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Cardozo and the Civil Jury

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CARDOZO AND THE CIVIL JURY

> Singularly enough, nearly all legal theory in negligence cases is designed to serve the ends of allocating the power of judgment respectively to judge and jury.[*]

Michael D. Green and Ashley DiMuzio[**]

I. INTRODUCTION

This paper began with an invitation by Professor Sam Levine to the senior co-author of this article to participate in the March 2017 Cardozo Symposium at Touro Law School. After the symposium, the junior co-author joined in working remarks made at the symposium into this article. Where we use the singular first-person pronoun, we refer to the senior co-author, although the work reflected in this article is a joint effort.

I readily accepted Sam's invitation. I am a torts teacher, and Cardozo opinions are ubiquitous in torts casebooks. I have read and taught them for many years.[1]

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[*] LEON GREEN, JUDGE AND JURY 261 (1930).

[**] We cannot say enough about the generosity, kindness, and encouragement provided by Professor Andrew Kaufman in assisting us in this project. He has talked with us about our ideas, made insightful suggestions about where we might find additional evidence in support of our thesis, helped us think through the evidence that we did secure, and assisted us in obtaining inaccessible documents that he prepared decades ago during his work on the Cardozo biography. All to assist us in disagreeing with a position he took in his Cardozo biography. John Goldberg carefully read a draft and made many helpful comments for which we are grateful. We also appreciate the assistance of the Special Collections staff at the Harvard Law Library, especially Edward Moloy and Jane Kelly in facilitating access to Kaufman's papers prepared during his research efforts for the Cardozo book, and Julianne Claydon, the librarian for the New York Court of Appeals, and Jim Folts at the New York State Archives, for facilitating access to internal Court of Appeals memoranda authored by Judge Benjamin Cardozo.

[1] This paper is limited to Cardozo and the civil jury based on our expertise and the different considerations that might exist in one's attitude about criminal juries and civil juries, although we welcome a parallel inquiry into Cardozo and his approach to the criminal jury. We limit our consideration to tort cases for reasons of expertise, time, and the fact that tort law is the common law area in which judge-jury allocation issues arise most frequently.

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As I started thinking and reading about Judge Cardozo after a bibliography was prepared, I began to appreciate what a daunting task I had undertaken and regretted that I had accepted Sam's kind invitation.

There are six biographies of Cardozo,[2] including Andrew Kaufman's definitive biography in 1998. In addition, there are five books by Cardozo, four containing his revised academic lectures over a decade and numerous miscellaneous speeches delivered over his career.[3] That work is supplemented by at least three Symposia devoted to Cardozo,[4] not to mention this one, over 50 memorials or assessments of his work in the 1930s,[5] countless later articles devoted to him, his opinions, his rhetorical style, as well as his views and lectures about jurisprudence.[6] I despaired of finding something new to say about Cardozo—a concern that I imagine my fellow participants in the Touro symposium also shared,[7] as Joel Goldstein confirmed at the symposium, expressing a similar sentiment.[8]

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[2] ANDREW L. KAUFMAN, CARDOZO (Harv. Univ. Press 1998); GEORGE S. HELLMAN, BENJAMIN N. CARDOZO, AMERICAN JUDGE (Whittlesley House, McGraw-Hill 1940); BERYL H. LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING (Case West. Univ. Press rev. ed. 1969); RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO (Harv. U. Press 1997); JOSEPH POLLARD, MR. JUSTICE CARDOZO: A LIBERAL MIND IN ACTION (The Yorktown Press 1935); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (U. Chi. Press 1990).

[3] Four of the books and many of Cardozo's other speeches are collected in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO. MARGARET E. HALL, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (Matthew Bender; Margaret E. Hall ed., 1967) [hereafter "SELECTED WRITINGS"]. The fifth book, a treatise, was written while Cardozo was in practice. *See* BENJAMIN N. CARDOZO, THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK (2d ed. 1909).

[4] A major symposium, held after Cardozo's death, was published in parallel in the Harvard and Columbia Law Reviews and the Yale Law Journal in January 1939. SELECTED WRITINGS, *supra* note 3, at 432. The initial issue of the Cardozo Law Review was devoted to articles about Judge and Justice Cardozo and his work. 1 CARDOZO L. REV. 1 (1979).

[5] *See* SELECTED WRITINGS, *supra* note 3, at 430-32.

[6] *See id*.

[7] The thought also occurred to former Chief Judge Judith Kaye who wrote on the Historical Society of the New York Courts website in a short biography of Cardozo:

> Anyone preparing a portrait of Benjamin Nathan Cardozo would necessarily approach the task with great trepidation. Already there are so many wonderful writings about him, most especially Professor Andrew Kaufman's 731-page masterpiece, which took more than 41 years to complete. Surely, by now everything worth saying (and perhaps some that is not) about Cardozo has been said.

Judith S. Kaye, *Benjamin Nathan Cardozo*, HISTORICAL SOCIETY OF NEW YORK COURTS, available at http://www.nycourts.gov/history/legal-history-new-york/luminaries- court-appeals/cardozo-benjamin-feature.html

[8] Symposium, *Benjamin N. Cardozo - Cardozo and Judicial Decision Making,* THE JEWISH LAW INSTITUTE AT TOURO COLLEGE JACOB D. FUCHSBERG LAW CENTER (March 23-24, 2017)

But as I read more, I realized that each of our predecessors who addressed Cardozo were influenced by their own vision, values, biases, and interests. And what I have to say today is similarly a product of the "total push and pressure of the cosmos"[9]—as William James put it—that I have experienced.

As a torts teacher, I fervently believe that to understand U.S. tort law, one must understand the respective role of judge and jury. I spend a lot of time impressing that view on my students and, before the Civil Procedure teachers get their hooks into them with summary judgment, judgment as a matter of law, the respective roles of judge and jury on matters of fact, law, and mixed questions of fact and law, and sufficiency of the evidence, I make them attend to those matters as they read torts cases.

I also believe that our tort law is significantly shaped by the fact that we have a jury deciding the vast majority of tort cases.[10] By contrast, in virtually no other western country is a civil jury employed regularly,[11] although vestiges still exist in Canada and Great Britain.

To take a concrete example, "duty," actually "no-duty," is frequently invoked by judges as a way to avoid leaving the outcome to the jury when they think that liability *in that case* should not be imposed.[12] By contrast, in other continental legal systems, there is virtually no invocation of duty as there is no jury to control.[13]

https://videos.tourolaw.edu/media/Benjamin+N.+Cardozo+Cardozo+and+Judicial+Decision making/0_yqt7qth8/68043701.

[9] WILLIAM JAMES, *The Present Dilemma in Philosophy*, *Lecture I*, *in* PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (Longman Green and Co. 1907).

[10] Michael D. Green, *The Impact of the Jury on American Tort Law*, *in* EUROPEAN TORT LAW (2005) (Helmut Koziol & Barbara C. Steininger eds. 2006).

[11] *See, e.g.*, JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1014 (1994) (stating that in common law countries other than the United States, "the civil jury has been abolished"); NEIL VIDMAR, A HISTORICAL AND COMPARATIVE PERSPECTIVE ON THE COMMON LAW JURY, *in* WORLD JURY SYSTEMS 1, 3 (Neil Vidmar ed., 2000) ("[W]ith the exception of the United States and parts of Canada, the jury has been largely abandoned for civil cases. . . ."); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 193–94 n.1 (1996) (commenting that the abolition of the civil jury is "a course that the rest of the civilized world took long ago").

[12] *See, e.g*., Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762 (La. 1999); Packard v. Darveau, 759 F.3d 897 (8th Cir. 2014). The New York Court of Appeals has been particularly practiced at this technique over the years. *See, e.g.,* Strauss v. Belle Realty Co., 482 N.E.2d 34 (N.Y. 1985); Lauer v. City of New York, 733 N.E.2d 184 (N.Y. 2000); Johnson v. Jamaica Hospital, 467 N.E.2d 502 (N.Y. 1984).

[13] *See* W. Jonathan Cardi & Michael D. Green, *Duty Wars,* 81 S. CAL. L. REV. 671, 701 (2008) ("[I]t is also notable that Continental tort cases are largely devoid of any analysis of duty in imposing liability for negligence. In fact, the presumption of an obligation of care is

Similarly, the demise of a consumer expectations standard in strict products liability is largely the result of discomfort about how the standard provides virtually no constraints on the jury when it comes to how safe a product should be made.[14] Yet, the Europeans have, for 30 years, employed a consumer expectations test without any notable difficulty.[15] But in Europe, it is judges who are applying the test.

So, this is the background against which we have formed the views expressed in this paper about Cardozo and the jury. We are happy to report that in all of the books about Cardozo, we found only one in which there was any coverage of this topic—other books about Cardozo did not even have an entry for the jury in their index.[16] We have read the work of those who knew him and participated in the multitude of tributes to him and found nothing in them about Cardozo and the civil jury.[17]

To us, this is little short of astonishing. The civil jury has long been a controversial institution, having come under withering criticism by Mark Twain in the 19th Century.[18] John Guinther, who examined

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so strong that duty is not even an element of a claim for accidental injury."); *see also* EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW, IN RESEARCH UNIT FOR EUROPEAN TORT LAW, EUROPEAN CENTRE OF TORT AND INSURANCE LAW, UNIFICATION OF TORT LAW: FAULT 369, 372 (Pierre Widmer ed., 2005); *see also* William L. Prosser, *Palsgraf Revisited,* 52 MICH. L. REV. 1, 12 (1953) (stating that "the concept [of duty] is unknown to the continental law").

[14] *See* Bruce Feldthusen et al., *Product Liability in North America*, *in* PRODUCT LIABILITY: FUNDAMENTAL QUESTIONS OF PRODUCT LIABILITY IN A COMPARATIVE PERSPECTIVE (Helmut Koziol et al., eds., forthcoming 2017) ("Courts and commentators became concerned about the indeterminacy of the consumer expectations test for these kinds of cases and the concomitant unconstrained discretion it afforded juries."); Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV 1217, 1236-37 (1993) (explaining dissatisfaction with the consumer expectations test for design defect claims).

[15] *See* Willem H. Van Boom et al., *Product Liability in Europe, in* PRODUCT LIABILITY: FUNDAMENTAL QUESTIONS IN A COMPARATIVE PERSPECTIVE 253 (Helmut Koziol et al., eds. De Gruyter 2017).

[16] *See supra* note 2. Pollard mentions the jury only in the context of explaining Wagner v. International Railway Co., 133 N.E. 437 (N.Y. 1921), in which Judge Cardozo held that rescuers were foreseeable as a matter of law and therefore the case had to be submitted to the jury, the issue of the right to jury trial in connection with injunctions to quell public nuisances, and with regard to arbitration agreements. None of these authors, save for Professor Kaufman, have written a single word about Cardozo's views on the jury and its appropriate role in deciding civil cases.

[17] There is such an enormous amount written about Cardozo both during his lifetime and in memoriam. We have not read it all, but we have read all of the material that seemed most likely to contain a discussion of Cardozo and the jury.

[18] "The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system

the jury in America more recently reflected: "[F]or each advocate of the jury throughout its long history in America, there seems to have been a matching opponent."[19] During Cardozo's era, there was considerable academic attention to the matter. Leon Green, a contemporary of Cardozo's, published a book in 1930 entitled *Judge and Jury*.[20]

The one text[21] containing a discussion of Cardozo and his relationship to the jury did not dissuade us from this topic. Because we don't agree with that author's assessment, we are left a little sliver of room to say something in this article about Cardozo that has not been said previously.

