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THE RIDDLE OF THE PALSGRAF CASE

BY THOMAS A. COWAN*

ALTHOUGH now ten years old and the much scarred object of attack and counter-attack by learned writers in the field of torts, the case of *Palsgraf v. Long Island Railroad*¹ is still the best springboard available from which to plunge into the troubled waters of the law of negligence. The decision raises most of the important issues of this branch of the law. In addition, it has the advantage of being a real case decided by distinguished judges. A hypothetical case involving the same facts would be regarded as too fantastic for serious consideration.

If the *Palsgraf Case* were nothing but the record of the disposal of a lawsuit, then the unremitting attention which it has received from writers on the law of torts would be difficult to understand.² However, it is more than a mere case. It is a legal institution. Not only is it constantly cited with approval and followed by numerous courts; it is also a direct and distinct intellectual challenge to anyone who finds it necessary to read and to understand it. In this article, the writer proposes to do two things: First, and incidentally, to state as precisely as possible what he believes the *Palsgraf Case* stands for. Second, and mainly, to discuss in general terms several important aspects of the law of negligence in the light of that famous decision.³

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¹(1928) 248 N. Y. 339, 162 N. E. 99.

²See particularly Green, *The Palsgraf Case*, (1930) 30 Col. L. Rev. 789; Green, *Judge and Jury* (1930) Ch. 8; Goodhart, *The Unforeseeable Consequences of a Negligent Act*, (1930) 39 Yale L. J. 449; Harper, *Liability Without Fault and Proximate Cause*, (1932) 30 Mich. L. Rev. 1001, 1004; Harper, *Treatise on the Law of Torts* (1933) 154, 166; Buckland, *The Duty of Care*, (1935) 51 L. Q. Rev. 637; Prosser, *The Minnesota Court on Proximate Cause*, (1936) 21 MINNESOTA LAW REVIEW 19, 31 et seq.; *Restatement, Torts*, sec. 281 (b), Comment *g*.

³The law of negligence, unlike many other branches of the common law, owes much of its present form to the great writers on torts. Their ideas pervade the entire subject and one can write on negligence today only within the intellectual milieu which they have created. The following discussion is no exception to the rule. On the contrary, it may be taken as a particularly good example of the operation of this principle. It is clear, therefore, that it would be impossible to credit by means of specific reference every writer whose ideas have been made use of in this article. Never-

At the risk of wearying those readers who have the case well in mind, we must repeat its essential facts. The plaintiff Mrs. Palsgraf, while awaiting a train, was standing under some scales on a station platform of the defendant railroad. Thirty feet or more away, railroad guards were assisting a passenger to board a slowly moving train. The passenger was carrying an innocent looking package which contained explosive fireworks; and when this was knocked under the wheels of the coach by one of the railroad guards, it exploded. The platform was shaken, and the scales were knocked down, injuring Mrs. Palsgraf. The jury found that the guards had been negligent in handling the boarding passenger. The trial court refused to charge that the negligent handling of this passenger was not the proximate cause of the injury to Mrs. Palsgraf. There was judgment for the plaintiff and the defendant appealed. In a three-to-two decision, the appellate division affirmed the judgment.⁴

The opinions of the judges of the appellate division are brief and to the point. In the majority opinion, the judges agreed that the jury might well find negligence. All other issues, except duty, they resolved under the pat formula: "Every case must stand upon its own facts." The duty breached was made out simply: "It must be remembered that the plaintiff was a passenger of the defendant, and entitled to have the defendant exercise the highest degree of care required of common carriers."

The minority opinion was equally clear-cut. Although admitting that the jury was warranted in finding the defendant negligent, the dissenting judges argued that as a matter of law the injury was too remote. They refused to regard the negligence of the defendant as the proximate cause of the injury because of the intervening negligence of the passenger in carrying explosives.

In the light of the concepts usually employed, either of these

theless, I am conscious of being especially indebted to the following in addition to those cited in note 2 *supra*. Bohlen, *Studies in the Law of Torts* (1926); Bohlen, *Selected Essays on the Law of Torts* (1924); Green, *Rationale of Proximate Cause* (1927); Green, *The Duty Problem in Negligence Cases*, (1928) 28 *Col. L. Rev.* 1014, (1929) 29 *Col. L. Rev.* 255; Winfield, *Duty in Tortious Negligence*, (1934) 34 *Col. L. Rev.* 40; Winfield, *The Law of Tort*, (1935) 51 *L. Q. Rev.* 249; Pollock, *Liability for Consequences*, (1922) 38 *L. Q. Rev.* 165; Pollock, *The Law of Torts* (13th ed. 1929); Edgerton, *Legal Cause*, (1924) 72 *U. Pa. L. Rev.* 211, 343; McLoughlin, *Proximate Cause*, (1925) 39 *Harv. L. Rev.* 149; 1 Street, *Foundations of Legal Liability* (1906).

⁴*Palsgraf v. Long Island R. R.*, (1927) 222 *App. Div.* 166, 225 *N. Y. S.* 412.

opinions would have disposed of the case quite satisfactorily. The case is an ordinary one involving a freak accident. The books are full of them, and usually they are settled by reference to duty of care or to proximate cause.

However, the *Palsgraf Case* was not destined to rest at the level of simplicity. In the court of appeals it became the subject of two involved opinions, that of the court being written by Judge Cardozo and that of the dissentients by Judge Andrews. The judgments of the appellate division and of the trial court were reversed and the complaint was dismissed. That much is certain. But the reasons for the ruling of the court of appeals and the reasons why the minority opposed that ruling are buried in a tangled web of legal theories.

