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BENJAMIN CARDOZO AS PARADIGMATIC TORT LAWMAKER

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My assigned topic is a mouthful: Benjamin Cardozo as Paradigmatic Tort Lawmaker. In other words, what did he do and how did he do it? And was he paradigmatic? For purposes of this conference, I think the first two questions are more important. The assumption is that he did something significant for tort law. After a long time studying his opinions, I came to the conclusion that in the what-did-he-do category, his contribution was significant, but less significant than his reputation, and that his major message for his day and ours was in the how-did-he-do-it category. The two categories are combined, for it is largely by studying the what-did-he-do that we understand how-he-did-it, at least to the maximum extent that we can ever understand how a judge does it. I am going to take some liberties in this paper, often summarizing conclusions with briefer evidence than I set forth at length in my book.

After Cardozo had been on the bench for seven years, he undertook the task of explaining what he did in his Yale Lectures entitled *The Nature of the Judicial Process*.[1] A major theme of my biography[2] is that as a judge on the Court of Appeals, Cardozo delivered two messages: one that his listeners heard as the major key, and one that his listeners heard, if they heard it at all, as a minor key. The major-key message is a familiar one in our day, but it was not so familiar in his. It was Cardozo's acknowledgment that judges made law and his stirring defense of the practice. The minor-key message was that in making law, judges were restrained by history, by precedent, and by the powers and responsibilities of the other branches of government. The law was not always fair; judges could not always do justice. The task for the judge was to figure out when it was appropriate to "make new law" and when it was not; the task for the judge's biographer is to figure out what determined the judge's calculus. My bottom line is that I do think he was paradigmatic, in the sense of exemplary, in both

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1. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1948).
2. ANDREW L. KAUFMAN, CARDOZO (1998).

of the messages he sent. But different judges, even those who believe in the messages that Cardozo was trying to send, will put the elements of decisionmaking together in different ways in particular cases. I do not think that Cardozo was always exemplary in the results he reached. Occasionally, he stumbled, sometimes rather badly. But perhaps all I am saying is that he was human.

Cardozo's tort opinions exemplify what I believe to be the mixed message nature of his contribution to tort law. In his day, he was lionized, especially by academia, as a progressive judge who cast off the shackles of nineteenth century mechanical jurisprudence and formalism and used the capacity of judge to make law to modernize doctrine. In my view that was true sometimes, but it was also not true sometimes.

Since I have already written about Cardozo's tort decisions and his approach to tort law in three chapters of my biography, perhaps it would be most useful to start by quoting my two-page conclusion, just to make clear at the outset what my views are regarding Cardozo as a lawmaker in the field of torts. In so doing, I will presume, in this audience, a familiarity with all, or at least most, of the cases to which I casually refer, although I will discuss many of them individually later in the paper.

> Cardozo approached negligence law with a fundamental acceptance of its central premises, even when some of its principal features, including the dominance of the fault principle over strict liability and the persistence of some of the defenses to the negligence action, were coming under strong attack. He viewed the negligence cause of action as one between two parties with the issue being whether one party was responsible for the injuries of another. In that setting, fault was crucial. The larger public issue—who should bear the costs of inevitable accidents in an industrial society—was to be addressed by statute in a legislative setting where all interest groups could be represented. In some instances, he refused to consider whether public policy considerations warranted a modification of an existing rule because the legislature had already modified the rule in part and left the remainder intact.
>
> Cardozo considered the difficult legal issues at the intersection of his method of philosophy, emphasizing logical reasoning, and his method of sociology, emphasizing public policy, on an ad hoc basis that focussed on the reasons for particular rules in the context of the facts of each case. In reaching his decisions, Cardozo was not moved by sympathy for parties, like Donald MacPherson or Helen Palsgraf, based on their economic or social status. Unlike equity cases, where justice was to be done on an individual basis, justice in these cases was done by crafting a just rule, applying it impartially

to the relevant facts, and accepting the results, whether seemingly harsh or not.