To lay out our thesis, we find that Cardozo demonstrated little respect for the jury in the opinions that he wrote,[22] and he felt little reluctance to infringe on its factfinding role in a tort case when it suited his purposes. He would not only find the historical facts at issue based on his reading of the appellate record, even when the jury could reasonably have found them otherwise, but also make the normative judgment about whether the defendant (or plaintiff) acted reasonably and whether the harm that occurred was within the defendant's scope of liability, known more popularly as proximate cause, two of the central factual aspects in a negligence case.[23]

because it was good a thousand years ago." MARK TWAIN, ROUGHING IT 247 (Am. Pub. & F.G. Gilman & Co. 1872).

[19] *See* JOHN GUINTHER, THE JURY IN AMERICA xiii (Harper & Row 1988); *see also* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 444 (1997) ("[T]he civil jury has come under attack as an archaic institution that has outlived its usefulness. . . ."); Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337, 340 n.18 (2011).

[20] GREEN, *supra* note*.

[21] The only other discussion of anything approaching this issue, and it is quite peripheral, is an article on the difference between law and fact in workers' compensation and its application to whether an injury "arose out of employment." The author used the difference between Cardozo and Andrews in *Palsgraf* to explain how authority between judge and jury is allocated. *See* Kenneth Vinson, *Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula*, 47 ALA. L. REV. 723, 754 (1996) ("The real battle in Palsgraf . . . was whether judge or jury should determine if the scope of railroad liability should be extended to cover cases such as Palsgraf's.").

[22] The qualification "in the opinions he wrote" is an important one. Cardozo penned internal court memoranda recommending to his fellow judges that an appeal be affirmed without opinion. Those memoranda, as we discuss *infra* text accompanying notes 152-59 reveal a different picture from that which we describe in Cardozo's published opinions.

[23] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. q (Am. Law Inst. 2012).

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By contrast, Andrew Kaufman concludes that "Cardozo was assiduous in protecting the role of the jury,"[24] although he adds that Cardozo "did not hesitate to take an issue away from the jury when his reading of a record convinced him that the factual issue should be decided only one way."[25]

We don't find Cardozo being assiduous with regard to the jury's role—rather Cardozo displayed little regard for the jury's role in tort cases, at least those in which he took sufficient interest to write an opinion.

Instead, Cardozo acted as a super-juror, reading the record and making his own independent judgments. When those judgments concurred with the jury's conclusion, he would affirm its decision. But when he disagreed, he felt free to overturn the decision through a variety of devices. He was perfectly willing to find facts consistent with his view of the case, regardless of whether the jury might have come to a different – yet reasonable – conclusion about them. Ironically, we are buoyed in this conclusion by a statement that Andy

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[24] KAUFMAN, *supra* note 2, at 255. No support is cited for this statement, but a page earlier Kaufman writes that Cardozo frequently supported affirmance of an appeal based on there being sufficient evidence to support the jury's determination. *Id.* at 253. In communications with him, he stated that the memoranda cited on that matter were the basis for his assessment of Cardozo's approach to the jury.

[25] *Id*. at 255-56. Kaufman's qualification on his assiduous protector assessment might be interpreted in at least two ways. One is that Cardozo removed a matter from the jury when no reasonable jury could find otherwise. That is the well-accepted standard for when a factual matter becomes a legal one for the court to decide. The second interpretation is that when Cardozo's reading of the record persuaded him about the proper outcome of a disputed matter, he substituted his judgment for that of the jury. The second interpretation is consistent with our thesis but is incompatible with Kaufman's assiduous-protector tenet. We should add that Kaufman, a couple of pages later, wrote more on Cardozo and the jury:

> Cardozo was confident in this ability to read case records and decide when a factual issue was sufficiently clear that it should be decided by the court and not by a jury. He recognized the potential danger of substituting his judgment for that of the jury. "If courts are to resist the present tendency to substitute administrative agencies for the common law tribunals, they must be ready to accredit to the triers of the acts a reasonable equipment of common sense and conscience." But he did overturn jury verdicts in a moderate number of cases. He saw that as his job.

Id. at 257. The quoted language is from an internal court memorandum that Cardozo wrote. *Id*. at 645 n.36. Once again, it is part of a judge's job to determine whether the party with the burden of proof has met her burden of production and whether the evidence in a case permits a reasonable determination by the jury. It is not the court's role to find or make inferences about the facts that are different from the ones made by the jury and it is not the court's job in substitute its judgment for the jury's on mixed questions, such as negligence, that are assigned to the jury. As we lay out in the remainder of this article, we think that is precisely what Judge Cardozo did in a substantial number of tort opinions he penned.

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Kaufman made while one of us was in Cambridge looking at notes he had taken while conducting research at the archives of the New York Court of Appeals. Andy observed that with 23 years of practice, the largest portion doing appellate work, and his considerable self-confidence, Cardozo was comfortable that he could read an appellate record and determine for himself what had occurred.[26] Cardozo was also comfortable with substituting his judgement for the jury's on mixed questions of fact and law such as negligence or scope of liability.[27]

This article proceeds first to examine several of Cardozo's torts opinions, some famous, some not, over the span of his career as a judge and Justice. All of the cases analyzed are cases that implicate the jury's role in making factual determinations, and on appeal at least one issue involved the question of whether there was sufficient evidence (or allegations in the complaint) for the jury's determination. This examination reveals what we believe is Cardozo's cavalier approach to the jury's role. In the process, Cardozo largely ignored the procedural posture of the case and the implications for how an appellate court should approach its role in the appeal.[28] After canvassing those cases, the article turns to how other judges on the Court of Appeals treated these same matters in opinions they authored during the period that Cardozo served on the Court of Appeals. Finally, we assess internal Court of Appeals memoranda prepared by Cardozo for his fellow judges that recommended affirming cases without an opinion or denying a discretionary appeal.[29]

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[26] Conversation between Andrew L. Kaufman and Michael D. Green, Cambridge, Mass. (July 13, 2017). *See also* KAUFMAN, *supra* note 2, at 254 ("While Cardozo had a strong respect for the work of the judge and jury of the trial court, he brought from his own legal practice a confidence in his own ability to grasp particular factual settings and he applied that skill to the interpretation of . . . case records.").

[27] Kaufman acknowledges this aspect of Cardozo's judging as well, describing his "occasional unwillingness to leave a matter to the jury . . . as part of the business of judging to keep a jury from being swayed by sympathy when the record indicated that there was no factual issue that ought to be submitted to it." *See* KAUFMAN, *supra* note 2, at 257. Our contention, of course, goes beyond this: Cardozo intervened even when the record well supported the jury's determination.

[28] As well, this would include determinations of mixed questions of law and fact that are assigned to the jury, such as negligence. When no reasonable jury could find in a particular way on such a question, the matter becomes one of law for the court. *See, e.g.,* Burns v. Wilkinson, 126 N.E. 513 (N.Y. 1920) (an excellent example of one of Cardozo's judicial brethren acknowledging the standard of review).

[29] We address these memoranda because they constitute the evidence supporting Andy Kaufman's assessment that Cardozo was "assiduous in protecting the role of the jury." *See* Kaufman, *supra* note 2, at 253 n.26.

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II. ASSESSING JUDGE CARDOZO'S OPINIONS

Preliminarily, it is important to appreciate that at the time Cardozo was a member of the Court of Appeals, sufficiency review was similar to what it is today. Facts were for the jury to determine,[30] and if the procedural posture of the case involved an appeal based on the insufficiency of the evidence, the court was obliged to take all the facts and inferences therefrom as favorable to the verdict winner.[31] The situation was similar for motions to dismiss the complaint and for summary judgment. Although various verbal formulas were batted about for what evidence (or allegations) would be sufficient, including "only a scintilla of evidence," "no evidence," "no substantial evidence," and "no credible evidence,"[32] the inquiry was similar to sufficiency analysis as we know it today.

There is one quirk of the Court of Appeals' appellate jurisdiction as a result of constitutional provisions addressing the same that requires mention. Until 1926, the court was barred from reviewing the sufficiency of the evidence if the Appellate Division had ruled unanimously on the matter.[33] After the 1925 revisions to the New York Constitution, the Court of Appeals' review of sufficiency matters was expanded to include cases in which the Appellate Division had unanimously reversed the trial court's determination of sufficiency.[34]

We begin with an obscure torts opinion of Cardozo's, *Perry v. Rochester Lime Co.*,[35] which was published only two years after Judge Cardozo joined the Court of Appeals. Judge Cardozo's opinion starts with a paragraph of facts about the case.[36] Defendant stored dynamite

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[30] Although the Appellate Division might review then to determine if a motion for a new trial was properly granted or denied. HENRY COHEN, THE POWERS OF THE NEW YORK COURT OF APPEALS § 124 (Baker Voorhis & Co. 1934).

[31] *See id*. at 344 ("The Court of Appeals assumes that those facts were found which support the conclusion, in the absence of evidence to the contrary."). Or, on a motion for summary judgment, in favor of the party against whom summary judgment was sought. *See also id*. at 346 n.50 ("The question of law whether there is any evidence to sustain the verdict must be answered by inquiry, not into what the jury did find, but what it might have found under the charge. The language is familiar that 'the jury might have believed this bit of testimony and rejected that, and the conclusion is that, a question of fact existing, the questions of law asserted to exist are not shown to exist.").

[32] *Id*. at 312-13 n.53.

[33] *See id*. at § 103, p. 296.

[34] *Id.* at § 104, p. 298.

[35] 113 N.E. 529 (N.Y. 1916).

[36] *Id.*

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on the banks of the Erie Canal.[37] It did so in an unlocked box in a public place and in violation of an ordinance.[38] Two boys found the dynamite, stole a container containing considerable firepower, and the next day, while moving the explosives, accidentally set them off, killing themselves and a boy of eight who was tagging along with the two older boys.[39] This suit was only about the eight-year old's death.[40]

After acknowledging that defendant was negligent in violating the ordinance, the issue of proximate cause arose.[41] Judge Cardozo in the meat of his opinion then explained why the harm was not reasonably foreseeable, emphasizing the wrongdoing of the boys who had stolen the explosives and concluded: The decedent's "death was not *the* proximate result of the open chest in the highway,"[42] failing to acknowledge (surely Cardozo understood) that the law does not demand that a single proximate cause be identified and that there can be multiple such causes.[43]

Our main point is that nowhere does Judge Cardozo tell us the procedural posture of the case. What happened below is critical to the appropriate scope of the appellate court's review, but the opinion is entirely silent about the matter.[44] It is as if Judge Cardozo is deciding this case as both trier of fact and law in the first instance. That, of course, was not the case. The trial judge had non-suited the plaintiff, and the Appellate Division affirmed unanimously without an opinion,[45] so the proper issue was whether there was sufficient evidence for a reasonable jury to find defendant's negligence to be a proximate cause of the child's death.

Reasonable judges might disagree on that matter, but Judge Cardozo avoided such consideration by ignoring the procedural posture and the role of the jury and stating the facts as immutable without recognizing the range of facts that a jury might have found. By

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Perry*, 113 N.E. at 529.

[41] *Id.* at 530.

[42] *Id.* It is the case that Cardozo used the phrase "proximate result" rather than "proximate cause" but the former phrase has no legal meaning and, in context, he could only have meant proximate cause.

