Marquette Law Review

Volume 49
Issue 3 *Winter 1966*

Article 6

Limitation of Liability in Wisconsin Negligence Actions

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LIMITATION OF LIABILITY IN WISCONSIN NEGLIGENCE ACTIONS

INTRODUCTION

Students of tort law are occasionally confronted with the use of the phrase "limitation of duty" as a label for those cases where, under circumstances clearly showing a negligent act, the courts have declined to impose liability. Limitation of duty is, in fact, only one of several theories which can be used by a court in holding that there is no liability. There may be a duty to the injured party, plus a negligent act, but with no liability arising because the manner in which the injury occurred was too unusual or improbable, even though the injury was in fact caused by the negligent act. A third, and perhaps narrower, theory is applied to limit liability where the court believes that a socially undesirable new area of liability would arise if the type of injury involved were actionable. These various theories are so interrelated that they cannot be studied as separate and distinct topics.

This article will attempt to discuss the development of the law in the particular fact situation to which these theories typically apply. This fact situation has three characteristics: first, there must be a negligent act; second, there must be causation in fact; and third, the courts must recognize a reason for limiting liability. The first two characteristics are assumed to exist in the discussion since the law has developed around the courts' treatment of the third characteristic, the reason for limiting liability.

The Wisconsin Supreme Court, in the recent case of *Schilling v. Stockel*,[1] was faced with a fact situation in which the plaintiff was driving his car with his left arm resting on the windowsill. The defendant was approaching from the opposite direction in a pickup truck. A large carton was blown off the pickup truck by a gust of wind. It struck the plaintiff's car and injured his elbow.

The court was concerned mainly with the question of the plaintiff's contributory negligence. The jury had attributed fifty per cent of the causal negligence to the plaintiff. On appeal, the court held that although they could not find that the plaintiff was free from negligence as a matter of law, nevertheless ". . . upon these facts, public policy precludes the attachment of liability for his conduct."[2] The court then directed entry of judgment for the full amount of the plaintiff's damages.

The majority held, in effect, that the jury could under these facts find that the plaintiff was contributorily negligent, but that the court could, after this finding, rule that there should be no liability therefor, due to considerations of "public policy."

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[1] 26 Wis. 2d 525, 133 N.W. 2d 335 (1965).
[2] *Id.* at 534, 133 N.W. 2d at 339.

DECISIONS PRIOR TO SCHILLING V. STOCKEL

Before further consideration of the reasoning of the majority and concurring opinions, it is necessary to examine the cases which the court said were determinative of the issues involved in *Schilling*. The court summarized the applicable law as follows:

> On a number of occasions, this court has considered the problem presented when there is a negligent act accompanied by an extraordinary injury. There was a period in our judicial history when we accepted the view of the New York court of appeals in Palsgraf v. Long Island R.R. Co. (1928), 248 N.Y. 339, 162 N. E. 99. Under such view, if there was an injury resulting from careless action which was not reasonably apparent to the one so acting, there was deemed to be no breach of duty to the injured party; he was simply outside of the zone of risk. Waube v. Warrington (1935), 216 Wis. 603, 258 N. W. 497.
> Commencing in 1952, with Pfeifer v. Standard Gateway Theater, Inc. (1952), 262 Wis. 229, 55 N. W. (2d) 29, we ruled on a number of cases in which we rejected "the *no-duty* formula of *Palsgraf* and *Waube*," to use the phraseology of Longberg v. H. L. Green Co. (1962), 15 Wis. (2d) 505, 516, 113 N. W. (2d) 129, 114 N. W. (2d) 435. See Colla v. Mandella (1957), 1 Wis. (2d) 594, 598, 85 N. W. (2d) 345, and Klassa v. Milwaukee Gas Light Co. (1956), 273 Wis. 176, 77 N. W. (2d) 397. Duty is still an important factor in determining whether an act is negligent. . . . However, once an act has been found to be negligent, we no longer look to see if there was a duty to the one who was in fact injured.[3]

PALSGRAF V. LONG ISLAND R. R. CO.