For the majority, Judge Cardozo wrote that the defendant's servants, if negligent at all, had been negligent toward the passenger; that no duty of care was owed to Mrs. Palsgraf since no risk of injury to her was foreseeable; that Mrs. Palsgraf might not avail herself of the duty owed to someone else as the basis of liability to her on some theory of negligence in the abstract; and that since no duty was made out, there was nothing for the jury to find respecting negligence, and no inquiry into proximate cause was in order.

Judge Andrews' opinion for the minority took the view that since the jury found the defendant negligent at least toward the passenger, such negligent conduct entailed liability for all harmful consequences of which it was the proximate cause. In his view, one owes to the world at large a duty to refrain from conduct creating an unreasonable risk of injury to others. If harm results from such conduct, a breach of duty is fully made out. Whether the negligence of the defendant was in fact the proximate cause of the plaintiff's injury was in his opinion not a question which the appellate court might properly consider.

Negligence toward the passenger, therefore, was a large bone of contention in the court of appeals. Judge Cardozo's opinion seems to center around what might be called "transferred negligence," on analogy to the similar doctrine of transferred intent. He says repeatedly that although the conduct of the defendant's guards might have been negligent as to the passenger, it was not negligent as to Mrs. Palsgraf. Her right of action must be primary, not derivative. It must stem from a duty owed to her, not to someone else. The trial court and the appellate division had

decided the case without reference to a possible right of action in the passenger against the defendant. Could not the court of appeals have done the same thing?

Let us take the passenger (and any duty owed to him) out of the case for the moment. Suppose the defendant's servants were negligent in loading a crate, owned by the defendant or another, on the baggage car of a train. Unknown to anyone in the railroad's employ, the crate unlawfully contained dynamite. The dynamite exploded, the scales were thrown down and Mrs. Palsgraf was injured. How would the case be decided now? Surely not on the ground that a duty was owed to the owner of the crate and that Mrs. Palsgraf might not derive from that duty a right of action for herself. The hypothetical case would be decided, we may presume, either on the theory of foreseeability or unreasonableness of risk (duty), or on proximate cause, or both. The decision of the majority would then be that no duty owed to Mrs. Palsgraf had been breached since she was outside the area of foreseeable risk. The minority's view would be that a duty owed to the plaintiff had been breached, and that the appellate court could not say as a matter of law that the negligence was not the proximate cause of the injury. The duty of the railroad to the owner of the crate would not be relevant.

Both Cardozo and Andrews needlessly complicated their opinions by neglecting to dismiss from consideration the question of duty owed to the passenger. With Cardozo this position seemed to make it necessary for him to do battle with the theory of "negligence in the air," a theory which Andrews lost no time in repudiating. Second, Cardozo was forced to consider and discard the theory of transferred negligence. Andrews, of course, relied upon "transferred negligence." In fact, he carried transference to its ultimate conclusion by raising the duty of care to the rank of a universal command: "Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." By this process of expansion he found a duty to the plaintiff.

It would have been much simpler if Cardozo could merely have said that injury to the plaintiff was unforeseeable and that hence she was outside the area of risk. Likewise Andrews could simply have said that the defendant's conduct was negligent as to Mrs. Palsgraf and that the refusal of the trial judge to rule that the negligence was not the proximate cause of the injury was

justified. This view would serve to dispose of the *Palsgraf Case*. Of course, it would not also dispose of the legal problems raised by the case: namely, transferred negligence, duty of care, foreseeability, and proximate cause.

TRANSFERRED NEGLIGENCE

A's conduct subjects B to unreasonable risk of injury. C is hurt as a result of A's act. Has A violated a duty to C? On Judge Andrews' theory one might be inclined to answer that he had, since every one owes to the world at large the duty not to threaten unreasonably the safety of others. On Judge Cardozo's theory, one might reply that he had not, unless C was within the orbit of risk.

The difference between these tests of the existence of the duty is not as wide as the verbal statement of them might seem to indicate. Cardozo says that the test is this: Did the defendant owe to Mrs. Palsgraf (or to one of her general class, i. e. intending passengers) a duty not to subject her to a risk which had as a foreseeable result the likelihood of the type of injury that occurred? Andrews, on the other hand, says that the test is the following: Did the defendant owe to the world at large the duty not to engage in conduct unreasonably dangerous to others, regardless of whether injury to Mrs. Palsgraf was foreseeable or not? Andrews did not mean that, given a condition of negligence toward some one, the defendant is liable for all injuries that actually occur to anyone whatever. "Proximate cause" still limits liability. And Cardozo did not mean that likelihood of injury to the individual plaintiff had to be foreseeable. It would suffice if the risk was to a general class of which the plaintiff was a member. Cardozo might deny liability by holding that the plaintiff's injury fell outside the foreseeable orbit of risk; Andrews could reach the same result by calling the injury remote, or the risk not unreasonable. In other words, if the judges had used different tests of the existence of duty, the same results could have been reached. Conversely, if the judges had used the same tests, different results could have been arrived at. In the *Palsgraf Case*, the intuition of the two judges led them to different results, but this was not necessarily because they used different methods.

Now, although identical results might be reached under either theory, this does not mean that the temper of the doctrines is the same. Unquestionably, Judge Andrews imposes a stricter standard

of responsibility, and the application of his rule would be likely to result in more judgments for plaintiffs. He does not excuse unforeseeable harm. His only limitation is proximate cause, whereas Cardozo allows both to limit liability.

As Cardozo pointed out, Andrews' theory of duty is analogous to the doctrine of "transferred intent." It conceives of negligence as continuing anti-social conduct. A, intending to injure B, accidentally injures C. A is held liable on the basis of an intentional injury to C. I have not heard anyone explain transferred intent on the theory that one owes to the world at large the duty not to subject the safety of others to risk of intentional harm and that one who intends harm to another intends harm to all others. And yet this might do as hasty rationalization of the cases on intended wrongs. Cardozo admits that his theory does not apply to wilful wrongs, which he implies are governed by the less refined rule of the earlier law that one acts at his peril. He makes no attempt to explain why the rule of intentional wrong should be different from that for injuries arising from negligence. The intimation is that when the law becomes less barbaric, the rule of intentional wrongs will change to conform to that of negligence. However, we are far from sure of that. Liability without specific fault is growing, not diminishing.