[43] Sweet v. Perkins, 90 N.E. 50, 51 (N.Y. 1909) ("There may be more than one proximate cause of an accident, if each of the causes asserted can be seen to have been an efficient one, without which the injury resulting would not have been sustained.").

[44] *Perry*, 113 N.E. 529 (N.Y. 1916).

[45] Perry v. Rochester Lime Co., 147 N.Y.S. 1136 (App. Div. 1914).

doing so, he managed also to dodge the prohibition on the Court of Appeals reviewing sufficiency matters when the Appellate Division ruled unanimously on the question.[46]

Perry is also useful as a prelude to *Palsgraf*,[47] as it demonstrates that the concept of proximate cause was alive and well in New York in the early twentieth century. Indeed, the Court of Appeals had been using this concept to limit liability as far back as the mid-nineteenth century.[48]

Let us fast forward a dozen years to *Palsgraf*, which according to Dean Prosser, is "perhaps the most celebrated of all torts cases."[49]

Let us begin with the facts, well not all of the facts, but the distance of Ms. Palsgraf to the pushing and pulling of the two passengers. Numerous commentators have addressed the matter of how far Ms. Palsgraf and the falling scales were from the train and the fireworks that exploded.[50] Judge Posner complains that Cardozo's facts were "slanted" and that he "[made up facts.]"[51] Professor Kaufman concludes that "Cardozo's characterization of Ms. Palsgraf's location did have a basis in the record."[52] Yet, other testimony in the case would have supported a conclusion that she was much closer to the incident than Cardozo implies.[53]

The actual distance is not important. What is important is that Cardozo stated the facts in the same fashion as he did in *Perry*, as if he

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[46] *See supra* text accompanying notes 33-34. To be fair, as John Goldberg urged us, proximate cause is an issue that courts have long deferred to juries less than they do for the other judgmental, yet denominated-factual, matter of negligence.

[47] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

[48] Ryan v. New York Cent. R.R. Co., 35 N.Y. 210-11 (1866).

[49] William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 1 (1953). To stay focused on our thesis and exercising heroic self-restraint—we will desist from criticizing the substance of the opinion, already admirably accomplished by the late Gary Schwartz. *See* Gary T. Schwartz, *Cardozo as Tort Lawmaker*, 49 DEPAUL L. REV. 305 (1999).

[50] *See, e.g.,* William H. Manz, Palsgraf*: Cardozo's Urban Legend?,* 107 DICK. L. REV. 785, 788 (2003) ("Cardozo's impossible version of event has proved remarkably resistant to criticism or correction."); *cf.* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES & MATERIALS 327 (Foundation Press 12th ed. 2010) (identifying discrepancies between the record and Cardozo's recitation of the facts).

[51] POSNER, *supra* note 2 at 38. Another commentator who delved deeply into the record and other sources, concludes that "it is difficult not to conclude that the statement of facts was crafted to support the result." Manz, *supra* note 50, at 816–17.

[52] KAUFMAN, *supra* note 2, at 298.

[53] Manz, *supra* note 50.

were the factfinder in the case, rather than acknowledging that, on the mixed evidence, the jury's job was to determine the distance.[54]

Moreover, given the jury verdict for the plaintiff, Judge Cardozo's role was to defer to what the jury might have found, not to decide the facts *de novo* on appeal.[55] There can be no doubt that Cardozo knew his role. Cardozo himself wrote "all facts warranted by the evidence will be deemed to have been found in favor of the successful party" in a treatise he authored on New York procedure while discussing the role of the appellate court in appeals of jury verdict.[56]

This phenomenon of stating the facts without a hint of deference to what the jury might have found based on the record in the case repeatedly occurs in Cardozo opinions.[57] Another example of this appellate factfinding by Cardozo occurred in *Adams v. Bullock*.[58] That case involved a young boy who was electrocuted and burned when the wire he was swinging came in contact with the defendant-trolley's electrified wires. To read Judge Cardozo's opinion, one would think that there was nothing, save extraordinary measures, available to avoid the accident. A student author, who read the trial transcript in the case, states that the court's outcome, reversing the judgment for the plaintiff, was strengthened by telling a story that was "not clearly supported by the underlying record"[59] with regard to available precautions. To borrow the Cardozian style, Economy of opinions this does serve; but respecting the role of the jury it does not.

The effect of *Palsgraf's* adopting foreseeability as the test to determine whether a duty is owed to the plaintiff—the risk reasonably perceived defines the duty to be obeyed—rendered duty a matter that

[54] Andrew L. Kaufman, *Benjamin Cardozo as Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 281, 291-92 (1999).

[55] Thus, we disagree with Professor Kaufman who concluded that the blame is on the plaintiff's lawyer for not nailing down the distance from the train to the weighing scale. KAUFMAN, *supra* note 2, at 297. The plaintiff's lawyer convinced the jury it was close enough to impose liability. What the plaintiff's lawyer didn't do was convince Judge Cardozo, a burden that, if the role of the jury were respected, would not exist.

[56] BENJAMIN N. CARDOZO, THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 88 at § 59 (2d ed. 1909).

[57] As Kaufman puts it, after referring to a number of Cardozo's opinions, he "came away from reading the record with such a confident vision of the facts that he concluded that there was nothing to submit to a jury." KAUFMAN, *supra* note 2, at 298-99.

[58] 125 N.E. 93 (N.Y. 1919).

[59] Elizabeth Smallwood, *A First-Year Tort Law Institution*: Adams v. Bullock 30 (2004) (unpublished student paper), available at http://www.law.berkeley.edu/sugarman/adamsfinal-1.doc.

relies heavily on the facts of each case. Some commentators claim that *Palsgraf* is, in the end, not that important to tort law.[60] Judge Posner claims that notwithstanding *Palsgraf's* treating unforeseeable plaintiffs as a matter of duty, "Most states continue to muddle along with the nebulous 'proximate cause' approach. . . ."[61]

Professor Kaufman expressed the view that *Palsgraf* was merely a matter of torts taxonomy: would unforeseeability of plaintiffs be dealt with as a matter of duty as Cardozo held[62] or as a matter of proximate cause, as argued by Andrews?[63]

But much rides on where we situate this issue. Duty is a matter of law for the court; proximate cause[64] is for the jury. Duty, as a matter of law, is a general rule of law applicable broadly to all cases falling

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[60] *See* Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377 (1985) ("[T]he case does not matter. It is a sport: its freakish facts ensure that it will not be repeated, and no matter how general its language, the case will have (as has in fact been the case) no precedential importance."); WILLIAM L. PROSSER & YOUNG B. SMITH, CASES AND MATERIALS ON TORTS 361 (4th ed. 1967) ("Although the Palsgraf Case has been cited a good many hundreds of times on the general proposition that there must be duty before there can be negligence, it appears actually to be of a good deal more theoretical interest than practical importance. Case have been few and far between in which parallel facts, of direct causation of harm to the unforeseeable plaintiff can be found."). Professor Jonathan Cardi also adverts to this view: "Because a majority of courts render fact-specific plaintiff-foreseeability rulings, one might argue that whether duty or proximate cause is the proper home for plaintiff-foreseeability is no longer of particular relevance to tort law." W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1897 (2011). Professor Thomas Cowan, in an early commentary on *Palsgraf*, identified and criticized its effect of specifying duty, a rule of law, at such a factually detailed level that it is limited to a ticket for a single ride on the duty railroad. Thomas F. Cowan, *The Riddle of the* Palsgraf *Case*, 23 MINN. L.REV. 46, 58 (1938-39).

[61] POSNER, *supra* note 2, at 41. Recent scholarship casts doubt on Judge Posner's assessment. *See infra* notes 69-71 and accompanying text.

[62] It is worth noting that Cardozo's turn to duty raised an issue that the defendant had never argued and which was never presented to the court. *See* Points for Appellant, Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928); Plaintiff-Respondent's Brief, Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928) (both on file with authors). John Goldberg expressed to us the view that, in the end, Cardozo did act to affirm the jury by not overturning the jury's finding of negligence, a matter on which a number of commentators have questioned. We are not in agreement, accepting the jury verdict was merely a means to enable Cardozo to write an opinion on an issue that had been the subject of extensive debate in the drafting of the first Restatement of Torts. *See* KAUFMAN, *supra* note 2, at 287-95. We believe that if, in order to write an opinion on an issue that was important for the day and might have lasting significance, overturning a jury's finding was the way to do it, Cardozo would have had no reluctance to do so.

[63] KAUFMAN, *supra* note 2, at 301 & 302-03.

[64] Although a mixed question of law and fact, proximate cause is categorized as a factual matter for the jury.

within its scope,[65] while proximate cause is about the specific facts of the case and whether defendant's liability, given negligence, harm, and circumstances surrounding them, extends to plaintiff's harm.[66]

However, foreseeability is a matter that depends on the specific facts of the case: if Ms. Palsgraf had been standing next to the guards when they were pushing the passenger on the train, she would have been a foreseeable plaintiff. A few feet away, maybe not so clearly, but a judgment that, in the first instance is for the jury. So *Palsgraf* puts the judge in the role of deciding foreseeability in the specific context of that case, requiring attention to the facts of the case in doing so, even when the relevant facts are in dispute.[67] As Professors Goldberg and Zipursky have observed, "When courts find themselves talking about "duty" at a very high level of specificity, they may well be talking not about duty at all, but about breach."[68] Yes, or about proximate cause.

Judge Cardozo does, it is true, recognize the role of the jury in *Palsgraf*, acknowledging that when foreseeability is subject to conflicting inferences, the question is for the jury. Professor Jonathan Cardi recently did an exhaustive 51-state survey of the impact of *Palsgraf* on modern tort law.[69] He found that, among states he could classify, the *Palsgraf* duty approach overwhelmingly prevailed over proximate cause by an 8-1 ratio.[70] He also found an almost even split among jurisdictions with regard to accepting Judge Cardozo's

[65] RESTATEMENT, *supra* note 23, at § 7, cmt. a ("[N]o duty rules are matters of law decided by the courts. . . ."); Cowan, *supra* note 60, at 55.

[66] *See* RESTATEMENT, *supra* note 23, at § 29.

[67] Professor Seavey remarked on this shift in authority, apparently approvingly, as it gave "the court greater control of the case." Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 383 n.17 (1938-39). *See also* Cowan, *supra* note 60, at 54-55.

[68] John C. P. Goldberg & Benjamin C. Zipurski, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 717 (2001). Professor Cowan, attempting to formulate a rule to be derived from *Palsgraf*, illustrates this specificity well:

> [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.

Cowan, *supra* note 60, at 56

[69] *See* Cardi, *supra* note 60, at 1901-13.