The first case cited by the court is the famous *Palsgraf* case.[4] In that case the plaintiff was injured by a falling scale which was supposedly knocked over by an explosion resulting when an employee of the defendant, while helping a passenger board a train, jarred loose a package containing explosives which the passenger was carrying.

This case, in the majority and dissenting opinions, crystallized the two opposing views on the subject. Justice Cardozo for the majority set forth the no-duty approach. He felt that there was no negligence with respect to the plaintiff, since there was no duty to protect her from something as unforeseeable as the accident in question.

> 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.[5]

Thus, Cardozo stated the rule that foreseeability of injury to the particular person, or one in a like position, was an element to be considered in determining if there was a duty owed.

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[3] *Id.* at 531, 133 N.W. 2d at 338.
[4] Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
[5] *Id.* at 345, 162 N.E. at 101.

Justice Andrews, in his dissent, stated:

> The proposition is this: Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. . . . Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.[6]

His theory is that if anyone is endangered, the actor is negligent toward society as a whole. Once this negligence is established, foreseeability as to the particular type of chain of events that occurred is irrelevant to establish a duty.

It is apparent that foreseeability has its place in both theories. Under Cardozo's approach, the person actually injured, or one in a like position, must have been foreseeably endangered by the defendant's act, and danger to parties not actually injured is irrelevant. Cardozo did not discuss causation, since he felt that there was no negligence upon which to base causation.

Justice Andrews begins his discussion of causation by stating that where injuries "result" from an unlawful act, the defendant is liable for the consequences.[7] It does not matter whether or not the injuries were foreseeable.[8] He subsequently implies that by "result" he means "proximate cause."[9] It is then stated that in determining causation, one factor is whether or not there was a ". . . natural and continuous sequence between cause and effect."[10] Thus he treats "foreseeability" as involving different concepts than those involved in finding a "natural and continuous sequence." It is arguable that what is natural is foreseeable and vice versa. Andrews did not state what he thought the difference to be.

There is a question as to the actual issue involved in *Palsgraf*. Cardozo's position is fairly clear, but it is uncertain whether Andrews was saying that there was a jury question as to whether the plaintiff was endangered, or that it made no difference whether or not he was endangered.

WAUBE V. WARRINGTON

The first Wisconsin case to cite *Palsgraf* was *Waube v. Warrington*.[11] There the plaintiff's wife died of shock after seeing their daughter killed by the defendant's auto. The court held that there could be no recovery, and used language similar to that used by Cardozo in *Palsgraf*, although the court did not state that it was following the *Palsgraf* decision. The court stated that the duty must be deter-

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[6] *Id.* at 350-351, 162 N.E. at 103.
[7] *Id.* at 351, 162 N.E. at 103.
[8] *Ibid.*
[9] *Ibid.*
[10] *Id.* at 354, 162 N.E. at 104.
[11] 216 Wis. 603, 258 N.W. 497 (1935).

mined before causation could be discussed.[12] It was then stated that the duty cannot be extended beyond the field of physical peril.[13] However, in addition to this language the court also recognized the policy argument that to impose liability for mental shock arising from fear for the safety of others would impose too great a burden on the users of the highways.[14] The possibilities of liability would be greatly increased if this were to be allowed. Thus there are two separate theories evident in the opinion, either one of which would be sufficient to support the decision reached.

It should be noted that in *Waube* there was not actually a *Palsgraf* type fact situation. There was no actual physical contact which caused the injury to the plaintiff's wife, which might place the case in an area of the law separate and unique from direct-physical-contact cases. Also, it is arguable that the type of injury involved was actually foreseeable. which was not the case in *Palsgraf*. A few other states have applied the reasoning of *Palsgraf* to this type of fact situation.[15]

Pfeifer v. Standard Gateway Theaters, Inc.

The next case which purported to deal with the same problem was *Pfeifer v. Standard Gateway Theater, Inc.*[16] The court in that case was confronted with a trial court's jury instruction which used the language "natural and probable result"[17] and "ought reasonably to foresee"[18] with reference to the method of determining proximate cause. In reversing, the supreme court held that foreseeability is not an element of causation,[19] citing *Osborne v. Montgomery*.[20] Also, the use of the term "substantial factor"[21] was recommended instead of "proximate cause."