Cardozo was willing to modernize rules that restricted liability, but often with conditions that gave weight to the reasons for the original rule. This qualified innovation resulted in matched pairs of cases. Thus, after he applied the concept of foreseeability to update an anachronistic privity rule in *MacPherson*, he [later] demonstrated [that there were] limits on that concept . . . and on his willingness to abolish privity. Likewise, his readiness to create a remedy for a tenant against a [negligent] landlord . . . disappeared in the absence of a relevant statute. While he was willing to modernize land law a bit . . . to impose on railroad companies the consequences of their lack of care . . . [to a technical trespasser], . . . he was not willing to impose special precautions on trolley companies. Likewise, the doctrinal advance . . . [of imposing liability on a careless public weigher to a third party was not applied to accountants in different circumstances.] And he was ready to chip away at aspects of . . . [New York's rule refusing to impose liability for widespread damage for negligently causing a fire] but not to dispense with its restriction of the potential for enormous liability.

From the middle of the nineteenth century the history of tort law was marked by a conflict between respect for precedent and arguments for change, and a tension between the liability-increasing and liability-restricting nineteenth-century precedents of *Thomas v. Winchester* and *Ryan v. New York Central Railroad.* Cardozo's opinions reveal a number of considerations that influenced his accommodation of the contending principles and doctrines: the need to reorient rules to meet modern conditions, reluctance to establish the potential for crushing liability, respect for the special role of the jury, deference to the constitutional authority of the legislature and governor, especially when they had already taken some action, and, finally, confidence in his own ability to read a case record and make up his mind about the relation between the parties and the effect of their conduct.

Foreseeability, not as an abstract notion but in the context of a factual setting, was crucial to Cardozo's idea of the duty of care that underlay liability for negligence. Foreseeability guided or should guide the conduct of all parties. It informed business managers with respect to the risks they needed to avoid, minimize, or insure against. Foreseeability also informed ordinary, people that life was risky and that all people had to exercise prudence in their daily lives. But foreseeability was not the only determinant of liability. It was limited by the notion that liability was not to be extended in indeterminate amounts to indeterminate numbers of people or in new situations whose complexity suggested that the legislature or an agency was a better forum for reaching a solution.

There is no formula for explaining why Cardozo viewed some of the considerations more strongly in some cases than others. It is misleading to try to find a chronological pattern of more adventurous opinions like *MacPherson* in his earlier years and more cautious

> opinions, like *Palsgraf*, *Moch*, or *Ultramares* in his later years. The fraud portion of *Ultramares* was creative, and there were many innovative opinions in his later years on the Court of Appeals and on the Supreme Court, as well as some cautious ones in his early years as a judge.
>
> Cardozo's conclusions in individual cases were based on his judgment about the importance of the relevant guides to decision in each particular factual setting. He understood that his job was to weigh the relevant considerations, including public policy considerations, and to make a pragmatic choice among them in order to decide a case. He did that work conscientiously as long as he was on the court. He was not the first judge to introduce new public policy considerations into the calculus of tort law. Nonetheless, at a time when the use of policy considerations had become obscured, perhaps even to many judges, he trumpeted their relevance. Readers, especially readers of a later day, will not always agree either with the public policy considerations that he espoused or with his ultimate conclusion in a given case. But Cardozo's use and defense of a pragmatic methodology in judging helped pave the way for the changes in tort law that followed after him.[3]

With those conclusions in mind, let us examine some of the individual decisions. Torts scholars have argued that historically there were two competing theories of proximate cause. One theory used the language of "natural and probable consequences."[4] It emphasized the foreseeability of the risks or the harm of negligent conduct.[5] The other used the language of "natural and proximate" results.[6] It emphasized the closeness in time or proximity of the negligent conduct to the harm suffered. New York courts, however, used the language of both theories imprecisely, and the choice of wording did not portend any particular outcome.[7]

Cardozo began his encounter with the problems of tort law early. His first notable opinion, *MacPherson v. Buick Motor Co.*[8] established that a car maker would be liable for damages resulting from defects, even when the car owner had purchased the car not from the maker but from a dealer.[9] He had a choice to make in deciding the case. There were two major lines of cases in New York tort law dealing with the general issue of proximate cause at the time *MacPherson* came to the court. One began with *Thomas v. Winchester* in 1852.[10]

3. *Id.* at 310-12.
4. ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 26 (1963).
5. *Id.* at 27.
6. *Id.* at 29.
7. *Id.* at 29-32.
8. 111 N.E. 1050 (N.Y. 1916).
9. *Id.* at 1053.
10. 6 N.Y. 397 (1852).