[70] *See* Cardi, *supra* note 60, at 1890-92 ("On this score, Cardozo has clearly won the day. When faced with the issue, thirty-three (of fifty-one) courts hold with fair consistency that whether the plaintiff was a foreseeable victim is a question to be decided in the duty context. Only four jurisdictions clearly follow Judge Andrews in holding that plaintiff-foreseeability is properly and solely a matter for proximate cause.").

qualification that the jury should decide foreseeability when in dispute for duty purposes. Half of them adhere to the classical view that duty is a matter for the court and therefore it displaces the jury in deciding foreseeability.[71]

Another case, one in which Judge Cardozo issued one of his infrequent dissents,[72] again reveals his attitude about inconvenient facts. Although a tort case, the issue was a procedural one: whether in a wrongful death suit, a claim against an initial tortfeasor who caused plaintiff's decedent injury in erecting a picket fence could be joined with a claim against the physician who treated plaintiff's decedent.[73] The majority ruled that they could not, relying in part on the fact that under existing joinder rules, inconsistent claims could not be joined.[74] Dissenting, Cardozo took the common-sense position that

> a negligent tortfeasor is not relieved of liability because the injury has been aggravated by the malpractice of a surgeon . . . ; that the two causes of action are therefore not inconsistent, since proof of the one will not exclude the other, but both may coexist; that each of the defendants has thus contributed to a single casualty, which is the subject of action, i.e., the death of the child.[75]

The only difficulty with Judge Cardozo's view is that his version of the case does not match the facts alleged in the complaint. The majority opinion reports that plaintiff's claim was that the initial tortfeasor's negligence "solely caused" the death of plaintiff's decedent.[76] Meanwhile the claim against the physician alleged that he "so negligently treated him [the decedent] that, solely by reason of such negligent treatment, intestate died."[77] While each of the alleged tortfeasors could be a cause of death (Cardozo's version) that scenario was just not what the plaintiff alleged.[78] While this shaping of the facts

[71] Cardi, *supra* note 60, at 1901.

[72] *See* Bernard L. Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo*, 30 COL. L. REV. 597, 606 ("Judge Cardozo has written few dissenting opinions.").

[73] Ader v. Blau, 148 N.E. 771 (N.Y. 1925).

[74] *Id.* at 775.

[75] *Id.*

[76] *Id.* at 772.

[77] *Id.*

[78] Of course, it may be that the majority had the facts wrong, and Cardozo had them right. But if that were the case, we would have expected Cardozo to highlight that difference and cite to the record to reveal the majority's mistake (or, better yet, convince the majority of the

did not implicate any jury determination, it does reveal a willingness to ignore an inconvenient set of facts in order to reach what Cardozo deemed the best result.[79]

Given his intellect, this difference in the factual premises between Cardozo and the majority could not have escaped his notice. That he was also the sole dissenter suggests that other judges on the court appreciated that Cardozo was writing an opinion applicable to a different set of facts. Perhaps Cardozo was anxious to make the joinder point for the much more common situation[80] of a plaintiff who alleges the initial harm caused by the first accident was aggravated by the malpractice of the physician. There is no inconsistency in those claims and, under New York's then-existing joinder rules, could properly be joined.

Greene v. Sibley[81] is another much-commented-on case in which Judge Cardozo wrote an opinion reflecting his view that the defendant had not been negligent.[82] What Cardozo neglected to mention was the contrary jury determination, although he did add the offhand statement: "We find no evidence of negligence."[83] Yet, surely

accuracy of his account of the facts before decision was rendered). Cardozo said nothing about the discrepancy in the factual accounts in his dissent.

[79] On this matter, Cardozo turned out to be right. The provision barring joinder of inconsistent claims was repealed by the New York Legislature ten years later. *See* Great N. Tel. Co. v. Yokohama Specie Bank, 76 N.E.2d 117, 120 (N.Y. 1947).

[80] Indeed, one might wonder why plaintiff's lawyer insisted on making inconsistent claims, such that plaintiff could logically prevail in only one of them, at least if they were joined in the same case. The reason why plaintiff's lawyer structured the claim in this inconsistent manner may stem from the allocation of the burden of proof on aggravation at the time of *Ader*. At that time, when one defendant caused some harm to plaintiff and another defendant aggravated the harm, the burden of proof to show the magnitude of harm that was caused before the aggravation and after was on the plaintiff. Not until the middle of the twentieth century did courts begin to shift the burden of proof to defendants. *See* RESTATEMENT, *supra* note 23, at § 26, cmt. h & Rptrs. Note (Am. Law Inst. 2010). Thus, at the time of *Ader*, it may have been strategically advantageous to make inconsistent claims when plaintiff could not show the magnitude of harm caused by each of the initial tortfeasor and the aggravating tortfeasor.

[81] 177 N.E. 416 (N.Y. 1931).

[82] We find ourselves in disagreement with Andy Kaufman about *Greene* as well. Andy's view is that Cardozo felt the plaintiff had an obligation to look out for herself: "The customer should simply have looked where she was going." KAUFMAN, *supra* note 2, at 257. Whether the plaintiff looked out for herself or not bears on her own contributory negligence not the defendant's negligence. The jury had resolved both negligence by the defendant and the plaintiff's contributory negligence in favor of the plaintiff, as the Appellate Division explained. Greene v. Sibley, Lindsay & Curr Co., 248 N.Y.S. 491 (App. Div. 1931). Judge Cardozo's opinion said nothing about plaintiff's negligence.

[83] *Greene*, 177 N.E. at 417.

within his own recitation of facts was evidence of negligence: the workman on whose leg plaintiff had tripped neglected to warn the plaintiff after he suddenly shifted his position to his knee so that his leg was extended into the aisle behind the plaintiff.[84] She had seen him working to her side before he was a threat, then turned to the counter to receive change for her purchase and did not see him change position.[85] Interestingly, Cardozo's rendition of the facts differed in nuanced but significant ways from the Appellate Division, which had, 3-2, affirmed the judgment entered based on the jury verdict.[86]

In similar fashion, Cardozo's opinion in *MacPherson v. Buick Motor Co.*,[87] sets up a factual account of the accident in a much cleaner

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[84] *Id.*

[85] *Id.*

[86] The Appellate Division wrote:

> The jury was warranted in finding that plaintiff, having made a purchase at a counter in defendant's store, stood there facing the counter waiting for her package and change. Hearing a voice just to her right, she turned her head, and saw two of defendant's employees talking together about a cash register located on the counter in front of them and just to the right of plaintiff.
>
> The cash register was temporarily out of repair, and the employee standing next to plaintiff had just come there to find out what the trouble was. Plaintiff's look disclosed this man standing upright immediately next to her, in front of the counter where the cash register stood. At that moment the clerk returned with the package and change. Plaintiff turned to her left to take them. Then, within a second or so, having in mind the position of the man as she had just noticed it, she turned to her right— intending to make 'a sweep around him standing there'—and stepped out with her left foot. During the second or so, which those acts of plaintiff occupied, the man changed his position by dropping down on one knee— his left knee— in order to look across the surface of the counter and under the cash register. In that position, his left leg stretched out along the floor behind him 'the length of his knee to his foot or heel,' estimated by plaintiff as being two feet. As plaintiff swung and stepped—intending to sweep around him—the outstretched leg caught her foot and she was thrown.

Greene v. Sibley, Lindsay & Curr Co., 248 N.Y.S. 491, 491 (App. Div. 1931), *rev'd*, 177 N.E. 416 (N.Y. 1931).

By contrast, in his opinion, Cardozo does not mention the one-second gap between the time plaintiff observed the workman posing no threat and when she turned to leave and tripped over his newly outstretched leg. Cardozo also questioned the plaintiff's credibility, adding the editorial comment "so she says," to his relating her testimony that she thought, upon turning, that he was in the same position as he had been a second before. And, conspicuously absent from Cardozo's statement of the facts, as was so often the case, was the Appellate Division's introduction to the facts: "The jury was warranted in finding . . . ." *Id.* at 492.

[87] 217 N.Y. 382 (1916).

version than that of the Appellate Division.[88] Jim Henderson opines that the reason was to tee up an opinion that would overturn a privity rule whose time for banishment had come. Although this slanting of the facts had no impact on the jury's findings, it does reveal a judge willing to state the facts in a fashion to further other purposes.

Before concluding this discussion, we have one more example, thecolloquiallyknown"Flopper"case.[89] TheFlopper was an amusement ride on which a young man, on a date with the woman who became his wife, fell and suffered a fractured kneecap.[90] And, no doubt, considerable bruising of his pride. (Alas, lost pride is not a legally compensable injury—but a fracture is). The ride consisted of an inclined, smartly-moving belt that made remaining on one's feet difficult.[91]

Judge Cardozo adopted a robust assumption of risk doctrine to dismiss the plaintiff's claim, but the dignity-damaged plaintiff had one last hope to preserve the jury verdict he had received below: he had testified that right after alighting on the machine and just before he fell, the Flopper executed a sudden and unexpected jerk.[92] Such a malfunction by the machine might be the basis for a determination of negligence and a risk of which the plaintiff was not aware.[93]

Judge Cardozo was having none of it. Rejecting the plaintiff's factual claim that the belt performed improperly when it suddenly jerked, Cardozo wrote:

> One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk,

[88] MacPherson v. Buick Motor Co., 145 N.Y.S. 462 (App. Div. 1914), *aff'd,* 111 N.E. 1050 (1916). *MacPherson*, it is true, did not overturn a jury verdict that Professor Henderson claims is at least questionable. However, at the time of *MacPherson*, the Court of Appeals was constitutionally barred from reviewing factual matters that had been affirmed unanimously by the Appellate Division, which was what the Appellate Division had done. *See supra* notes 33-34 & accompanying text.

[89] Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929).

[90] *Id*. at 173-75.

[91] *Id*. at 173.

[92] *Id*. at 174.

[93] Cardozo also claimed that even if the Flopper did execute a spasm, it would make no difference. *Id.* at 174 ("But the jerk, if it were established, would add little to the case. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall."). That assessment seems incorrect. Risk reflects the potential magnitude of harm discounted by the probability of its occurring. If the Flopper jerked, the probability of falling and injuring oneself would be increased, a risk of which the plaintiff would not have known and therefor assumed.

> accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment.[94]

This language sounds more like the reasoning of a smart juror who is working out whether to believe the plaintiff or the amusement park about whether the Flopper did more than its usual flopping than a judge whose role is to determine if a jury might reasonably have concluded otherwise about the existence of a jerk.[95]

Tellingly in this regard is that there was corroborating evidence in support of plaintiff's jerk claim; when plaintiff was thrown to the belt: "His wife in front and also friends behind him were thrown at the same time."[96] In addition, two witnesses, the plaintiff's fiancé and his sister, testified that the belt suddenly jerked.[97]

So, the issue becomes whether the plaintiff's jerk testimony should be believed when coupled with the evidence supporting it. The defendant's evidence that a jerk was not possible was persuasive—the Flopper was driven by a belt that ran smoothly and could not have suddenly jerked. But this dispute is quintessentially a jury matter, yet

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[94] Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929). As with *Greene* and other cases discussed above, there is reason to question the accuracy of Judge Cardozo's account of the facts: "An examination of the trial transcript and exhibits in *Murphy* reveals that the story told in Cardozo's opinion is inaccurate and misleading." KENNETH W. SIMONS, *Murphy v. Steeplechase Amusement Co.*: *While the Timorous Stay Home, the Adventurous Ride the Flopper*, *in* TORTS STORIES 179, 182 (Robert L. Rabin & Steven D. Sugarman eds. Foundation Press 2003).

[95] Another option would have been granting a new trial based on the weight of the evidence. However, that was a determination left largely to the trial judge and we have no indication that there was a motion for a new trial made in the trial court. The Court of Appeals did not have the authority to review new trial motions. *See* COHEN, *supra* note 30, at § 125, p. 346.

[96] *Murphy*, 166 N.E. at 174.