By eliminating foreseeability as an element of causation, the court seemed to go farther than the position taken by Justice Andrews in his dissent in *Palsgraf*. Andrews said that there was causation if there was a "natural and continuous sequence between cause and effect." The Wisconsin court in *Pfeifer* implies that the word "natural" involves foreseeability, and is therefore undesirable. But to completely eliminate foreseeability would result in liability for all consequences which could be traced back to the negligent act, as long as there be no intervening

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[12] *Id.* at 605, 258 N.W. at 497.
[13] *Id.* at 613, 258 N.W. at 501.
[14] *Ibid.*
[15] Curry v. Journal Publishing Co., 41 N.M. 318, 68 P. 2d 168 (1937) (cites *Waube* extensively); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E. 2d 420 (1944); Cote v. Litawa, 96 N.H. 174, 71 A. 2d 792 (1950); Resavage v. Davies, 199 Md. 479, 86 A. 2d 879 (1952).
[16] 262 Wis. 229, 55 N.W. 2d 29 (1952).
[17] *Id.* at 233, 55 N.W. 2d at 31.
[18] *Ibid.*
[19] *Id.* at 235-236, 55 N.W. 2d at 32.
[20] 203 Wis. 223, 234 N.W. 372 (1931).
[21] Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 236-37, 55 N.W. 2d 29, 33 (1952).

cause. The court recognized that this would be going too far, and qualified the holding:

> [I]n cases so extreme that it would shock the conscience of society to impose liability, the courts may step in and hold as a matter of law that there is no liability. . . .
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> . . . If the jury does determine that there was negligence, and that such negligence was a substantial factor in producing the injury, it is then for the court to decide as a matter of law whether or not considerations of public policy require that there be no liability.[22]

This tells us that the court must make a determination of when the conscience of society would be shocked. But the case gives no guidelines as to what type of fact situation would shock this collective conscience.

KLASSA V. MILWAUKEE GAS LIGHT CO.

The next case cited in *Schilling* as bearing on the question of limitation of liability is *Klassa v. Milwaukee Gas Light Co.*[23] The plaintiff was denied recovery in this case because the testimony indicated that her physical illness was caused not by anxiety for her own safety, but for the safety of others. The court re-affirmed the reasoning of *Waube* on similar facts, saying that the conclusion reached was grounded upon judicial policy.[24] Of the two arguments advanced in *Waube* the court emphasized the policy argument.

> Whenever a court holds that a certain act does not constitute negligence because there was *no-duty* owed by the actor to the injured party, although the act complained of caused the injury, such court is making a policy determination.[25]

This general statement seems to indicate that either the court was ignoring the *Palsgraf* theory of "no-duty because no foreseeability," admittedly not applicable in *Klassa,* or they were saying that foreseeability is a consideration in finding public policy.

COLLA V. MANDELLA

The court was soon considering the problem again in *Colla v Mandella.*[26] Here the injured party was sleeping in his house when it was struck by a runaway truck owned by the defendant. He subsequently died of a heart attack. The court allowed recovery for injuries resulting from fear of personal injury. *Waube* and *Klassa* were cited as not holding to the contrary.[27] The court again discussed the possibility of

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[22] *Id.* at 238-240, 55 N.W. 2d at 34-35.
[23] 273 Wis. 176, 77 N.W. 2d 397 (1956).
[24] *Id.* at 182-183, 77 N.W. 2d at 401.
[25] *Id.* at 183, 77 N.W. 2d at 401.
[26] 1 Wis. 2d 594, 85 N.W. 2d 345 (1957).
[27] *Id.* at 598, 85 N.W. 2d at 348.

limiting liability where the consequences of the negligent act are unusual or improbable.