Let us scrutinize more closely the analogy between transferred intent and transferred negligence. A, intending to harm B, injures C, an innocent bystander. A is held to have "intended" the injury to C. Can the injury to C really be called intentional, or must we say that though the injury to C was not intentional, nevertheless one bent on mischief is liable for all the harm he causes?

Either theory will do. We may regard the injury as intentional, by expanding the meaning of the term intentional. That is, we may depersonalize the end terminus of the relation "intends to injure," so that the proposition, A intends to injure B, implies that A intends to injure everybody. Intent is thus transferred from one to all. On the contrary, we may refuse to regard the injury to C as intentional, but hold A responsible on the theory of absolute liability for all harm caused where intention to injure anyone is made out. This position rejects the possibility that intent can be transferred and thus is in accord with the popular notion that intent is a specific state of mind, but the result is the same.

There is indeed a third alternative which regards transference

as neither right nor wrong, but irrelevant. It might be called *objective* intent. Working backward from the injury to the act of the defendant, it determines whether in fact the defendant's conduct entailed that high degree of likelihood of harm which one customarily associates with intention to injure. This theory disregards the defendant's secret intention or state of mind and gathers intent solely from conduct. It also dismisses as irrelevant defendant's *desire* to injure some specific individual or thing, and takes account only of the probability of harm attendant upon his risky conduct.

These three theories may also be applied to "transferred negligence." If this is done the third (the objective theory) which is weakest for intent, becomes strongest for negligence. Let us suppose that A's conduct is such that if injury were to result to B, A would be negligent toward B. In fact C is injured. Here again we may expand the meaning of negligence (or duty of care) by depersonalizing the object end of the relation "is negligent to." Negligence to one becomes negligence to all. Second, we may refuse to expand the term negligence, but impose absolute liability once a condition of negligence (less injury) to anyone is found. Finally, we may merely regard defendant's conduct objectively, and ask whether in fact it constituted an unreasonable risk to the injured party without regard to whatever other persons or objects might likewise have been subjected to risk of injury. This third view rejects negligent states of mind, negligence in the abstract and negligence in the air. It avoids the sense of unreality attached to Andrews' doctrine of negligence toward the whole world. Moreover, this view escapes the danger that the risk to the person actually injured will be minimized whenever the risk to the one who escaped injury is much greater.⁵ For instance, it is just possible that if the railroad guards had been careless in loading a box on the train rather than in assisting a passenger (and hence a depository of legal rights in himself), the court might have been more willing to agree that the defendant was negligent as to Mrs. Palsgraf.

Whatever may be said of the desirability of retaining the no-

⁵Throughout the entire opinion Cardozo had his eye focused on the boarding passenger. Injury to him was more likely than injury to Mrs. Palsgraf. *This is a psychological weakness in the foreseeability test.* It is difficult to regard as foreseeable an unlikely injury, when an injury much more likely to happen does not in fact occur. In determining foreseeability, risk alone is relevant. What injury actually happened is not in point. And the greater risk tends to overshadow and minimize the lesser risk.

tion of transferred intent, transferred negligence should be discarded out of hand. The doctrine is not needed. It is commonplace that carelessness leads to unexpected injuries. In determining whether the careless agent is liable for injury which, though less likely, has in fact occurred, it is in no sense important to consider what other possible injuries were more probable.

Andrews' doctrine of transferred negligence is in result a species of strict liability, with the qualification that the defendant's conduct be *virtually* negligent, i.e., have all the elements of negligence toward someone, save only damage to that one. It is an intermediate position between liability for all harm however caused, and liability only to the restricted class foreseeably subjected to unreasonable risk.

Andrews' theory runs counter to what I believe is still current sentiment in favor of dangerous enterprise.⁶ Even reckless conduct, certainly mere negligence, and particularly risk in commercial enterprise, when not resulting in actual damage are all apt to be lightly regarded and readily condoned. In a vast number of cases, liability for negligence is in no sense based upon carelessness or inadvertence, but is the foreseeable result of the pursuit of the ordinary affairs of life in an exemplary manner. This is the basis of workmen's compensation statutes and is generally recognized as such. What is not so frequently mentioned is the fact that all human endeavor takes its expectable toll of invaded interests. Industry maims and kills others than its employees with fairly determinable regularity. Automobilists slay those rash enough to venture upon the public highways with a periodic frequency that is a delight to students of actuarial science. One does not know of the manifold and complicated legislative and judicial standards of care. One cares even less, until the possibility of damage enters the picture. Enterprise would stop or liability insurance would be universal if standards of care had always to be observed. This is the real basis of the popular objection to strict liability, and not the moral sentiment that liability should be based on fault.

DUTY OF CARE

Both judges require the breach of a duty of care as an element of liability for negligence. They differ in the way they determine the existence of the duty. Cardozo's duty is based on foreseeability. Andrews' is not. Yet, each test bespeaks duty.

⁶See Green, *Judge and Jury* (1930), 65-74 and authorities there cited.

There has been much discussion of the place of duty in the Anglo-American law of negligence. Professor Winfield traces its origin and development in the cases.⁷ He finds it is late come to English law. He does not approve of it, but he concludes that it is so firmly imbedded in the law that great confusion and much inconvenience would result from uprooting it.⁸ Professor Buckland is not so timorous.⁹ He suggests that the concept should be altogether dispensed with.