[97] SIMONS, *supra* note 94, at 187.

one that Cardozo arrogated to the court without a word about the proper procedural handling of the matter.[98]

We would expect skeptics familiar with Cardozo's torts opinions to be thinking, what about *Pokora*?[99] *Pokora*, with its complement, *Baltimore & O.R. Co. v. Goodman,*[100] are staples in torts casebooks. Both cases involve contributory negligence by drivers crossing railroad tracks and were decided in the U.S. Supreme Court.[101] *Goodman* was authored by Justice Holmes and *Pokora* by Justice Cardozo.[102] Both were pre-*Erie* when federal courts unabashedly made tort law.

In *Goodman*, Justice Holmes employed a precept from *The Common Law*[103] that addressed the emerging body of tort law. He posited that while initially judges would defer to juries about negligence, with sufficient experience, courts would develop rules of law more specific than the general reasonableness standard and that would then enable clearer law and more efficient case resolutions.[104]

Holmes adopted a rule in *Goodman* that required the driver of an automobile at an obscured railroad crossing to stop, get out of his vehicle, approach the tracks, look both ways and then return to the motor vehicle before proceeding or be deemed contributorily negligent as a matter of law.[105] Of course, this "rule" shifted much authority to the court on this issue. So long as the historical fact of whether the driver had exited the vehicle was not in dispute, the *Goodman* rule would resolve the case without the need for a jury.

Seven years later, after Cardozo succeeded Justice Holmes on the Supreme Court, the Court confronted another railroad crossing accident. Although technically limiting *Goodman* to its facts,[106] the Court effectively overruled the *Goodman* rule of contributory negligence.

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[98] Ken Simons, who wrote a piercing assessment of the *Murphy* case agrees: "Cardozo is quick to conclude that the evidence of a sudden jerk is too weak to support the verdict—too quick in my view." SIMONS, *supra* note 94, at 187-88.

[99] Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934).

[100] 275 U.S. 66 (1927).

[101] *Pokora*, 292 U.S. at 99; *Goodman*, 275 U.S. at 69.

[102] *Id*.

[103] OLIVER W. HOLMES, JR., THE COMMON LAW 123-24 (1881).

[104] *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 161-63 (1993).

[105] *Goodman*, 275 U.S. at 70.

[106] *Pokora*, 292 U.S. at 102 (citing facts contained in the court of appeals opinion in *Goodman*, but which were not contained in the Supreme Court's opinion); *see Goodman*, 275 U.S. at 102 n.2.

Cardozo explained how getting out and reconnoitering at a railroad crossing could, depending on the facts, be more dangerous than remaining in one's vehicle.[107] This requires careful attention to the facts of each railroad crossing accident, thereby restoring the role of the jury to determine those facts as well as the mixed question of whether the driver had exercised reasonable care on those facts.[108]

Pokora returned to the jury the evaluative assessment of whether a driver had exercised reasonable care in negotiating railroad tracks, removing that determination from the rule of law crafted by Holmes. Isn't *Pokora* jury affirming and therefore inconsistent with your theory?, we would expect the skeptic to wonder.[109]

Well, yes, Justice Cardozo in *Pokora* is jury-affirming. And this does appear puzzling given the thesis this article pursues. Or, perhaps, *Pokora* represents contrary evidence. Let us tender a response—one we think reasonable and in which we are buoyed by the fact that another commentator has expressed a similar view.

Justice Cardozo's *Pokora* opinion is not about protecting the role of the jury, rather that is merely a consequence of *Pokora*. In this view, we find ourselves largely in agreement with John Goldberg.[110] Nowhere in *Pokora* do we find a hint that Cardozo believed the jury was the appropriate decision maker or even that he felt the *Pokora* decision gave greater authority to the jury in negligence cases was worth acknowledging. Thus, we posit that *Pokora* is a product of Cardozo's pragmatism in judging,[111] his distaste for formalism, and his attention to contemporary practices—Cardozo appreciated how out-of-step Holmes's rule was with how drivers negotiated railroad crossings.[112] Indeed, Justice Holmes' view that those crossing railroad

[107] *Pokora*, 292 U.S. at 102 (quoting *Goodman*, 275 U.S. at 70).

[108] And created what Gary Schwartz has characterized as an ethics of particularism about tort law—each case is different and careful attention to the facts in the instant case is required. RESTATEMENT, *supra* note 23, at § 8 cmt. c.

[109] John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1460 (1999).

[110] *Id.*

[111] KAUFMAN, *supra* note 2, at 218-19.

[112] Indeed, Cardozo acknowledged this view in *Law and Literature*, referring to imposing a duty of vigilance on a guest in another's car: "I find it hard to imagine a rule more completely unrelated to the realities of life. Men situated as the guest in the case I have supposed do not act in the way this rule expects and required them to act. . . . The law in charging them with such a duty has shaped its rule in disregard of the common standards of conduct, the everyday beliefs and practices of the average man whose behavior it assumes to regulate." SELECTED WRITINGS, *supra* note 3, at 364. We find it notable and significant to our thesis that Cardozo

tracks should stop, emerge from the vehicle, perform a 180 degree scan of the tracks, then return to their vehicle and proceed is so comical that torts students enjoy a good laugh when the standard is articulated in class.

As Bernard Shientag put it many years ago: "The predominant characteristics of his philosophy are pragmatic--a flexibility, rather than a dogmatic rigidity; a concern with facts and realities and consequences, rather than with abstractions and formal rules.[113] Similarly, Leon Green commented that Cardozo was "far more interested in the solution of the particular problem than in setting up a rule."[114]

III. THE STRUCTURE OF JUDGE CARDOZO'S OPINIONS

Up to this point, we have analyzed Cardozo only on a micro level, opening up and looking inside individual cases for evidence. However, zooming out and comparing Cardozo to the other judges who served with him on the Court of Appeals is the next logical step. We reviewed every tort case the Court of Appeals heard on appeal that implicated the issue of judge-jury allocation during Cardozo's tenure on the court.[115] We were able to pinpoint which aspects of Cardozo's characteristics in his opinion-writing were shared by other judges and which aspects were peculiar to him.

To define the search parameters, only tort cases that were tried before a jury or granted summary judgment were included. The appealed issue had to involve a sufficiency of the evidence question. We limited our review to appeals decided between 1917 and 1932.[116] *Per curiam* and memorandum decisions were excluded. A total of 16 opinions by Judge Cardozo and 41 opinions from other judges fit these criteria. We prepared two charts, one for Cardozo's opinions and the other for the opinions of the other Judges, which can be found in Appendices A & B at the end of this article. There were three main aspects of the opinions that we looked for: (1) procedural history, (2)

said nothing about the role of the jury in this instance with its ability to knock the rough edges off of the law.

[113] Bernard L. Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo*, 30 COLUM. L. REV. 597, 601 (1930).

[114] Leon Green, *Benjamin Nathan Cardozo*, 33 ILL. L. REV. 123, 124 (1938).

[115] *See infra* Appendix A.

[116] The years Benjamin Cardozo served on the New York Court of Appeals. *See* KAUFMAN, *supra* note 2.

language that referred to jury involvement, such as "the jury found,"[117] and (3) the overall deference to the jury reflected in the opinion.

First, procedural history included discussion of what happened in the lower courts, so as to frame the basis for the appeal and the role of the Court in deciding the matter. Thus, if summary judgment was granted in the trial court on the ground that plaintiff had no evidence of causation, or because plaintiff was contributorily negligent as a matter of law, those histories reveal a potential judge-jury issue on appeal. How much time the judge spent on it and where in the opinion the procedural history was located were taken into consideration.

To start with a comparison of numbers, only 50%[118] of Cardozo's opinions included any mention of the procedural background, while 87.8%[119] of the other judges' opinions dealt with procedural history ($p = .0066$). The majority of opinions had the procedural history placed toward the beginning or within the first few paragraphs.[120] Probing further into the eight cases in which Cardozo did include procedural background, there is a sense of grudging acknowledgement rather than recognition of its critical role in framing the appeal.[121] Several of the cases only had a partial history, while others buried it later in the opinion or split it up over several paragraphs.[122] On the other hand, almost all of the other judges' opinions containing procedural history placed it within the first or second paragraph.[123] An early and thorough recital of the procedural history tells the reader what the issue is and the role of the court in order to frame properly the substantive decision. Cardozo seemed to pay little attention to that effort, and instead focused on the substantive

[117] Touris v. Brewster & Co., 139 N.E. 249, 250 (N.Y. 1923).

[118] *See* Cardozo Comparison Chart, *infra* Appendix A.

[119] *See* Judge Comparison Chart, *infra* Appendix B.

[120] *See* Horton v. New York C. R. Co., 142 N.E. 345 (N.Y. 1923), *see also* Cadby v. Hill, 132 N.E. 104 (N.Y. 1921).

[121] *Compare* Stern v. Int'l R.R. Co., 115 N.E. 759, 760 (N.Y. 1917) (Judge Cardozo, at the outset of the opinion, states "[Plaintiff] has obtained a judgment against three defendants" with no indication as to whether the trial was a jury trial or bench trial until two paragraphs later) *with* Orlando v. Pioneer Barber Towel Supply Co., 146 N.E. 621 (N.Y. 1925) (Judge Pound starts with a sentence summarizing the case, then goes directly into the procedural background. Several further mentions to the lower court's decision are made throughout the opinion.).

[122] *See* Adams v. Bullock, 125 N.E. 93 (N.Y. 1919); *see also* Coons v. N.Y. Tel. Co., 162 N.E. 578 (N.Y. 1928).

[123] *See* Lopes v. Linch, 115 N.E. 15 (N.Y. 1917); *see also* Muller v. Hillenbrand, 125 N.E. 808 (N.Y. 1920).

decision.[124] Overall, Cardozo's attention to the case's procedural background reflects comparative indifference to it and concomitantly identifying and framing any judge-jury issue.[125]

Jury-friendly indicators are words often found in opinions that judges use to recognize the role of the jury in making factual findings based on making credibility assessments and drawing inferences as well as the deference given to its judgments on mixed questions that are denominated as matters of fact. Examples of some of these common indicators include "[t]he jury could (or might) find,"[126] "taking all reasonable inferences in favor of . . . ," "only if evidence permits,"[127] and "[t]he jury was entitled to believe."[128] Indicators are evidence that the judge, in writing his opinion, acknowledged the role of the jury and the legal guidelines within which judgment as a matter of law is appropriate. Indicators are also a way for the judge to remind the reader of the appropriate standard of review. Indicators that highlight the judgment as a matter of law standard might say "from the testimony offered in behalf of the plaintiff the jury could have found . . ."[129] or "the facts determinative of the question presented to us, as the jury might have found them . . . ."[130] Judge Cardozo often failed to make use of these indicators; they made an appearance in only 43.8%[131] of his opinions, as opposed to the 80.5%[132] ($p = .016$) appearance rate in other Judges' opinions. Cardozo's opinions acknowledged the jury's factfinding role significantly less than his legal counterparts did.