In that case the court found liability in favor of a remote user of drugs against the seller who had mislabeled them, despite the fact that the seller had had no dealings with either the user or her husband, the purchaser.[11] There was no privity between them. Nevertheless, Cardozo found liability because the act of negligence was imminently dangerous to the user and the seller was therefore "justly responsible for the probable consequences" of his negligence.[12] Subsequently, the New York Court of Appeals began to focus more on the danger to non-contracting third parties than on the inherent dangerousness of the product itself. Thus liability to a non-contracting third party was recognized in cases of defective scaffolds,[13] an exploding bottle of aerated water,[14] and an exploding large coffee urn.[15]

The second line of cases was exemplified by *Ryan v. New York Central Railroad*[16] in which Judge (later United States Supreme Court Justice) Ward Hunt gave perhaps the most restrictive and controversial nineteenth-century application of proximate cause. His opinion held that an owner who negligently set his woodshed on fire was not liable for the destruction of a nearby house to which the fire spread.[17] Destruction of the shed upon which sparks first fell could have been anticipated, but the spread of the fire to other property was not a "necessary or an usual result," even though it was "possible" and "not unfrequent."[18] The chance that the fire would spread was "remote" and depended upon "accidental and varying circumstances" over which the owner had no control.[19] Imposing liability would require that a landowner guarantee the complete security of all his neighbors and would "create a liability which would be the destruction of all civilized society."[20]

Thomas and *Ryan* demonstrate the courts' ability to use rather similar formulations of the general doctrine of liability for negligence to respond to different policy considerations and thus, to reach different results in cases where the damage that occurred would seem, to a lay observer, a foreseeable consequence of the defendant's negligent conduct. Much of the history of New York tort law may be understood as

11. *Id.* at 405-09.
12. *Id.* at 410.
13. Devlin v. Smith, 89 N.Y. 470 (1882); Coughtry v. Globe Woolen Co., 56 N.Y. 124 (1874).
14. Torgeson v. Schultz, 84 N.E. 956 (N.Y. 1908).
15. Statler v. Ray Mfg. Co., 88 N.E. 1063 (N.Y. 1909).
16. 35 N.Y. 210 (1866).
17. *Id.* at 210-17.
18. *Id.* at 212.
19. *Id.* at 212-13.
20. *Id.* at 216-17.

an attempt to accommodate the tension between *Thomas'* expansion of liability on the basis of the foreseeability of the risk and *Ryan's* limitation of potentially indeterminate liability despite the foreseeability of risk. That tension reappears in the contrast between Cardozo's famous opinions in *MacPherson* and *Palsgraf v. Long Island Railroad Co.*[21]

After *Thomas* and *Ryan*, the New York Court of Appeals had difficulty maintaining consistency either in doctrine or in results in cases involving proximate causation, and doctrinal confusion over proximate cause continued through Cardozo's arrival on the New York Court of Appeals in 1914.[22] The court expressed no clear theory of legal cause, mingling language and ideas of prior cases as they seemed appropriate to deal with particular cases. Not until Cardozo's opinions in *MacPherson*—and later in *Palsgraf*—was there any full-fledged discussion of proximate cause or the related issue of duty in the New York Court of Appeals.

By 1916, courts and academics were stating confidently that the general rule was that a manufacturer was not liable for injuries resulting from the use of a defective product by a third party with whom it had no contractual relationship unless certain conditions were met. The relevant conditions were quite narrow: the product must have been imminently dangerous to life and involved in the preservation or destruction of life or the seller must have known that the article was imminently dangerous and failed to give notice of the danger to the buyer.[23]

The New York Court of Appeals could have pointed to the text writers and numerous cases in the United States for the proposition that unless the plaintiff fit one of the exceptions, the court would apply the general rule of nonliabilty of a negligent manufacturer to a third party with whom it had no contractual relations (or, in lawyer's technical language, no "privity"). Of the three generally recognized exceptions, only the one that encompassed sales of inherently or imminently dangerous articles was relevant. Disregarding that exception would have been easy. The court could simply have written, as Chief Judge Willard Bartlett did write in dissent, that "the defective wheel on an automobile moving only eight miles an hour was not any more

21. 162 N.E. 99 (N.Y. 1928).

22. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 51-61 (1992).

23. Huset v. J. L. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903). *See* 2 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 1486-92 (1906); FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 366-72 (1878).

dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed."[24] Bartlett pointed out that there would be no liability in the carriage case and indeed that such a case was one of the illustrations of nonliability used by the court in *Thomas*.[25] A case similar to *MacPherson* had just been decided in favor of nonliability by the United States Circuit Court of Appeals for the Second Circuit.[26]

However, in New York, the *Thomas* line of cases had broadened the exception for dangerous articles to the point where it seemed about to swallow the general rule of nonliability. Cardozo's opinion in *MacPherson* virtually completed the process. He chose not to follow the so-called general rule. In so doing, he focussed on the New York precedents and not on broad propositions of negligence law. For Cardozo, the *Thomas* rule did not require that a product be inherently dangerous, like a poison or an explosive. It was enough that the product be imminently dangerous if imperfectly constructed. He relied on *Devlin v. Smith*,[27] *Statler v. Ray Manufacturing Co.*,[28] and *Torgeson v. Schultz*[29] (the defective scaffold and exploding products cases) for that proposition, arguing that even if those cases were viewed as having extended the *Thomas* rule, the court was "committed to the extension."[30]

After discussing developments in the United States and England since the original decision in *Thomas*, Cardozo restated the scope of its doctrine as extending to all articles "reasonably certain" to be dangerous when negligently made.[31] The manufacturer would be liable if it knew that the article would be used by persons other than the dealer without new tests. At this point, Cardozo was willing to throw a few crumbs to the former general rule. Recognizing that anything can be used in a dangerous way, he stated that the required knowledge must be of probable, not just possible, danger.[32] He also concluded that there was no need for the court to consider whether the *MacPherson* principle applied to manufacturers of component parts. Cardozo was then ready to apply his new rule to the particular case, which involved

24. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1056-57 (N.Y. 1916).

25. Thomas v. Winchester, 6 N.Y. 397, 398, 400 (1852).

26. *See* Cadillac Motor Car Co. v. Johnson, 221 F. 801, 806 (1915).

27. 89 N.Y. 470 (1882).

28. 88 N.E. 1063 (N.Y. 1909).

29. 84 N.E. 956 (N.Y. 1908).

30. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1056-57 (N.Y. 1916).

31. *Id.* at 1053.

32. *Id.*

injury to the person who purchased the Buick from the car dealer.[33] Cardozo pointed out the weakness of Buick's position—it recognized a legal duty only to the dealer, the person least likely to use the car—and held that the sale of an automobile fit within the protection of his stated rule.[34]

Cardozo studiously avoided discussing the broad ramifications of the case. His opinion simply analyzed established principles of negligence law, in particular the duty of a seller of goods to strangers.[35] There was no explicit or implicit consideration of other factors, such as the relative economic position of manufacturers and consumers, the ability to spread costs, the needs of industry to avoid potentially crushing liability, or the relevance of insurance. The issue was conceived of and discussed solely in terms of duty and the persons to whom sellers of products owed duties.

Cardozo gave only glancing intimations that any policy considerations affected his views of the proper outcome in *MacPherson*. While he recognized that precedents must be adapted to changes in society, he did not state what new conditions or needs of life justified the decision. He seemed concerned only with changed factual circumstances, not with any new social or legal theory. There was absolutely no hint that he was creating any more extensive liability than familiar negligence theory warranted. On the face of it, Cardozo concluded that Buick had a duty to those persons who were likely victims of a negligently made car. The duty was found in general tort law, as expounded in a string of New York decisions. In *MacPherson*, Cardozo used the concept of foreseeability to impose liability on a manufacturer in a situation where it had not previously been thought to exist. But foreseeability was not necessarily a liability-increasing notion. Cardozo used it to deny liability as well.

Cardozo's opinion in *MacPherson* did not acknowledge that any important principle was at stake. He disposed of the contrary authorities either by reconciling them on the ground of the remoteness of the negligence in those cases or by viewing them as merely different applications of the same principle. Thus, Cardozo presented the new rule in the most modest terms. This style of argument would become typical of Cardozo's writing—the attempt to narrow differences of principle or to turn apparent differences of principle into differences of application. While the New York precedents supported his argument, the new rule did represent a break with other jurisdictions. As Chief

33. *Id.*
34. *Id.*
35. *Id.* at 1051-55.