> It is recognized . . . that even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because the injury is too remote from the negligence or too "wholly out of proportion to the culpability of the negligent tort-feasor." . . .[28]

The decision did not add much to previous decisions, other than to rephrase the "conscience of society" concept in the slightly more specific terms of remoteness and proportion of injury to culpability. Since the plaintiff recovered there was still no indication of what would sufficiently shock the conscience to limit liability.

LONGBERG V. H. L. GREEN CO.

The last in the string of cases cited in *Schilling* as being applicable to the question at hand was *Longberg v. H. L. Green Co.*[29] There the plaintiff was injured by a fall on an icy sidewalk. The ice had been formed by water which had leaked from the defendant dentist's upstairs office and had travelled down through the walls and onto the sidewalk. The court allowed recovery against the dentist, saying that his liability was not wholly out of proportion to his culpability.[30]

The court stated:

> The public-policy determination formula of *Pfeifer, Klassa,* and *Colla* seems to us a more realistic description of what a court does when it declines to impose liability in these situations than the *no-duty* formula of *Palsgraf and Waube.*[31]

This was the state of the law immediately prior to the *Schilling* case. It is clear from the language used in *Longberg* that the court considered the *Waube* type fact situation to be the same as the "remoteness" or "disproportion of injury to culpability" situation which was discussed in *Pfeifer, Colla, Klassa* and *Longberg,* for purposes of limiting liability. It should be noted, however, that in none of these latter cases did the court find that there was a degree of remoteness or disproportion which was sufficient to deny recovery. The policy consideration discussed in *Waube* was the undesirability of placing an undue burden on the users of the highways. This is a social policy which is aimed at promoting a desirable change, or discouraging an undesirable change, in society. The questions of remoteness or disproportion of injury to culpability appear to be considerations of justice and fair play rather than social policy. "Judicial policy" is a better term to describe this latter type of policy consideration. The term

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[28] *Id.* at 598-599, 85 N.W. 2d at 348.
[29] 15 Wis. 2d 505, 113 N.W. 2d 129 (1962).
[30] *Id.* at 516, 113 N.W. 2d at 135.
[31] *Ibid.*

"public policy" has, through judicial definition in countless jurisdictions, become so general in meaning that it can include both types of consideration discussed here.[32] The very fact of its generality makes it almost meaningless.

The question of whether or not Wisconsin ever adopted the no-duty rule of *Palsgraf* has little bearing on the present state of the law, unless and until a true *Palsgraf* type fact situation arises in a Wisconsin case. If in fact this rule ever was adopted, it has not been used or emphasized in cases subsequent to *Waube.* However, it has never been directly repudiated, although some dicta in the cases may so indicate.

The only two cases where the plaintiffs were denied recovery on grounds of public policy were *Waube* and *Klassa,* and they were decided on the basis of a desirable social result, with no question of foreseeability involved. Thus, the question prior to *Schilling* was how foreseeability would fit into the considerations of public policy used by the court in limiting liability. The Wisconsin court has never, at least since *Waube,* had before it a true "fantastic chain of events" fact situation where the result was clearly unforeseeable to the negligent actor.

Thus, the only definite law prior to *Schilling* was that the court could limit liability where a desirable social result was thereby effected, and that the jury could not consider foreseeability in determining causation.

Implications of Schilling

The *Schilling* case represents the first instance where the court has declined to impose liability because of public policy where the policy was of the "justice and fair play" variety, rather than the "social engineering" variety. The question then becomes whether or not the decision provides any substantial guidelines for the future.

In *Schilling,* as in *Longberg,*[33] the court treated the previously discussed cases as involving a single type of fact situation with only one rule of law applicable. There was no mention, either in *Schilling* or in the other Wisconsin cases, of sub-classifying the fact situations beyond the general heading of "a negligent act accompanied by an extraordinary injury." As previously stated, *Palsgraf*[34] has been interpreted so broadly in other jurisdictions[35] that it might be said to support this very general

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[32] "The term 'public policy' is perhaps the most expansive and widely comprehensive phrase known to the law . . . . The phrase is used in several senses, and it may mean the common law or general statutory law of the state, and it may mean the prevalent notions of justice and general fundamental conceptions of right and wrong, and it may mean both . . . .