To take our analysis a step further, there was only one case written by other judges in which the opinion lacked both procedural history and jury indicators.[133] The rest of the cases made mention of the jury and the role it has in deciding factual matters, whether it was through indicators or a general deference throughout the entire

[124] *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).
[125] *See* Perry v. Rochester Lime Co., 113 N.E. 529 (N.Y. 1916).
[126] Tantillo v. Goldstein Bros. Amusement Co., 162 N.E. 82, 83 (N.Y. 1928).
[127] Loktich v. Bethlehem Eng'g Corp., 152 N.E. 253, 254 (N.Y. 1926).
[128] Raolaslovic v. N.Y. Cent. R.R. Co., 156 N.E. 625, 627 (N.Y. 1927).
[129] Nowakowski v. N.Y. & N. Shore Traction Co., 114 N.E. 1042 (N.Y. 1917) (Chase, J.).
[130] Pyne v. Cazenovia Canning. Co., 115 N.E. 438, 438 (N.Y. 1917) (Collin, J.).
[131] *See* Cardozo Comparison Chart, *infra* Appendix A.
[132] *See* Judge Comparison Chart, *infra* Appendix B.
[133] *See* McLoughlin v. N.Y. Edison Co., 169 N.E. 227 (N.Y. 1929) (Kellogg, J.).

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opinion. On the other hand, only 69%[134] (p = .016) of Cardozo's opinions made some form of reference to the jury. These numbers provide important evidence that Cardozo's approach to appealed jury decisions was different from and less jury-oriented than his peers.

Finally, our gestalt sense of our comparative reading of these opinions is that opinions by other judges made clear from their language at an early stage of the opinion that the court was deciding an appeal from a jury decision on a potential question of fact.[135] Only a few times was a second read-through necessary to determine the exact layout of the case. However, when reading Cardozo opinions, multiple read-throughs were necessary and many cases read like *de novo* reviews.[136] Overall, the lack of procedural background and recognition of the role the jury caused backtracking to lower opinions to gather procedural and factual information,[137] an effort not required when reading other judges' opinions.

Taking a brief step outside the realm of solely torts decisions, Cardozo's disregard of jury determinations is an interesting contrast to Mark Graber's (and others') assessment about Cardozo's deference to administrative agencies.[138] One might have thought that Cardozo, despite his extraordinary people skills, would have given little deference to anyone, at least in his professional life.

Yet he did protect and defer to administrative agencies, which he thought necessary and important to conducting the business of government.[139] In a case after Cardozo joined the U.S. Supreme Court involving confusion over different grades and names of pine lumber, some lumber producers modified their labels voluntarily to avoid confusion, while others resisted.[140] The FTC investigated and found unfair competition by the latter dealers and issued a remedial order, which was reversed by the court of appeals. On review, Justice Cardozo wrote:

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[134] *See* Cardozo Comparison Chart, *infra* Appendix A.

[135] *See generally* Mintz v. Int'l R.R. Co., 124 N.E. 893 (N.Y. 1919).

[136] *See generally* Fiocco v. Carver, 137 N.E. 309 (N.Y. 1922).

[137] Perry v. Rochester Lime Co., 113 N.E. 529 (N.Y. 1916). Here Cardozo fails to make any mention of the procedural history of the case.

[138] *See generally supra* note 8.

[139] *See, e.g.,* Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Benjamin Nathan Cardozo 54-58 (Nov. 26, 1938) (statement of Dean G. Acheson).

[140] Fed. Trade Comm'n v. Algoma Lumber Co., 291 U.S. 67 (1934).

> The findings of the Commission as to facts, if supported by testimony, shall be conclusive. . . . The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.[141]

The irony and inconsistency of his deference to agency factfinding contrasted with his treatment of juries is palpable.[142] Why the difference? Might it be that deference to expertise was consistent with Cardozo's world view while deference to lay judgments was not? We don't know, but this seems one plausible explanation.[143]

IV. JUDGE CARDOZO'S EXTRA-JUDICIAL WRITINGS

We now assess Cardozo's own unencumbered words about the jury. What did Cardozo say about his views on the role of the jury in resolving non-equity civil cases? The jury was no stranger to Cardozo. Although the bulk of his practice was in appellate courts, Cardozo tried a substantial number of jury cases before his appointment to the New York Supreme Court.[144] And a considerable number of appeals confronted by the Court of Appeals during Cardozo's tenure began with a jury verdict. For as thoughtful and probing a mind as Cardozo's it is hard to believe he had not confronted and formed opinions about

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[141] *Id*. at 73.

[142] We have not found any case in which Judge Cardozo did something similar with regard to protecting a jury's determination.

[143] Unfortunately, there is no way to further investigate as Cardozo never revealed his views about the jury. *See infra* text accompanying notes 149-150.

[144] That's not precisely the way that Andrew Kaufman put it in his biography: after explaining the cases his three-partner firm had in the trial courts, Kaufman concludes "Cardozo must have handled some of this trial work. . . ." KAUFMAN, *supra* note 2, at 62. Kaufman has personally assured us that Cardozo had significant jury trial experience and that those who claim otherwise, *e.g.,* Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Benjamin Nathan Cardozo 96 (Nov. 26, 1938) (statement of Chief Justice Hughes "at the bar, he was spared the stormy conflicts of jury trials and the contests which evoked passion and animosities"), are wrong. *See* email communication from Andrew Kaufman to Michael D. Green (June 22, 2017). Judge Posner also reports that Cardozo was "a highly successful trial lawyer" but cites no source in support. POSNER, *supra* note 2, at 2.

the appropriate role of the jury in contemporary dispute resolution.[145] What were they?

In three series of lectures, each series published as a book, and another collection of speeches and lectures published in a fourth book entitled, *Law and Literature*,[146] "Cardozo tried," in the words of Andrew Kaufman, "to describe and defend what he did as a judge."[147]

Cardozo ranged over the jurisprudential debates of the day as formalism was yielding to the realists. He considered the role of policy in common lawmaking and how to determine the mores of contemporary society. Cardozo addressed consideration of other sources of law, including the legislature and made the case for the formation of an organization to rationalize the welter of common law precedent that reflected incoherence and created uncertainty—what was to become the ALI. He addressed negligence, its objective nature, the need for line drawing in assessing whether a party was negligent, the frequency that mixed questions of law and fact need to be decided,[148] and the way that the objective standard for determining negligence deviates from an individualized assessment of wrongdoing by the defendant.

Throughout all his cogitations about law and judging, Cardozo used the word "jury" but twice, once, irrelevantly, during a story to explain the "important truth" that our system relies on the notion that judges are learned in the law. The story involved a trial judge who got distracted at the end of a case during instructions and thus "forgot to tell the jury anything else [about the applicable law]."[149] The second time he used the word "jury" occurs in the course of discussing the concept of proximate cause and the absence of any definitive test for its determination. All we get are signposts that might direct one in this determination, Cardozo explains. Cardozo expresses approval of Professor Henry Edgerton's views on this matter[150] but adds, "I do not

[145] Leon Green wrote in 1930 of the significance of the jury and its relation with appellate courts as "the dominant idea of Anglo-American courthouse government. The whole of our procedure is built about it. . . ." He went on to claim that the strongest supporters of the jury are judges. *See* LEON GREEN, JUDGE AND JURY 375-76 (1930).

[146] SELECTED WRITINGS, *supra* note 3, at 338

[147] KAUFMAN, *supra* note 2, at 222.

[148] SELECTED WRITINGS, *supra* note 3, at 175-76.

[149] SELECTED WRITINGS, *supra* note 3, at 351-52.

[150] Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 348 (1924). What Edgerton said about the jury and Cardozo's coy demurrer on the issue is notable. Edgerton wrote with regard to proximate cause "[G]ood sense requires that large latitude be left to the judgment and intuition of the trier of fact; the limit of this latitude is the point beyond which the judgment

say that I would follow him in all his conclusions as to the relative function of judge and jury.[151] What does Cardozo add to explain his difference with Edgerton and perhaps thereby shed some light on where he stands on the jury? Nothing.

Thus, in all his words about law and judging and the struggle of a judge to remain true to principles that sometimes were not readily discernable, the role of the jury, its genius and disadvantages, and the allocation of decision making between court and jury were not important enough for Cardozo to address.

V. INTERNAL COURT MEMORANDA

The internal processing of cases in the Court of Appeals when Judge Cardozo sat on the court began with the filing of the parties' briefs. Oral argument followed, and after argument, the court held a conference at which one judge was assigned primary responsibility for each case. The conference also addressed, for each of those cases, the necessity of a written opinion or, on the other hand, whether the case could be affirmed without a written opinion, typically in a brief *per curiam* opinion. In the latter case, the judge assigned to the case would prepare a memorandum for the rest of the court summarizing the facts and explaining why, based on the law, a written opinion was unnecessary. These memoranda were for internal court use only and were entirely confidential until Andy Kaufman was able to convince Sol Wachtler, then the Chief Judge of the Court of Appeals, to make them available for the biography that Kaufman was writing.[152] Today, those memoranda are made available to researchers who can demonstrate a legitimate need for access.

Those memoranda provide the support for Andy Kaufman's assessment of Judge Cardozo's approach to the jury.[153] At Kaufman's urging and with his help, we managed to review relevant memoranda, first by identifying them from Kaufman's handwritten notes at the time he was reviewing the memoranda. We chose every case that, from Kaufman's notes, it appeared that Cardozo had written a memorandum

and intuition of the court tell it that a reasonable man would not go." He proceeded to justify the inconsistent outcomes that will result from leaving this judgment to the jury as a factual matter rather than entombing such a decision in a legal ruling. *Id*. at 372-73 (footnote omitted).

[151] SELECTED WRITINGS, *supra* note 3, at 305.

[152] *See* KAUFMAN, *supra* note 2, at x-xi.

[153] *See supra* note 24 and accompanying text.

about a tort case in which a judge-jury issue might have existed. We then were able to obtain access to those memoranda at the New York State Archives.

We found 21 cases that met our criteria: tort cases with a judge-jury issue decided by the Court of Appeals between 1914 and 1932 without a written opinion in which Judge Cardozo had been assigned primary responsibility for the case and therefore had authored a memorandum to the rest of the court with his recommendation for an affirmance without opinion. Curiously, we found seven cases decided between 1914 and 1918 and fifteen decided between 1922 and 1933, but no cases in the years between 1918 and 1922; we have no explanation for that gap. Virtually all cases involve an institutional defendant (railroads were common) appealing a jury verdict and trial court judgment for the plaintiff that was affirmed by the Appellate Division, although frequently by a divided court.[154] In all cases save two, Cardozo appears comfortable with the jury verdict or at least does not express disagreement.[155]

There are a substantial number of cases that provide ample support for Andy Kaufman's assessment of Cardozo's deference to the jury during the early years of Cardozo's judicial career. Typical was

[154] Recall that, until the 1925 revisions to the New York Constitution, the Court of Appeals did not have jurisdiction to review a unanimous Appellate Division decision on a matter involving sufficiency of the evidence.

[155] One exception is *Schott v. U.S. Printing Co.,* in which Judge Cardozo wrote: I

> do not feel at all satisfied that the defendant omitted any precaution which it ought reasonably to have taken. But I think that the responsibility for any injustice that may have been done must rest upon the jury. The case was fairly submitted to them. They were told that they must find for the defendant if the absence happened through failure to adjust the guard. They were told that no guard was to be expected except one that was reasonably adapted for the practical operation of the machine. They were told that if this was the first time that the suggestion of such danger came to the defendant, the failure to provide against it was not a breach of duty, more than this could hardly have been asked for.

The other is *Sanders v. New York Cent. R. Co.*, 240 N.Y. 639 (N.Y. 1925) (per curiam) in which Cardozo wrote about the factual causal connection between plaintiff's having been hit by a heavy curtain in a locomotive and his apoplexy suffered the following day:

> I have a great deal of doubt whether it [the apoplexy was caused by the blow]. Again, however, the question is one of fact, and beyond our power of review.