Judge Bartlett pointed out in his dissent, some of the contrary authorities from other jurisdictions represented differences of principle and not just differences of application.[36]

Cardozo ignored the state of the law in other jurisdictions. Instead, his opinion assembled the analysis and the factual situations in the prior New York cases to enunciate a general New York rule. In New York, prior case law made the innovation less striking than it would have been elsewhere, although this additional change in degree replaced an old rule (which the court had gradually modified) with a different new rule that incorporated the cumulative effect of those modifications. Cardozo made the shift with a characteristic rhetorical flourish:

> Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization requires them to be.[37]

The rhetorical flourish was appropriate to the state of New York law where Cardozo could focus on the need to show "imminent danger." Elsewhere in the country, he would have had to contend with "inherent" danger, a much more difficult task. The New York Court of Appeals was already close to the *MacPherson* result, and Cardozo was most ready to innovate when the distance he had to travel from established law was small. Cardozo did not invent the doctrine that imposed liability on Buick. Analogy powered by public policy considerations—his perception that the exceptions to the original rule were more generally applicable than the rule itself—convinced him to reformulate and improve the governing doctrine.

In the national context, *MacPherson* was a major innovation. Cardozo's opinion turned out to be very influential because its careful reasoning attacked the basis of the general rule of nonliability. But Cardozo's innovation also had limits. In his opinion Cardozo allowed for the possibility that manufacturers would not be held liable in all circumstances. While he mentioned that the provision of extra seats in a car indicated that passengers were within the manufacturer's duty of care,[38] he did not say whether protection extended to an injured pedestrian or the owner of property damaged by a defective car. He also reserved the case of the manufacturers of component parts for future decision. Finally, he noted that the basis of Buick's liability was

36. *MacPherson*, 111 N.E. at 1055-57.
37. *Id.* at 1053.
38. *Id.*

in the law of torts and not in the contract between Buick and the dealer to whom it sold the car. Therefore, it was uncertain whether anyone other than the dealer could take advantage of warranties made by Buick.[39] These cautions were typical of Cardozo's reasoning process. Rather than suddenly establishing a general, unqualified principle, he tried to preserve flexibility for unforeseen future applications of the rule.

Although Professors Seavey and Prosser argued that the exceptions were formulated in a way that would allow them to be sloughed off later, Cardozo took the exceptions seriously.[40] Indeed, he later joined Judge McLaughlin's opinion in *Chysky v. Drake Brothers Co.*,[41] holding that a waitress injured when she bit into a nail embedded in a piece of cake that had been given to her by her employer could not recover from the producer of the cake in a suit based on contractual breach of warranty.[42] There was no privity, no contract between the waitress and the cake maker.[43] The court relied on Cardozo's statement in *MacPherson* that the basis of liability in that case was in tort, not contract. If there was to be contractual liability, there had to be privity between the parties. If the exceptions expressed in *MacPherson* had been a smokescreen for the basic principle that a producer of a defective product would be liable to anyone who might be expected to use it, Cardozo would have applied the *MacPherson* principles to permit the waitress to recover regardless of her choice not to sue in tort. Yet Cardozo joined the majority that ruled against the waitress, not Judge Hogan's silent dissent.

Although Cardozo's opinion in *MacPherson* expanded the liability of manufacturers to consumers based on the foreseeability of harm from negligence, it did not use that concept to expand the liability of all defendants or even to formulate a rule for analysis of all negligence cases in terms of duty. Almost immediately after *MacPherson*, Cardozo wrote another opinion in which he used the language of proximate cause to deny liability. In *Perry v. Rochester Lime Co.*,[44] the defendant company stored nitroglycerine caps in tin boxes marked "Blasting caps, handle with care."[45] The tin boxes were placed in wooden boxes in a storage chest on public property along the Erie

39. *Id.* at 1051.

40. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 642-43 (1917); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 379 (1939).

41. 139 N.E. 576 (N.Y. 1923).

42. *Id.* at 577-78.

43. *Id.* at 578.

44. 113 N.E. 529 (N.Y. 1916).