. . .

"'Public policy' is further defined as being that rule of law which declares that no one can lawfully do that which tends to injure the public, or is detrimental to the public good. . . ." 72 C. J. S. *Policy* (1951).

[33] Longberg v. H. L. Green Co., 15 Wis. 2d 505, 113 N.W. 2d 129 (1962).

[34] Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[35] Note 15 *supra.*

classification. But, an analysis of the case will reveal that only a very narrow type of fact situation was involved. Not only was there a completely unexpected chain of events which was set in motion by the defendant's negligent act, but the person injured was not the one endangered by the original act. If the person carrying the package had been injured by the exploding fireworks, there would still be an unforeseeable chain of events, but the injury would have been foreseeable.

There are actually three possible types of fact situations in any negligence action: (1) a foreseeable injury may be caused by a foreseeable chain of events; (2) a foreseeable injury may be caused by an unforeseeable chain of events; and (3) an unforeseeable injury may be caused by an unforeseeable chain of events.[36] In jurislictions where the no-duty rule of *Palsgraf* is followed, it is essential to know whether or not the facts in a given case fit into the third category, which is the only one where the no-duty rule applies. Cardozo said that in this category there can be no liability. In jurisidictions which follow this, a clear distinction is made between the "unforeseeable injury from unforeseeable chain of events" situation and the injury which results to a particular person from a *general* menace, where it is not necessary to identify in advance the exact person who will be injured.[37]

If the no duty rule is not the law in Wisconsin, there is no necessity of making the foregoing classifications, at least with respect to the determination of duty, but Wisconsin has had no judicial determination of the exact question involved in Cardozo's decision. *Waube*[38] is the only case that is even arguably close to the *Palsgraf* type fact situation, since the mother was clearly beyond the physical danger area. Even so, it can be said that the mental shock was forseeable. In both *Klassa*[39] and *Colla*[40] the injured parties were clearly within the physical danger area, and in *Pfeifer*[41] and *Longberg*[42] there was a general risk such that if any class of persons was endangered, the plaintiff was a member of that class. There can be no final determination of this point in Wisconsin until a fact situation fitting the "unforeseeable injury

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[36] It is obvious that there can be no fourth category with unforeseeable injury resulting from a foreseeable chain of events which, by definition, involves a foreseeable injury.

[37] "We see little similarity between the Palsgraf case and the situation before us . . . [A] ship insecurely moored in a fast flowing river is a known danger not only to herself but to the owners of all other ships and structures downriver, and to persons upon them . . . . The shipowner and wharfinger in this case having thus owed a duty of care to all within the reach of the ship's known destructive power, the impossibility of advance identification of the particular person who would be hurt is without legal consequence." Petition of Kinsman Transit Co., 338 F. 2d 708, 721-22 (2d Cir. 1964).

[38] Waube v. Warrington, 215 Wis. 603, 258 N.W. 497 (1935).

[39] Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W. 2d 397 (1956).

[40] Colla v. Mandella, 1 Wis. 2d 594, 85 N.W. 2d 345 (1957).

[41] Pfeifer v. Standard Gateway Theaters, Inc., 262 Wis. 229, 55 N.W. 2d 29 (1952).

[42] Longberg v. H. L. Green Co., 15 Wis. 2d 505, 113 N.W. 2d 129 (1962).

from unforeseeable chain of events" category is litigated, with the question of duty being raised. The Wisconsin jury instructions, which contain no requirement that the injured party be endangered by the original negligent act in order to recover,[43] assume that the no-duty rule is not the law in Wisconsin. The dictum in *Schilling* that the no-duty formula of *Palsgraf* has been rejected is at least a strong indication that it *would* be rejected.

The only alternative to the no-duty rule is the "duty to the world at large" rule espoused by Justice Andrews in his *Palsgraf* dissent. But, this applies only to considerations of duty. Andrews clearly indicated that foreseeability of the injury was an element of causation to be considered by the jury. It is unquestionably the law in Wisconsin that foreseeability is not a consideration in determining causation. Thus, if the "duty to the world at large" rule is coupled with the substantial factor rule of causation there is absolutely no occasion for the jury to consider whether or not the injured party was endangered by the original negligent act. Not even Justice Andrews' *Palsgraf* dissent goes this far.