How much did the concept of duty contribute to the solution of the *Palsgraf Case*? Nothing at all, so far as I can see. Certainly no one will say that Andrews' attenuation of duty to cover the "world at large" leaves any effectiveness in the notion of duty as an instrument of specific analysis. One owes a duty to the world at large not to be negligent, just as one owes a duty to the world at large to do or to refrain from doing many things. Judge Andrews' statement of duty merely means that conduct entailing unreasonable risk of injury may be actionable.

Does Cardozo's idea of duty aid analysis? I believe not. He also uses the term to mean that conduct entailing unreasonable risk of injury may be actionable, but he adds the proviso that the action may be maintained only by those to whom injury was foreseeable. He too could ignore the concept duty, by simply stating his rule in terms of unreasonable and foreseeable risk.

The law lays upon everyone a duty not to injure others in actionable ways. This is merely a definition in a circle, and has all the truth and all the sterility of every tautologous proposition. Duty is an empty concept, for law, until filled up with meaning by statute or decision. To say that a duty exists is a short way of saying that liability may be imposed. To say that a duty does not exist is a short way of deciding the case adversely to the plaintiff. In each instance duty adds nothing to the definition of the tort sued upon. It is a symbol or shorthand device to sum up a class of actionable wrongs.

This does not mean that the concept duty has no important work to do. On the contrary, *its evident purpose is to permit the judge to take the question out of the hands of the jury.* Or, to put the matter more generally, it enables the court to substitute a question of law for a question of fact. By this device appellate courts permit themselves to enter more particularly into the fact

⁷Winfield, *Duty in Tortious Negligence*, (1934) 34 Col. L. Rev. 41.

⁸Winfield, *Duty in Tortious Negligence*, (1934) 34 Col. L. Rev. 41, 58.

⁹Buckland, *The Duty of Care*, (1935) 51 L. Q. Rev. 637, 643 et seq.

determinations of negligence cases. The more willingness that is shown on the part of courts, especially appellate courts, to consider the existence of duty, the less is the chance that there will be anything left for the finders of fact to do. As a practical matter, whether duty is found or not, the habit of looking for it is always a potential limitation on liability.

Unfortunately, when the court passes on the question of duty and either finds or refuses to find a duty, it is required to formulate a rule of law, and a rule of law is presumed to possess general applicability. Hence, courts willing and anxious to define duties are under the necessity of generalizing all kinds of fact situations. The result often is a rule of law not reflecting any substantial social conviction. On the contrary, a finding of fact in a tort case is less open to such defect. Its social significance seldom goes beyond the interest of the parties to the suit. Moreover, it creates no precedent, leaves little room for learned dispute and does not trouble to justify itself by appealing to general principles. A rule of law, on the other hand, is precedential and disputable. It always embodies what purport to be general principles. And in the vast majority of negligence cases these characteristics of the rule of law prove to be quite embarrassing. The *Palsgraf Case*, for example, has just those aspects of uniqueness, chance and impalpability which had best be buried and forgotten in the verdict of a jury rather than be perpetuated in a rule of law. It expresses nothing significant of social policy. No general agreement, I venture to think, can be had as to whether the result of the decision is "good" or "bad."

What is the legitimate function of the court in defining duties in negligence cases? A duty of care is a rule of law which sums up in general terms the significant phases of an entire class of factual situations entailing unreasonable risk of injury. Duty-making is an aspect of the universal effort to introduce into the law the economizing effect of subsuming specific instances under general rules. It may be asserted with confidence that the urge to generalize is nothing less than a biological necessity. Hence in law no less than in life the activity of generalization goes on unabated. To substitute one rule for a potentially unlimited number of specific cases is not merely good legal theory and practice. It is a condition requisite to the survival of legal institutions. Therefore the function of the judge in enunciating rules of duty is as necessary as it is proper. It might be added that the function is not exercised properly unless its exercise be necessary.

Thus there are two requirements of a sound legal rule. One is the requirement that the rule should state a socially proper or desirable result. This needs no comment here. The second is that the rule should refer to a set of facts having appreciable social significance either because the factual situation recurs constantly, or because the situation, though rare, is peculiarly the object of deep social concern. If either of the above requirements is absent the rule should not be made.

We might call the first of these conditions of a legal rule its *desirability* and the second its *necessity*. These terms have the advantage of illustrating at once the distinction between the two conditions and their interdependence. The distinction between them is apparent. Their dependence may be said to be this: an unnecessary rule of law cannot be regarded as the statement of a desirable result; desirability of result alone may be regarded as the necessity for stating the rule.

The principles here set forth may be illustrated by reference to Cardozo's conception of duty in the *Palsgraf Case*. He spoke of the duty of the railroad with respect to exposing an intending passenger to foreseeable risk of harm. Specifically the rule that he had in mind, if fully explicated, must be that a railroad does not owe to an intending passenger the duty to refrain from permitting its guards to push upon a moving train another passenger carrying a package which, though innocent in appearance, contains fireworks, and which, if joggled from the boarding passenger's arm, will fall to the tracks, explode, shake the platform, knock down the scales, and thus injure the intending passenger. Can anyone use fewer elements in stating this rule of duty¹⁰—a rule which purports to be a rule of law?

When one considers the uniqueness of the rule of duty of the

¹⁰It is true that some of the factual elements of the rule could be generalized. For example, for guards, read employees; for fireworks, read explosive substances; for shake the platform, read disturb the premises upon which plaintiff rightfully stands, sits, lies; for scales, read adventitious appurtenance; and so on. But this would not be a general rule of law even though general terms were used in framing it. It still adds up to no more than the *Palsgraf Case*. Generally speaking, the more elements a rule of law contains, the fewer the cases to which it can be applied. And a rule of law containing as many elements as that of the *Palsgraf Case* is very likely to be applicable only to a *Palsgraf* situation. The larger the number of general characteristics ascribed to a class, the greater the likelihood that the class will contain only one member. Like the game the children play: Is "it" animal, vegetable or mineral? Male or female? American or foreign? This is the basis of the Bertillon method of identifying criminals. Philosophically, the process is akin to Leibnitz's principium identitatis indiscernibilium (identification by minute description).