45. *Id.*

Canal in Rochester. The storage was done without a permit and in violation of law.[46] Although the company usually kept the chest locked, one night the chest was left unlocked and open. Two boys took one of the wooden boxes and hid it in a neighboring barn.[47] The next day the two boys set out with the box accompanied by an eight-year-old boy. A few minutes later the caps exploded, killing all three boys.[48]

The lawsuit against the company was only for the death of the third boy, who had not been involved in the theft. The trial judge had dismissed the suit and the Appellate Division affirmed.[49] Cardozo affirmed the lower courts in a unanimous opinion. If he had meant *MacPherson* to state a principle of broad-ranging defendant liability, he could easily have reversed in *Perry* by concluding that the company had stored dangerous material negligently, in violation of law, and that the death of the boy was a foreseeable consequence of its negligence. Cardozo, however, did not even mention *MacPherson* or frame the issue in terms of whether the company owed the boy any duty. Instead, Cardozo began by positing the wrongfulness of the company's conduct in its violation of the statute and framed the issue in terms of the company's responsibility "for the proximate consequences of the wrong . . . for those consequences that ought to have been foreseen by a reasonably prudent man."[50] Cardozo concluded that as a matter of law there was nothing for the jury to decide: the open chest was not the proximate cause of the boy's death. It was "possible" but not "probable" that the contents would be stolen.[51] The company had not provoked the theft. Although the chest was open, the caps were hidden inside in the tin boxes.[52] The theft and subsequent events culminating in the boy's death were "new and unexpected" intervening causes.[53]

Although Cardozo employed the language of foreseeability of injury that had led to the conclusion of liability in *MacPherson*, *Perry* turned away from the spirit of *MacPherson*. Cardozo focussed on the geographic and temporal considerations associated with proximate causation and on the concept of intervening cause. Cardozo's unwillingness to let the case go to a jury is strong evidence that his emphasis

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Perry*, 113 N.E. at 529.
51. *Id.* at 530.
52. *Id.*
53. *Id.*

on the notion of foreseeability did not carry any ulterior notion of an expansion of defendant liability. *Perry* demonstrated Cardozo's self-confidence in reaching a judgment about what reasonable people ought to regard as foreseeable or not. Injury from the defendant's conduct was clearly foreseeable to Cardozo in *MacPherson* and just as clearly not foreseeable to him in *Perry*.

Cardozo's willingness to deny liability as a matter of law continued when he returned shortly after *Perry* to a more duty-oriented analysis. In *O'Connor v. Webber*,[54] butcher shop owners were exonerated from liability to an employee as a matter of law on the basis of a lack of duty to guard against unusual accidents.[55] O'Connor, the employee, had his fingers cut off by an electric chopping machine when the stick used to push the meat into the machine hit the revolving screw and the shock caused the employee's hand to slip into the machine.[56] Cardozo brushed aside the argument that a guard or a different shaped stick was necessary. The owners had fulfilled their duty by furnishing the only machine available on the market:

> They were not running a factory, where machinery is the principal thing, the very life of the business .... If they were charged with a duty to become inventors of improved devices, and that too in an attempt to guard against remote and doubtful dangers, the same duty must attach to every one who uses a standard machine of any kind in his office or his home.[57]

Cardozo relied on the remoteness of the danger and on economic and social conditions—the position of the shopkeepers as a small business—to help define the limited duty owed by the butcher shop owners to their employees.

Cardozo's opinions in *O'Connor* and *Perry* indicate that he was prepared to use either of the New York courts' formulations of "proximate cause"—foreseeability of harm or geographic and temporal notions of causation—as seemed appropriate. *Perry* was not an aberration. For example, in a case that involved not torts but an insurance contract, *Bird v. St. Paul Fire & Marine Insurance Co.*,[58] Cardozo linked coverage to geographic considerations by using the language of proximate cause.[59] Damage to a boat resulted when a fire broke out beneath some freight cars loaded with ammunition in the Black Tom railroad yards in New York harbor during World War I. The cars blew

54. 114 N.E. 799 (N.Y. 1916).
55. *Id.*
56. *Id.*
57. *Id.* at 800.
58. 120 N.E. 86 (N.Y. 1918).
59. *Id.* at 87-88.