The court in *Schilling* also did not differentiate between situations where the plaintiff's contributory negligence is in question and situations where only the defendant's negligence is in question. The difference between these two types of situations may be relevant in the "foreseeable injury from unforeseeable chain of events category." There is a split of authority as to whether or not there should be recovery where the person who was endangered by an act is the one who was injured, but by an unexpected chain of events.[44] The reason given for allowing recovery is that ". . . as between an entirely innocent plaintiff and a defendant who has been negligent as to results lying within the risk, the burden of the loss due to consequences beyond the risk should fall, within some ultimate limits, upon the wrongdoer."[45] However, it is arguable that liability should not attach where there is contributory negligence, since there is no completely innocent party.

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[43] "A person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person or property of (himself or) another to an unreasonable risk of injury or damage." WISCONSIN JURY INSTRUCTIONS—CIVIL, No. 1005 (1963).

[44] "[A] limitation to 'probable' or foreseeable consequences would restrict liability to the scope of the original risk created, and make the test of responsibility for the result identical with the test of negligence. This view has had considerable support in modern cases . . . ."

. . .

"There is an opposing view, that a defendant who is negligent must take existing circumstances as he finds them, and may be liable for consequences brought about by his acts, even though they were not reasonably to be anticipated." PROSSER, TORTS §48 at 260 (2d ed. 1955); see also PROSSER, TORTS §50, at 289-90, 299 (3rd ed. 1965).

[45] PROSSER, TORTS §48 at 260 (2d ed. 1955).

Having looked at what the court did not say in the decision, the next question is what it explicitly stated the law to be.

The court began by discussing the treatment of "arm out the window" cases in other jurisdictions:

> A few cases in other jurisdictions have taken the view that one whose arm is injured while extended from a motor vehicle is contributorily negligent as a matter of law, but the majority of cases have recognized this to be a question for the jury. . . .[46]

In fact, there are *no* cases cited in the A.L.R. annotation relied upon by the court which hold that having an arm out the window is contributorily negligent as a matter of law without some foreseeable danger before the accident, such as a car approaching on the wrong side of the road,[47] or where the injured party's own car has gone out of control.[48] Thus, in a fact situation like *Schilling,* where there was no unusual occurrence or warning to the plaintiff before the accident, there is overwhelming authority[49] that the issue of contributory negligence should be determined by the jury. The *Schilling* decision does not discuss why, in the face of such authority, the decision was in practical effect taken from the jury.

Justice Beilfuss, in his concurring opinion, stated that the plaintiff was not negligent as a matter of law, because there was nothing in the surrounding circumstances which would indicate any danger.[50] Justice Beilfuss stated the governing law as follows:

> The main question raised by the cases contained in the present annotation is whether the extension of a hand, arm, or other portion of the body from a motor vehicle constitutes contributory negligence. The majority of cases have taken the view that this is a question for the jury, and the courts have generally sustained the verdict of the jury in favor of the plaintiff, although a few have taken the view that under the circumstances of the particular case the plaintiff's position constituted contributory negligence as a matter of law. . . .
> . . . Every case, of course, turns upon its individual fact situation. . . .[51]

Justice Beilfuss stated further that he agreed with this as a general statement, but that it did not apply under the facts of *Schilling.* However, the cases in the annotation indicate that there are two alternatives; either the question is one for the jury or the plaintiff is *negligent* as a matter of law. Justice Beilfuss contends that either the question is one for the jury or the plaintiff is *not negligent* as a matter of law. The *Schilling* fact situation is precisely the type where the jury normally

[46] Schilling v. Stockel, 26 Wis. 2d 525, 530-31, 133 N.W. 2d 335, 338 (1965).
[47] Winninger v. Bennett, 104 S.W. 2d 413 (Mo. 1937).
[48] Black v. City of Berea, 137 Ohio St. 611, 32 N.W. 2d 1 (1941).
[49] Annot., 40 A.L.R. 2d 233, 235 (1955).
[50] 26 Wis. 2d at 541, 133 N.W. 2d at 343.
[51] *Op. cit. supra* note 49.

determines negligence, and nothing in the facts distinguishes it from those cases, nor is there any indication by Justice Beilfuss why it should be so distinguished.