Palsgraf Case, it seems inescapable that there was no *necessity* for stating it at all. Was the result socially *desirable*? Who knows? And this shows the connection between necessity and desirability. Society at large could not possibly have an opinion, one way or the other, on such a complicated issue. A socially desirable result must represent a consensus of opinion, or at least the judge should think that it does. Experience will test his perspicacity. But if the situation is a freak, there is no opportunity to weigh opinion, real or potential.

Cardozo's view of the nature of duty¹¹ made him willing to regard the duty toward the plaintiff's bodily security as possibly quite different from the duty with respect to security of the plaintiff's property. Professor Goodhart wonders whether one accepting this view would be willing to differentiate between duty respecting the plaintiff's foot and his eye, between his ship and the cargo which it carries.¹² Why not? In enumerating the elements of the alleged duty of the railroad to Mrs. Palsgraf, it would add little to the rule to distinguish between injury to her eye (less to be foreseen if the scales were only three feet high) and injury to her foot (more to be foreseen in such circumstances). The rule of duty in the *Palsgraf Case* already encompasses the bounds of the absurd. Therefore *reductio ad absurdum* is a work of supererogation. Many socially significant rules of law may be and are founded on the distinction between bodily security and security of property. To this extent, Professor Goodhart's criticism seems to lack cogency. But when one considers that the distinction between body and property may be superimposed upon the already distressingly artificial rule of the *Palsgraf Case*, the criticism becomes quite pointed.

Rules of law which distinguish occupiers' duties to trespassers from those to tolerated intruders or to invitees are examples of

¹¹Cardozo's theory of duty has been called *relational*. Duty is regarded as a relation between the defendant and a possible set of plaintiffs, or more specifically a relation between the defendant and some, but not all, particular interests of particular possible plaintiffs. There is a verbal inaccuracy, I think, in the use of the expression, "relational." The term "relative" I believe is intended. Andrews' duty is absolute; that of Cardozo is relative to particular interests of particular plaintiffs likely to be harmed as the result of particular risks. It is true that Cardozo speaks of negligence "with relation to" certain plaintiffs. However, this is an accident of language. He might have spoken of negligence "toward" certain persons. If he had, no one would have been tempted to call his view of duty "towardal." It might be better to call Andrews' view of duty *general* and that of Cardozo *specific*. At any rate, Cardozo is willing to differentiate duties on chance matters of fact.

¹²Goodhart, *The Unforeseeable Consequences of a Negligent Act*, (1930) 39 *Yale L. J.* 449, 467.

significantly differentiated rules. They are addressed to situations respecting which social policy differs. Moreover, they save litigation because they generalize a large number of likely fact situations. A statute, too, may well impose a duty on a particular class of persons to avoid special risks to designated persons or things. Here again, the classification upon which the general rule is based is likely to be socially significant. But when courts take freak situations from juries on the ground of duty, the resulting rule of law is apt to be a sport.

To sum up the question of duty: Duty is not an element of negligence but a device to permit the court to take cases from the triers of fact. Duty is always stated as a rule of law in order to relieve this invasion of its seeming arbitrary character. It goes without saying that the result stated by the rule of duty should be socially desirable. No less important, perhaps, as a hallmark of formal competence, the rule should possess general applicability. Otherwise, the economizing effect of generalization will have been achieved at too great a price, and the individual instance will be elevated to the dignity of a general rule. The least disastrous effect of such procedure is that the rule so stated demands more attention than it deserves or would get as an individual instance. At its worst, this habit has a stultifying effect on the judicial process. It brings the whole task of legal rule-making into disrepute and induces in reaction an unhealthy specificism, an overweening tendency to regard every case as *sui juris*.

The writer is inclined to believe that courts should hesitate to interfere with the triers of fact in negligence cases. Our courts would go a long way toward establishing the law of negligence on a more rational basis if interference with negligence verdicts were restricted to clearly discerned questions of public policy. An alternative would be to refrain from reporting such cases. But little hope exists on this score, since the commercial interests of the reporting agencies are too firmly entrenched, and since (in most jurisdictions) the assumption may presumably be made that when the appellate court takes a negligence case, an issue of law is involved.

The duty mania grows, and the law of negligence grows with it but not in wisdom nor in grace. One faced with the necessity of introducing order into the decisions is overwhelmed by the conviction that he is in the presence of the designedly perverse. Such chaos could not be accidental.

FORESEEABILITY

Duty is not a constituent element of a tort. Whether a duty exists in a given case is thus not a question of the external nature of the defendant's act. It is rather a matter of the internal organization of the judicial process. Foreseeability is quite different. It is an element of defendant's external legal behavior. It is based upon a profoundly important social policy. That is, whether liability for negligence should be restricted to harms resulting from conduct foreseeably dangerous is a matter in which everyone has a stake. Contrasted with this, the various duties which various courts impose on sundry defendants are judicial ephemerae. Only a very few of them indeed have lasting significance.

Foreseeability was the basis of the majority opinion in the *Palsgraf Case*. What can be said for it? Is it more subjective than Andrews' theory of general negligence? Which theory more nearly accords with current mores?

We must admit with Professor Harper that neither of these theories coerces decision.¹³ Cases may be decided either way with either theory. But this does not mean that they are mere rationalizations to be used or discarded at will. There is a toughness, an unyielding quality to them. A court which chooses one theory rather than another is apt to be stuck with it. Although first choice may be made for conscious fitting of theory to ends, yet once chosen the theory takes on vigorous life of its own and may even dictate the decision of subsequent cases in the hands of all but the strongest judges. A theory may be a horse to take you where you want to go, but if you mount a horse you cannot get him to climb a tree for you. One who chooses Cardozo's foreseeability theory is bound to have trouble with unforeseeable harm that should not go uncompensated.

