi* of the *Smith* case, then *A* is liable to *C*, for there was negligence in dropping the plank and the consequence of this conduct was the destruction of the cargo. Now shift the problem by having both the ship and the cargo belong to the same owner *B*. It is obvious that a court which follows the *Smith* case will hold *A* liable to *B*. This is substantially what the English Court of Appeal held in the *Polemis* case. What would a court, which accepted the doctrine of the *Palsgraf* case, hold when faced with this problem? It is submitted that it would hold that *A* was not liable to *B*, for *A*'s liability cannot reasonably be made to depend upon who owns the cargo. On what possible principle can *A*'s liability be affected by the fact of ownership? If *A* is not liable when the ship and the cargo belong to different persons why should he be liable when they belong to the same person? In neither case has he been negligent in relation to the cargo, and therefore in neither case ought he to be held liable for its destruction. The reason which applies in the one case ought to apply in the other.

It must be pointed out here, however, that there is a sentence in Judge Cardozo's opinion which may be construed as suggesting that he takes the view that the problems need not necessarily be decided in the same manner: "We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary."⁶¹ That he did not, however, intend to express any definite view on this point, which was not before him, appears from the citations he gives. The first one is to *Bird v. St. Paul F. and M. Ins. Co.*,⁶² in which he had written, "Others would have us say that reasonable probability of injury is important, not so much in measuring the extent of liability for wrong, as in determining whether there has been a wrong. . . . We need not go into these refinements." The second reference is to *Ehrgott v. Mayor, Etc. of City of New York*.⁶³ All that that case held was that the specific harm which actually resulted need not be absolutely foreseeable; as the court said, "Nothing short of Omniscience could have foreseen" that. But this is far different from saying that the defendant would be liable "for any and all consequences however novel or extraordinary." Neither the facts of the *Ehrgott* case, nor the words of the opinion, go as far as that.

Among other references which Judge Cardozo gives are citations from the *Smith* case and the words of Beven and Street. As we have attempted to show, these are in direct conflict with the *Palsgraf* case itself.

⁶¹ *Palsgraf v. Long Island R. R.*, *supra* note 1, at 346, 162 N. E. at 101.

⁶² 224 N. Y. 47, 54, 120 N. E. 86, 88 (1918).

⁶³ 96 N. Y. 264 (1884).

Moreover, Judge Cardozo points out that the doctrine of liability "for any and all consequences" may be too broad, and that it may not apply where there is a diversity of interests.⁶⁴ If the courts once adopt such a distinction, then we are faced with the terrifying prospect of a whole new series of cases in which it will be necessary to consider whether or not a person has the same interest in his foot and his eye, in his two adjoining houses, in his ship and the cargo which it carries. Obviously a single distinction between bodily security on the one hand and property security on the other, would be too broad.

It is, however, unnecessary to discuss here at any further length the question whether or not the principle of the *Palsgraf* case conflicts with that of the *Polemis* case. The important point to realize is that it is in absolute conflict with the dicta in the *Smith* case and with Beven's interpretation of them. It is on the *Smith* case and on Beven that the modern doctrine of liability for unforeseeable consequences has been primarily founded, for, as has been shown above, almost every writer on this subject has quoted and approved them. In view of the authority which any opinion written by Judge Cardozo, and indorsed by the majority of the New York Court of Appeals, must necessarily have, it is suggested that the validity of this generally accepted doctrine should be reconsidered. Is it not more logical to say, as Sir William Holdsworth does, that, "If we are basing liability upon a negligent act, and if negligence consists in a failure to foresee results which ought reasonably to have been foreseen, it would seem that the negligent person ought only to be made liable to the extent to which he ought to have foreseen those results"?⁶⁵

⁶⁴ "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e. g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now." *Palsgraf v. Long Island R. R.*, *supra* note 1, at 346, 162 N. E. at 101.

⁶⁵ 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 463.