The "beyond our power" statement by Judge Cardozo likely refers to the constitutional limitations on the Court reviewing a unanimous Appellate Division determination on sufficiency of the evidence that was in effect at the time of *Sanders.* The Appellate Division's affirmance of the Supreme Court was unanimous. Sanders v. New York Cent. R. Co., 212 A.D. 849 (N.Y. App. Div. 1925).

what he wrote in his memorandum addressing *Gorman v. Brooklyn Heights R. Co.*,[156] a case involving a jury verdict for a pedestrian who was hit by defendant's trolley while crossing the street. The issue on appeal was contributory negligence by the plaintiff. Plaintiff and defendant's evidence conflicted, and Cardozo wrote: "Accepting the plaintiff's version as we must for the purposes of this appeal . . . ," and continued on to say "that the question of the plaintiff's contributory negligence was for the jury." In another case, he wrote: "I think a jury would be fully warranted in holding that the narrative of the defendant's witnesses was suspicious and in refusing to accept it."[157] In general, these memoranda reflect just the sort of deference to jury fact finding in the face of conflicting evidence and jury judgments about mixed questions of fact and law that judges typically reflect.

However, in several cases beginning in 1924, Cardozo's assessments trend away from jury deference and sound more like Cardozo qua juror. He wrote about a case[158] involving a train accident in which the facts were similar to *Pokora v. Wabash Railway Co.,*[159] and in which the issue was also plaintiff's contributory negligence. Cardozo assessed the defendant's claim that plaintiff had a clear view when he was 25 feet from the locomotive, as one witness testified, a fact strongly supporting contributing negligence: "Anyone who tries to measure the distance of 25 feet with the eye will appreciate how wide of the mark his estimate is likely to be," instead of simply deferring to the jury's determination that plaintiff was not contributorily negligent. In another case, in which defendant raised a cockamamie theory about how plaintiff fell down an elevator shaft that would have exonerated the defendant, Cardozo wrote: "I think the circumstantial evidence is abundant that he fell [contrary to defendant's theory] at the open shaft upon the floor described." A handful of other cases reveal Cardozo immersing himself in the record and analyzing the case from that perspective, including being willing to overturn the jury's finding, unlike the earlier cases that reflected deference. This shift occurs chronologically, the stronger evidence for Cardozo's lack of deference appearing in the cases beginning in 1924 as mentioned above.

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[156] 108 N.E. 1095 (N.Y. 1915).

[157] Albano v. J. F. Tapley & Co., 138 N.E. 431 (1922).

[158] Shapiro v. New York Cent. R. Co., 147 N.E. 202 (N.Y. 1924).

[159] 292 U.S. 98 (1934).

For the missing years of 1918 to 1922, we took a closer look at the five tort opinions Cardozo published in that period to see if his attitude towards providing jury decisions with deference would be similar to those in his internal memorandum surrounding that gap. What we found were three cases where Cardozo affirmed the original jury ruling and two cases where he did not.

What do we make of the evidence provided in these memoranda? First, it is clear that Cardozo understood the role of the jury with regard to factual matters. Second, there are indisputable instances in which he respected that role, contrary to what we describe in his written opinions. Third, we might venture the theory that in cases in which Cardozo was not invested—recall these are cases in which he was recommending affirmance without a written opinion—Cardozo was willing to give the jury its due. Even then, we find instances in which Cardozo reverted to his super-juror role and could not resist parsing the record and making his own judgment, although in nearly every case that judgment conformed to the jury's judgment.

Yet we do not find this evidence sufficient to negate the judgment we make based on his written opinions. Cardozo was willing to adjust the facts to suit his purposes, regardless of what the jury might have been justified in finding. He was willing to substitute his judgment for the jury's when he felt strongly enough about the matter. Perhaps this is an overstatement, but we think it best captures the various strands of evidence we found: When the going gets tough, Cardozo was willing to take significant liberties with the jury's role; in cases in which it was easy going, Cardozo was amenable to giving the jury its due.

APPENDIX A
CARDOZO COMPARISON CHART

Case	Vote	Result	Issue
Perry v. Rochester Lime Co., 113 N.E. 529 (N.Y. 1916)	7-0	Denied New Trial	Is there sufficient conflicting evidence to award a new trial?
Stern v. Int'l R.R. Co., 115 N.E. 759 (N.Y. 1917)	6-0-1	Affirmed Jury	Is there sufficient evidence to sustain the jury verdict?
Pellegrino v. Clarence L. Smith Co., 123 N.E. 153 (N.Y. 1919)	7-0	Affirmed Jury	Is there sufficient evidence to sustain the jury verdict and is there enough evidence to show contributory negligence as a matter of law?
Adams v. Bullock, 125 N.E. 93 (N.Y. 1919)	7-0	Reversed Jury	Is there sufficient evidence to sustain the jury verdict?
Nicholson v. Greeley Square Hotel Co., 125 N.E. 541 (N.Y. 1919)	7-0	Affirmed Jury	Is there enough evidence to sustain the jury verdict and is there enough evidence to show contributory negligence as a matter of law?
Ward v. Clark, 133 N.E. 443 (N.Y. 1921)	6-0-1	Affirmed Jury	Is there sufficient evidence to sustain the jury verdict?

Procedural	Indicators	Notes
None	None	No mention of the role of the jury or the lower court decision.
1)Brief mention of procedural background 2)Second paragraph	"jury had the right to find"	Mentions the jury and its role only a few times for a long opinion, but does give overall deference to it.
1)Covers entire procedural background 2)First paragraph	"jury might fairly find"	Strong jury-friendly language throughout opinion.
1)Brief mention of procedural background 2)First paragraph	None	Does not mention the jury. Cardozo's decision is a 'no reasonable jury could find' but never says so.
1)Covers entire procedural background 2)First paragraph	"as a jury might find"	Strong jury-friendly language throughout opinion.
1) Covers entire procedural background 2) First paragraph	None	Strong jury-friendly language throughout opinion.

Case	Vote	Result	Issue
Fiocco v. Carver, 137 N.E. 309 (N.Y. 1922)	7-0	Reversed Jury	Is there sufficient evidence to sustain the jury verdict?
Hinz v. Eighth Ave. R.R. Co., 152 N.E. 475 (N.Y. 1926)	6-0-1	New Trial	Is there sufficient evidence to sustain the jury verdict and is there enough evidence to show contributory negligence as a matter of law?
Baker v. Lehigh Valley R.R. Co., 161 N.E. 445 (N.Y. 1928)	7-0	Affirmed Jury	Is there sufficient evidence to sustain the jury verdict?
Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928)	4-3	Reversed Jury	Is there sufficient evidence to sustain the jury verdict?
Coons v. N.Y. Tel. Co., 162 N.E. 57 (N.Y. 1928)	7-0	Reversed Jury	Is there sufficient evidence to sustain the jury verdict?
Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929)	6-1	Reversed Jury	Is there sufficient evidence to sustain the jury verdict?
Woloszynowski v. N.Y. Cent. R.R. Co., 172 N.E. 471 (N.Y. 1930)	7-0	Reversed Jury	Is there sufficient evidence sustain the jury verdict?
Greene v. Sibley, 177 N.E. 416 (N.Y. 1931)	5-2	Reversed Jury	Is there sufficient evidence to sustain the jury verdict?

Procedural History	**Indicators**	**Notes**
1) Brief mention of procedural background 2) First paragraph	None	No mention of jury past procedural history. Cardozo s decision is a 'no reasonable jury could find' but never says so.
1) Covers entire procedural background 2) second paragraph	"the jury might have found" "jury might determine" "jury might say" "jury should say"	Strong jury-friendly language with mention of jury throughout.
None	"jury must decide" "must be measured by a jury"	Strong jury-friendly language, talks about conflicting evidence and the jury role.
None	None	Only mentions jury once to say that sometimes inferences are for the jury, and sometimes they are for the court
1)Partial procedural background 2)Second paragraph	None	Only mentions jury during partial recitation of procedural history. Otherwise no deference is shown.
None	None	Reader doesn't know that it was a jury case until the final paragraph. Mentions how there is "no adequate basis for finding…" but otherwise no other homage to the standard or the procedural history.
None	None	No mention of jury. Frames argument around "no reasonable basis" but fails to embrace the "jury could find" language. Also no mention of reasonable inferences in favor of the party against whom jnov is sought.
None	None	Strong jury-friendly language with mentions of jury throughout.

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APPENDIX B
JUDGES COMPARISON CHART

Case	Judge	Cardozo Vote	Issue
Larkin v. N.Y. Tel. Co., 114 N.E. 1043 (N.Y. 1917)	Pound	Concur	Is there sufficient evidence to sustain the jury verdict?
Nowakowski v. N.Y. & N. Shore Traction Co., 114 N.E. 1042 (N.Y. 1917)	Chase	Concur	Is there sufficient evidence to show contributory negligence as a matter of law?
Lopes v. Linch, 115 N.E. 15 (N.Y. 1917)	Hogan	Concur	Is there sufficient evidence to show contributory negligence as a matter of law?

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Procedural History	Indicators	Notes
1) Covers entire procedural background 2) Second paragraph	"the jury might have found"	Attentive to procedural history, and uses a great deal of jury-friendly language throughout entire opinion.
1) Covers entire procedural background 2) Second and third paragraph	"the jury had a right to find" "the jury could have found"	Uses a great deal of jury-friendly language through entire opinion. "We must assume from the record that the jury had a right to find that the trolley car was run 'fast' and that the motorman did not blow the whistle or ring the bell. From the testimony offered in behalf of the plaintiff the jury could have found..."
1) Covers entire procedural background 2) First paragraph	None	While there are no buzzwords, speaks about the difference between questions of law and fact. Talks about the jury's role at least four times. "It is not easy to fix the exact boundary between the question of contributory negligence as a question of law and that of contributory negligence as a question of fact."

Case	**Judge**	**Cardozo Vote**	**Issue**
Escher v. Buffalo & Lake Erie Traction Co., 115 N.E. 445 (N.Y. 1917)	McLaughlin	Concur	Is there sufficient evidence to sustain the jury verdict?
Pyne v. Cazenovia Canning. Co., 115 N.E. 438 (N.Y. 1917)	Collin	Concur	Is there sufficient evidence to sustain the jury verdict?
Schmidt v. Leonhardt Michel Brewing Co., 116 N.E. 991 (N.Y. 1917)	Collin	Concur	Is there sufficient evidence to sustain the jury verdict?
Ochs v. Woods, 117 N.E. 305 (N.Y. 1917)	Collin	Concur	Is there sufficient evidence to sustain the jury verdict?
Turner v. Crystal Film Co., 121 N.E. 784 (N.Y. 1919)	Andrews	Concur	Is there sufficient evidence to sustain the jury verdict?