Why should foreseeability of risk be thought of as a necessary element in negligence? Foreseeability has a strong moral connotation. To persist in conduct whose foreseeable result is risk of injury to another's safety borders on the morally reprehensible. It may be justified, but it needs justification. What has this to do with the law of negligence? The following explanation might serve as a partial answer.

A fundamental contradiction in the law of torts is this: for the most part the law in action looks upon tort liability as punish-

¹³Harper, *Liability Without Fault and Proximate Cause*, (1932) 30 Mich. L. Rev. 1001, 1002-4.

ment for wrongdoing, whereas the plaintiff is interested only in having his own personal damage repaired. The courts really tend to administer the law of torts as a branch of criminal law; the plaintiff would like to regard the issue as strictly civil. Those injured in person or property who sue for damage would prefer not to have the moral delinquency of the defendant the criterion of responsibility. If the harm is the result of the conscious act of the defendant, it is hard for the plaintiff to see that he can recover only when the defendant is at fault. The damage is the same in any event. As between two innocent parties, why should the one who suffers injury sustain the whole loss?

Our legal procedure is thought not to be capable of apportioning loss among innocent participants of an injury. In the usual common law case some one must win and some one must lose. Similarly we feel that it is impolitic to apportion loss among wrongdoers, whether plaintiffs or defendants, perhaps because this seems to be trafficking with evil.

We may expect that the distant future will regard these self-imposed limitations with the puzzlement that we now feel when we consider how our ancient courts were tied down with the forms of action. Our legal historians tell us that once upon a time justice did not exist for those whose disputes did not fit a form of action. Is the result not precisely the same today? Comparative negligence in its broadest sense, and adjustment of loss among innocent participants of an injury, do not fit our judicial forms. These things are supposed to be too subtle for court and jury which, quite inconsistently, are thought capable of determining the amount necessary to assuage the pangs of a broken heart, or to make financially whole one who has suffered the loss of a limb.

Most intentional wrongdoing of a serious nature, and certain types of negligent conduct, whether resulting in injury or not, are and should be punishable criminally. And here the *fault* of the agent may well be the basis of legal inquiry. But when the injured party seeks to have his damage repaired, fault should be irrelevant. To be sure, the law may limit its protection to injuries resulting from fault. However, such limitation is capricious. Besides, it requires a complicated investigation into the tangled ethical and psychological problem of fault.

It is too much to expect the law of torts to abandon moral inquiry outright. Fault as the basis of tort liability is deeply imbedded in the law. Yet there is a decided movement away from

this limitation.¹⁴ Legislation particularly discards fault as the criterion for fixing responsibility for loss.¹⁵ Statutes defining standards of care seldom excuse those free from fault.¹⁶ That the defendant is not at fault is just as small a comfort to the average plaintiff as is the employer's lack of fault to an injured workman, to take but one example. Both plaintiffs want compensation.

Suppose that court and jury were deemed capable of apportioning responsibility among all the factors that contribute to an injury. Would it not be possible to decide roughly how much the railroad contributed to Mrs. Palsgraf's injury, and how much the passenger was responsible? Certainly, the railroad contributed something to the injury, though not all. Would it not be better to try to ascertain what proportion this was rather than to give her nothing as the majority did, or to give her everything at the hands of one defendant as Judge Andrews would have done?¹⁷

PROXIMATE CAUSE

There are two types of causes that are regarded as not proximate. One is a cause that is an element of a component of causes only some of which are attributable to the defendant. The other is a cause far removed conceptually from the harm done. The first situation is usually referred to as concurrent, intervening, or superseding cause. The second is generally called a *remote* as distinguished from a *proximate* cause. The two are capable of being regarded as quite different in legal effect.

INTERVENING CAUSE

If plaintiff's act concurs with another cause to effect an injury, our law usually requires that full responsibility for the injury be

¹⁴Bohlen, *Studies in the Law of Torts* (1926) 439. The English appear to have gone farther in this direction than we. "At the outset it is worth noting that the punitive or moral element seems stronger in American law than it is in the English." Goodhart, *The Restatement of the Law of Torts*, (1935) 83 U. Pa. L. Rev. 411, 416.

¹⁵Workmen's compensation acts are obvious examples.

¹⁶The technique of the courts in holding that a violation of a statutory duty of care is negligence per se is in effect a recognition that fault in these cases is irrelevant.

¹⁷This is of course the mere statement of an ideal. I do not mean to indicate that distribution of loss among the various factors which cause the injury is simple. On the contrary, equitable distribution of loss is an extremely complex matter, even though the ideal of distribution is easily to be apprehended. In this connection see Prosser, *Joint Torts and Several Liability*, (1937) 35 Cal. L. Rev. 413; Gregory, *Loss Distribution by Comparative Negligence*, (1936) 21 MINNESOTA LAW REVIEW 1. For a proposed statutory solution of this problem see Gregory, *Legislative Loss Distribution in Negligence Actions* (1935).

attributed to one cause. If the concurrent cause is the negligent conduct of another we may have joint tortfeasors, with each fully responsible as a rule. If the concurrent cause is the contributory negligence of the plaintiff, he must ordinarily accept full responsibility for the injury. If the concurrent cause is not contributory negligence, but is of such a nature as to relieve defendant of responsibility, we have intervening or superseding cause.