Thus, the court has held that there are factors which are beyond the province of the jury, but which the court may consider in limiting liability. The court determined that public policy requires that the plaintiff not be held liable for his negligent act.[52] Nothing was added which would clarify the meaning of public policy as a guide for the future. The term itself is the only standard, but is too general.[53] Until the court comes forth with a more detailed explanation of the nature of public policy, the inference arises that the court is using "foreseeability," only under a different name.

The *Osborne*[54] case itself, which *Pfeifer*[55] cites as the source of the doctrine of "no foreseeability in causation," contains language to the effect that foreseeability, while a consideration in negligence itself, may also operate to limit the legal consequences of the negligent act to the actor.[56]

If "public policy" does contain some element of foreseeability, the result is a situation where the court is doing what it has said a jury cannot do. It is limiting liability with a concept which is similar, if not identical, to the element of foreseeability in causation. If this is so, is it a desirable state of the law? Dean Prosser has said:

> The sole function of a rule of limitation in these cases is to tell the court that it must not let the case go to the jury. Yet we are in a realm where reasonable men do not agree. At least if judges and legal writers be reasonable men they have not agreed. . . .[57]

Justice Fairchild, in his concurring opinion in *Schilling,* stated that the question should be left to the jury, with the qualification that on the facts of the case the negligence of the defendant was greater than that of the plaintiff.[58]

CONCLUSION

Many questions remain unanswered. The *Schilling* decision answered nothing except the question of whether or not the court would ever limit liability under the "public policy" theory. There is also strong dictum to the effect that the no-duty rule will not be followed in Wisconsin if and when a true *Palsgraf* type fact situation arises.

The Wisconsin court's use of "negligent act accompanied by an

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[52] 26 Wis. 2d at 534, 133 N.W. 2d at 339.
[53] "The term 'public policy' is admittedly one of a vague and uncertain meaning . . . ." Trumpf v. Shoudy, 166 Wis. 353, 359, 164 N.W. 454, 456 (1917).
[54] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).
[55] Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W. 2d 29 (1952).
[56] 203 Wis. at 234, 234 N.W. at 376.
[57] Prosser, *Palsgraf Revisited,* 52 MICH. L. REV. 1, 31 (1953).
[58] 26 Wis. 2d at 537, 133 N.W. 2d at 345.

extraordinary injury" as a label for a fact situation is little more than a statement that the tort of negligence is involved. To imply that *Palsgraf* is the starting point for the development of the law applicable to the *Schilling* facts is at the least misleading. The issue argued in *Palsgraf* was whether or not there should be recovery for an unforeseeable injury resulting from an unforeseeable chain of events. The issue in *Schilling* was whether or not, where plaintiff's injury was clearly foreseeable if defendant was negligent at all, the unforeseeable chain of events was so unusual as to require the court to hold that there should be no liability. The confusion is compounded when the public policy considerations involved in *Waube* and *Klassa* are first mixed with questions of duty and causation and then extended to embrace considerations of foreseeability and disproportion of injury to culpability.

The most important question is still left unanswered. What is the nature of the "public policy" that guides the court in determining liability? The conclusion seems inescapable that it is the "foreseeability" that was eliminated as an element of causation in *Pfeifer*. It seems to have developed from a reluctance on the part of the court to go to the extreme of allowing recovery in every case where the injury could be traced back to the negligent act under the "substantial factor" test. If so, why should it not be a jury question whether or not unforeseeability of the consequences of a negligent act may preclude recovery?

No reason has been set forth by the court to explain why an apparent jury question should have been taken over by the court. If there is no strong justification, then the inference may arise that the court is attempting to remedy a previous mistake without admitting it; that mistake being the elemination of foreseeability as an element of causation.

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