Procedural History	**Indicators**	**Notes**
1) Covers entire procedural background 2) First paragraph	"it was for the jury to say"	Talk's about the jury's role and lists conflicting evidence that should be given to a jury to determine.
1) Covers entire procedural background 2) First paragraph	"the facts…as the jury might have found them"	Brief mention of jury throughout opinion.
1) Covers entire procedural background 2) First paragraph	"the facts…as the jury might have found them"	Walks through conflicting evidence and uses strong language to show a lack of evidence such as "barren," "no proof," and "inconceivable."
1) Covers entire procedural background 2) First paragraph	"the evidence enabled the jury to find" "jury could have found" "jury might reasonable have found"	Strong jury-friendly language throughout. Mentions the conflicting evidence that requires a jury decision.
1) Covers entire procedural background 2) First paragraph	"on the evidence the jury might have found" "jury might say"	Frames the facts and argument around the evidence as "the jury might have found." The entire opinion was very jury-friendly

Case	Judge	Cardozo Vote	Issue
Gilhooley v. Burgard, 122 N.E. 257 (N.Y. 1919)	Hogan	Concur	Is there sufficient evidence to sustain the jury verdict?
Elias v. Lehigh Valley R.R. Co., 123 N.E. 73 (N.Y. 1919)	Andrews	Concur	Is there sufficient evidence to show contributory negligence as a matter of law?
Fallon v. Swackhamer, 123 N.E. 737 (N.Y. 1919)	Crane	Dissent (no opinion)	Is there sufficient evidence to sustain the jury verdict?
Mintz v. Int'l R.R. Co., 124 N.E. 893 (N.Y. 1919)	Collin	Concur	Is there sufficient evidence to sustain the jury verdict?
Muller v. Hillenbrand, 125 N.E. 808 (N.Y. 1920)	McLaughlin	Concur	Is there sufficient evidence to sustain the jury verdict?

Procedural History	**Indicators**	**Notes**
1) Mentions procedural history 2) Scattered throughout opinion	None	Does not mention the jury until the decision is rendered in the opinion. Mostly a recitation of the facts and a few small paragraphs of analysis.
None	"it was for the jury to say" "may be considered by a jury"	Gets to a brief jury discussion after facts are laid out. Very streamlined opinion.
1) Covers entire procedural background 2) First paragraph	"evidence warrants no such conclusion"	Doesn't mention jury by name other than procedural history. Judge enters a JMOL and uses language to show that no reasonable person could find otherwise.
1) Covers entire procedural background 2) First paragraph	"jury might have found" "the entire evidence established"	Strong jury-friendly language throughout.
1) Covers entire procedural background 2) First paragraph	"the evidence …justified the jury in finding"	Short opinion, limited jury discussion. But, frames analysis around jury role.

Case	Judge	Cardozo Vote	Issue
Burns v. Wilkinson, 126 N.E. 513 (N.Y. 1920)	Andrews	Concur	Is there sufficient evidence to sustain the jury verdict?
Campbell v. Richmond Light & R.R. Co., 127 N.E. 271 (N.Y. 1920)	Andrews	Concur in result	Is there sufficient evidence to sustain the jury verdict?
Christensen v. James S. Hannon, Inc., 129 N.E. 655 (N.Y. 1920)	Andrews	Concur	Is there sufficient evidence to show contributory negligence as a matter of law?
Ford v. McAdoo, 131 N.E. 874 (N.Y. 1921)	Crane	Concur	Is there sufficient evidence to sustain the jury verdict?

Procedural History	Indicators	Notes
1) Covers entire procedural background 2) First paragraph	"clearly for the jury to decide"	Speaks directly about the burden of proof and the jury's role up front in the opinion. "Assuming as we must, therefore, the truth of the plaintiff's story, giving him the benefit of all the inferences to which a jury might say he is entitled and resolving all disputed points in his favor, we must determine whether this conclusion was justified, or whether there was involved a question of fact."
None	"the jury might find"	Uses jury-friendly language throughout opinion despite lack of procedural history.
1) Covers entire procedural background 2) Second paragraph	"it is generally for the jury to say"	Uses jury-friendly language throughout opinion.
1) Brief mention of procedural background 2) Midway through the opinion	"there is no evidence to show"	No direct references or use of other jury indicators. Had to infer that the ruling was a JMOL.

Case	Judge	Cardozo Vote	Issue
Cadby v. Hill, 132 N.E. 104 (N.Y. 1921)	Hogan	Concur	Is there sufficient evidence to sustain the jury verdict?
Grulich v. Paine, 132 N.E. 100 (N.Y. 1921)	Chase	Concur	Is there sufficient evidence to show contributory negligence as a matter of law?
Riley v. Standard Oil Co., 132 N.E. 97 (N.Y. 1921)	Andrews	Concur	Is there sufficient evidence to sustain the jury verdict?
Singer v. Erie Railroad Co., 132 N.E. 912 (N.Y. 1921)	Hiscock	Concur	Is there sufficient evidence to sustain the jury verdict?

Procedural History	**Indicators**	**Notes**
1) Covers entire procedural background 2) First and second paragraph	"the jury might have credited the evidence" "the jury might find"	Mentions multiple times that the issue before the court is one for the jury.
1) Covers entire procedural background 2) Midway through the opinion	"the jury could have found" "accepting the facts as the jury could have found them"	Mentions the jury multiple times throughout opinion.
1) Covers entire procedural background 2) First paragraph	"as the jury have said"	Short opinion, makes references to the jury and its role often.
1) Brief mention of procedural background 2) First paragraph	None	Gives deference to jury several times. "We do not see how it is possible to permit a jury to say that intestate was vigilant or that he exercised any care at all."

Case	**Judge**	**Cardozo Vote**	**Issue**
Wardrop v. Santi Moving & Express Co., 135 N.E. 272 (N.Y. 1922)	Andrews	Concur	Is there sufficient evidence to sustain the jury verdict?
Touris v. Brewster & Co., 139 N.E. 249 (N.Y. 1923)	McLaughlin	Concur	Is there sufficient evidence to sustain the jury verdict?
Horton v. New York C. R. Co., 142 N.E. 345 (N.Y. 1923)	Crane	Concur	Is there sufficient evidence to show contributory negligence as a matter of law?

Procedural History	**Indicators**	**Notes**
None	"the jury might infer"	Strong jury-friendly language throughout. "Under these circumstances we cannot say that he was guilty of negligence as a matter of law"
1) Covers entire procedural background 2) First paragraph	"The jury found"	Strong jury-friendly language throughout. "To permit the jury to find defendant negligent, under the facts here stated, and which are substantially uncontradicted, would be to make the owner of an automobile liable beyond reason and common sense."
1) Covers entire procedural background 2) Second paragraph	None	A lot of strong jury-friendly language throughout entire opinion. "I cannot find in the acts of [plaintiff], as I have given them above, any evidence that he violated section 53-a of the Railroad Law, and I find nothing in the entire case to justify the courts in saying so as a matter of law. Whether he did was a question for the jury."

Case	Judge	Cardozo Vote	Issue
Orlando v. Pioneer Barber Towel Supply Co., 146 N.E. 621 (N.Y. 1925)	Pound	Concur	Is there sufficient evidence to rule on liability as a matter of law?
Simpson v. Coastwise Lumber & Supply Co., 147 N.E. 77 (N.Y. 1925)	Crane	Concur	Is there a question of fact for the jury to decide?
Hyman v. N.Y. Cent. R.R. Co., 147 N.E. 613 (N.Y. 1925)	Crane	Concur	Is there a question of fact for the jury to decide?
Nalli v. Peters, 149 N.E. 343 (N.Y. 1925)	Crane	Concur	Is there sufficient evidence to sustain the jury verdict?
Loktich v. Bethlehem Eng'g Corp., 152 N.E. 253 (N.Y. 1926)	Lehman	Concur	Is there sufficient evidence to sustain the jury verdict?

Procedural History	Indicators	Notes
1) Covers entire procedural background 2) First paragraph	None	Frames the entire analysis around "whether as a matter of law the presumption was overcome." Strong jury-friendly language.
1) Covers entire procedural background 2) Directly after facts	"jury did not believe."	Speaks about jury throughout decision, and explains there was no question of fact for the jury to rule on.
1) Covers entire procedural background 2) Second paragraph	"matter for the jury to pass on"	Constantly mentions jury's role versus judge's role in determining whether the issue was one of fact or law.
1) Covers entire procedural background 2) Third paragraph	"the jury might find, or reasonably infer"	Frames question around the power of the jury and mentions jury twice during very short opinion.
None	"only if the evidence permits"	Doesn't mention the jury. Frames argument around the lack of evidence.

Case	Judge	Cardozo Vote	Issue
Dalton v. Hamilton Hotel Operating Co., 152 N.E. 268 (N.Y. 1926)	Hiscock	Concur	Is there sufficient evidence to sustain the jury verdict?
Raolaslovic v. N.Y. Cent. R.R. Co., 156 N.E. 625 (N.Y. 1927)	Kellogg	Concur	Is there sufficient evidence to sustain the jury verdict?
Shuman v. Hall, 158 N.E. 16 (N.Y. 1927)	Crane	Concur	Is there sufficient evidence to sustain the jury verdict?
Tantillo v. Goldstein Bros. Amusement Co., 162 N.E. 82 (N.Y. 1928)	O'Brien	Concur	Is there sufficient evidence to sustain the jury verdict?

Procedural History	Indicators	Notes
1) Covers entire procedural background 2) Midway through the opinion	None	No mention of jury. "when we come to the reversal of the judgment on the facts, the evidence so clearly sustains this disposition that we cannot and ought not to interfere with it."
1) Brief mention of procedural background 2) First paragraph	"if the evidence here was such as to justify the jury in believing" "the jury was entitled to believe" "for the jury to decide"	Constantly refers to the jury throughout opinion. Great breakdown of conflicting facts.
1) Mentions procedural background 2) Midway through the opinion	None	Strong jury-friendly language in the last few paragraphs of opinion.
1) Mentions procedural background 2) Second paragraph	"the jury could find" "the jury could and did find"	Spatters of jury references throughout opinion.

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Case	Judge	Cardozo Vote	Issue
Sandler v. Garrison, 164 N.E. 36 (1928)	Kellogg	Concur	Is there sufficient evidence to sustain the jury verdict?
Hendricks v. N.Y., New Haven & Hartford R.R. Co., 167 N.E. 449 (N.Y. 1929)	O'Brien	Dissent (no opinion)	Is there sufficient evidence to sustain the jury verdict?
McLoughlin v. N.Y. Edision Co., 169 N.E. 227 (N.Y. 1929)	Kellogg	Dissent (no opinion)	Is there sufficient evidence to sustain the jury verdict?
Reinzi v. Tilyou, 169 N.E. 101 (N.Y. 1929)	Pound	Concur	Is there sufficient evidence to show contributory negligence as a matter of law?
Harriman v. N.Y., Chi. & St. Louis R.R. Co., 171 N.E. 686 (N.Y. 1930)	Hubbs	Concur	Is there sufficient evidence to sustain the jury verdict?

Procedural History	Indicators	Notes
1) Brief mention of procedural background 2) First paragraph	"No proof whatsoever"	Doesn't mention the jury, but spends a lot of time discussing the severe lack of evidence.
1) Covers entire procedural background 2) First paragraph	"from conflicting evidence the jury could find" "the jury must be presumed to have found"	Talks about the conflicting evidence and refers to the jury's role often.
None	None	Doesn't mention jury until judgement is rendered. Uses a lot of language such as "could be inferred" when discussing the facts.
1) Mentions procedural history 2) Scattered throughout opinion	"the plaintiff offered evidence from which the jury might find"	Spends some time discussing when the evidence rises to the level of being able to render a JMOL compared to leaving the issue for the jury.
1) Brief mention of procedural background 2) Third paragraph	"the jury has found, upon sufficient evidence" "the jury was justified in finding"	Strong jury language throughout opinion.