For those who believe that liability should be restricted to foreseeable harms, foreseeability is as relevant to intervening cause as it is to a determination of duty of care. In fact, intervening cause may be subsumed under the concept of duty of care. Duty of care is a matter of foreseeable risk. Risk may be regarded as determinable by the likely consequences of defendant's act, and the likely consequences of defendant's act are closely related to the likely consequences of any alleged intervening cause. The whole thing might well be cast in the form of a preliminary determination of the existence of duty.

Naturally, when intervening cause is pleaded and the foreseeability test is resorted to, the matter becomes quite complicated.¹⁸ Assuming that each of the legal causes was a condition sine qua non, we then might have to ask ourselves the following questions:

a. Was the foreseeable risk attending plaintiff's act unreasonable even though no other cause should intervene?¹⁹

b. Was the foreseeable risk that another cause should intervene unreasonable?²⁰

c. Even though the risk that the intervening cause should occur was slight, was the foreseeable risk of injury to the defendant from the occurrence of the intervening cause so great that the plaintiff should have been deterred from acting?²¹

¹⁸Prosser, *The Minnesota Court on Proximate Cause*, (1936) 21 *MINNESOTA LAW REVIEW* 19, 38 et seq.

¹⁹Negligence with respect to the following entails a high degree of risk, and even though an intervening cause be necessary in the particular case, this requirement may be a triviality compared with the danger of defendant's original conduct: Explosives, high-power tension lines, escaping gas, unlabelled poison, runaway animals and vehicles, unsafely braked trolleys and locomotives, negligently started fires, and the like.

²⁰The following may be cited as examples of causes highly likely to intervene: change of weather, rescue of persons and property, dangerous conditions attractive to children, negligence, carelessness, inadvertence, or mere inaction of third parties, etc. See Eldredge, *Culpable Intervention as Superseding Cause*, (1937) 86 *U. Pa. L. Rev.* 121.

²¹The risk attending the intervening cause may be the same as those cited in note 18 supra with respect to defendant's own act. In addition, the criminal acts of third persons offer a high degree of risk of injury even though there be little likelihood that such criminal acts will in fact intervene.

d. To sum up the above: Was the component foreseeable risk of plaintiff's act and the intervening cause unreasonable?

To illustrate (a): X negligently loads dynamite on a truck. When crossing the only trolley track in town, the truck strikes the only obstruction of its size on the trolley line; a box of canned dynamite is dislodged, falling to the track; a one-man trolley approaches; the conductor-motorman is inside collecting fares; the box is struck by the trolley, does not explode, but its contents are strewn over a part of the track where small children are unlawfully playing, etc., etc. The number of intervening causes and their extreme unlikeness are quite irrelevant. Risk of injury was the foreseeable result of the negligent loading of the dynamite. This risk was so great that it may be regarded as foreseeable (unreasonably probable) even though the injury results from the most unusual concatenation of events. This is close, of course, to intentional injury, that is, to the limiting condition of the foreseeability test, the point where probability of injury is legally regarded as 1.000.

To illustrate (b): X negligently leaves unlocked at noon the door of a warehouse containing barrels of flour, although it is well known that a gang of mischievous boys in the neighborhood make the warehouse their rendezvous whenever opportunity affords. The boys enter and roll a barrel of flour down an inclined loading platform injuring a chance passerby on the otherwise usually deserted street back of the warehouse. We can say here that although the risk of defendant's action (to the plaintiff) was not high in itself, and although the danger of the intervening cause when and if it should occur was not very great, yet the probability that the dangerous cause would intervene was unreasonably strong, and hence the risk to the plaintiff might be foreseeable.

To illustrate (c): An automobile repairman tightens the brakes of a truck for a dynamite factory so negligently that the brakes will hold only if the truck is driven slowly and carefully but not if it should exceed, say, the legal speed limit. It is highly unlikely that a dynamite truck will be driven too fast. Yet we may say that risk of injury to third persons is foreseeable because of the great likelihood of danger if and when the intervening cause begins to operate. This rule explains the case of *Hines v. Garrett*²² where the conductor of a railroad forced a young woman to disembark from the train in a region in which dangerous characters

²²(1921) 131 Va. 125, 108 S. E. 690.

might be lurking. The woman was raped and the railroad was held liable. The risk of rape was slight, but a slight risk of rape is sufficient.

When we call the above types of injury foreseeable we are giving the term foreseeable a meaning that is strictly *entre nous*. Foreseeability is an unfortunate word. It seems to be linked unshakeably to the physical act of seeing. In fact, of course, foreseeability, as the "fore" indicates, is not "seeability" at all. Rather it is a question of the extent to which forethought might have induced or forestalled action. The probability of harm to the defendant is the criterion. And when intervening cause is in question, the probability that the cause will in fact intervene, and the probability of harm to the defendant when and if the extraneous cause does intervene all are factors of the component probability. Hence, the chain of sequences may be fantastically linked, and still there may exist probability of harm to the plaintiff so great as to be unreasonable because of the fact that defendant's act, though not risky in itself, is very likely to give occasion to the intervention of a harmful cause, or, what is more apt to be the case, because the intervening cause, though quite unlikely to occur, will result in very serious injury if in fact it does occur.

Probability of harm is a component of likelihood of injury and seriousness of injury. Speaking loosely, we may say that a great degree of likelihood of some danger is equal to some likelihood of great danger. Hence even if plaintiff's act requires another cause in order to produce harm, and even if the probability that the other cause will intervene is slight, yet where the resulting danger from the intervening cause is great, there may be appreciable probability of injury to the defendant, and, therefore, foreseeability.

Our law of intervening cause is burdened with a singleness of purpose that has already been adverted to. We insist upon looking for one efficient cause of the injury. It would be much better if here again we could marshal every effective cause, and divide responsibility among them.²³ If the defendant's negligence combines with that of another, apportion the effect of each and divide responsibility. If the defendant's negligence combines with an act of God and with the contributory negligence of the plaintiff to cause the injury, distribute responsibility among all parties concerned.²⁴

I shall not undertake to examine the difficulty of dividing up

²³See *supra* note 16.

²⁴"When, in addition to the fault of the defendant, another of the diverse

the causes of a given effect. However, if judge and jury can determine proximate cause, a metaphysical inquiry at best, they should likewise be equipped to decide what part each cause plays in the attainment of the result.

REMOTE CAUSE

So far in this section, we have been speaking mostly of intervening cause. Remote cause is something else. In intervening cause, the question is whether the injury is legally attributable to the defendant's act. Remoteness of cause is concerned with the extent to which defendant can be held responsible for damage resulting from an act otherwise legally attributable to him. It is admitted that defendant's act "caused" the injury. The question here is whether he should nonetheless be excused from repairing any or all of the damage he has done. With certain exceptions, the arbitrary rule seems to be that if the defendant is responsible for *any* injury resulting from his act, he is responsible for *all* injury so resulting.

This is a form of strict liability once legal damage, however slight, is made out. Here again the extent of the damage could be governed by the foreseeability rule. The probable extent of injury is just as determinable as the probability of injury, and if probability of harm determines liability, then probable extent of harm should determine extent of liability.

The exemptions from liability because of remoteness of cause are apt to be arbitrary. Even though no intervening cause break the chain, the courts sometimes call an abrupt halt to liability for extended damages. This is a form of discharge in bankruptcy without assignment of assets for the benefit of creditors. The New York rule of liability for spreading fires is an example. New York gives nothing to any but adjacent owners.²⁵ On the contrary, in a similar situation, an English court gave the plaintiff everything in the *Polemis Case*.²⁶ Both rules are so crude as to offend one's sense of justice.

antecedents of the injury is likewise regarded as causal, an apportionment should be made as follows:

1. If the injury is the result partly of the fault of the defendant and partly of vis major the defendant responds only for a part of the damage.

2. If at the same time it is the result of the fault of a third party, there is solidary responsibility, whenever the effect of the fault of one of the agents is not clearly limited to a part of the damage.

3. In the event of fault of the victim, regarded as a concurrent cause of the damage, responsibility must be apportioned by the "judge of the fact" who has absolute discretion in estimating the share of the responsibility of each." 6 Planiol et Ripert, *Droit Civil Français* (1930) 743-744.

²⁵Ryan v. New York Cent. R. R., (1866) 35 N. Y. 210.

²⁶In re *Polemis & Furness, Withy & Co.*, [1921] 3 K. B. 560.

CONCLUSION

A tort looks very like a crime. Then again it greatly resembles a contract. Still, it is neither. Though differentiated, it has not yet been individuated. The difficulty is brought in focus when one deals with a tort arising from a contract, or with a tort that is also a crime.

Not until 1914 did the English courts make up their minds about what to do with a tort that was also a crime.²⁷ The doctrine of merger used to be employed. Tort sank into crime much as manslaughter is lost in murder. Now it is not thought necessary to regard the interests of the plaintiff as insignificant when the sovereign interests of the state are flouted by crime. The injured party is no longer deemed to be sufficiently compensated with the knowledge that the wrongdoer is being punished.

Tort should be distinguished from crime in the light of purpose. The end of an action in tort is restitution, not punishment. Of course, if restitution also hurts a wrongdoer, perhaps so much the better, although this is a barbaric ethical principle. In a legal system based essentially on money judgment, sanction is efficacious only against those poor enough to feel the pinch of the judgment, and rich enough to pay it.

We know what trouble the courts experience when asked to separate a tort from the contract out of which it arises. Even yet courts speak of privity being necessary. And we must not forget that *MacPherson v. Buick Motor Co.*²⁸ was regarded generally as a daring move. Tort is different from contract. The basis of contractual relationships is planned undertaking. In unintentional torts, the harmful result is unsought. What has happened is an event which both parties deprecate. Can it be said that this has anything in common with an event toward the attainment of which both parties are deemed to have pledged themselves? To be sure, contractual enterprises often go awry. The results are injuries rather than benefits. True tort situations develop and the contract is relevant. But liability should not be governed by the rules developed to care for contractual enterprises. Continental jurisprudence to the contrary notwithstanding, the basis of tort liability should not be the will, however well that concept may serve as a support for the law of contract.

The development of torts in Anglo-American law has been

²⁷*Smith v. Selwyn*, [1914] 3 K. B. 98. See Winfield, *The Law of Tort*, (1935) 51 L. Q. Rev. 249, 253.

²⁸(1916) 217 N. Y. 382, 111 N. E. 1050.

warped by the vagaries of procedure. Assumpsit has twisted both debt and trespass unnaturally. A promise to pay a debt, like a promise to pay for a tort, has no meaning unless one is thinking of a fresh acknowledgment of an existing obligation. Suppose one does *not* promise to pay a debt or to make restitution for an injury? Is the obligation less binding? However, this drum has been beaten often enough. The literature on the subject is immense.

Subtract intentional undertakings (contract or tort) from the body of the law of torts, leaving negligent and accidental injuries. Define negligence, if you can, without reference to fault. Make it the breach of an objective standard of care set by jury, court or legislature. Bring together every substantial factor, human, natural and divine, which can be regarded as a cause sine qua non of the injury, and apportion responsibility according to fault if you must, or according to degree of participation, if you may.

This leaves only the question of remoteness of cause and effect. Here again apportion loss ex aequo et bono. More for near causes, less for ones far removed. Less for catastrophe of which defendant's act was merely the spark, more for damage resulting largely from defendant's enterprise. And in any event, return much of the law of negligence where it belongs: to the triers of fact, whose decisions can be quickly forgotten. Appellate courts would thus curb their dangerous penchant for crystallizing freak factual situations into rules of law. I now move that we bury the *Palsgraf Case*.