up, causing a second fire, which caused an even more violent munitions explosion.[60] The second explosion caused a shock wave that damaged Bird's boat 1,000 feet away. The question was whether the damage to the boat fell within the scope of an insurance policy that quaintly referred to the "[a]dventures and perils which the said [insurance] Company are content to bear" as those "of the Sounds, Harbors, Bays, Rivers, Canals and Fires, that shall come to the damage of the said boat."[61] As Cardozo noted, there was no express exception in the policy for damage from explosion, although policies commonly contained such exceptions.[62]

Cardozo, writing for a unanimous court, nevertheless overturned a judgment for the boat owner. Cardozo's analysis was interesting but baffling. The parties and the court treated the insurance policy as a fire policy, which required Bird to demonstrate that the damage had been caused by fire. While New York insurance cases assumed that there was liability if a fire in a building caused an explosion that damaged a neighboring building, Cardozo did not follow those cases and implicitly limited them. In deciding whether the fire caused the damage to Bird's boat, Cardozo stated the guiding principle as "the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract."[63] What was critical was the belief of "the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away."[64] Such an owner would not expect indemnity. (Bird's boat, of course, was less than one-fifth of a mile away.) Cardozo concluded that if the fire was "near at hand," the boat would be in the danger zone of "normal apprehension" and the owner would be covered under the policy.[65] But when the fire was "remote" and "extraordinary conditions" caused "indirect peril," then the case was out of the realm of probable expectation.[66] The damage to Bird's boat occurred by explosion, not fire, and it occurred over a remote distance and was "twice removed" from the initial cause.[67] The verdict for Bird was therefore reversed.

Cardozo's opinion was heavily influenced by torts concepts. He emphasized the expectations of the average owner—a reasonable person analysis—and the importance of the spatial connection in the defi-

60. *Id.* at 86.
61. *Id.*
62. *Id.*
63. *Id.* at 87.
64. *Bird*, 120 N.E. at 87.
65. *Id.*
66. *Id.*
67. *Id.*

nition of causation, a familiar element of proximate cause analysis. Cardozo, in fact, specifically referred to torts cases to support his reliance on spatial proximity in establishing causation. "This [recognition] is true even in the law of torts where there is a tendency to go farther back in the search for cause than there is in the law of contracts."[68]

Bird represented an important step in Cardozo's thinking about causation. It is quite clear that he understood the public policy implications of deciding the nature of the elements of proximate cause. Like the other cases following *MacPherson*, *Bird* established that foreseeability and duty were not, in Cardozo's mind, devices for automatic expansion of defendant liability for careless conduct. Rather than being rhetorical devices that presumed liability, they were standards or tests that needed to be carefully analyzed and applied according to the facts of the case.

Sometimes Cardozo's restrictive application of the notion of foreseeability worked to a plaintiff's benefit. In reversing a judgment that had dismissed a complaint in *Lewis v. Ocean Accident & Guarantee Corp.*,[69] Cardozo found liability under an insurance policy for injury "effected solely through accidental means," when the opening of an infected pimple by a doctor caused the spread of infection which killed the patient.[70] "To the scientist who traces the origin of disease, there may seem to be no accident" in what occurred.[71] Under that view the death would not be covered by the policy. But "our point of view in fixing the meaning of this contract . . . must be that of the average man."[72] And to Cardozo the average man would say that "the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident."[73]

But Cardozo brought to his judging a strong focus on the facts of cases, a confidence in his own ability to assess what happened, and a sense that people had to take personal responsibility for their own behavior, not just in enforcing the fiduciary principles with which his name is linked but also in the daily events of life. The shopper who turned away from the cash register after paying her bill and fell over the outstretched legs of the store employee whom she had seen a moment before trying to fix a machine should have looked to see where

68. *Id.* at 88.
69. 120 N.E. 56 (N.Y. 1918).
70. *Id.* at 56-57.
71. *Id.* at 57.
72. *Id.*
73. *Id.*

she was going.[74] Cardozo's opinion took away her verdict.[75] The customer who jumped on an amusement park ride called The Flopper, which consisted of a moving belt that ran up an inclined plane, had seen others falling before he got on and got hurt when he fell. His verdict too got taken away. "The timorous may stay at home."[76]

Cardozo returned to problems of duty in *Hynes v. New York Central Railroad Co.*[77] He had just delivered his lectures on *The Nature of the Judicial Process* and the ideas developed in them must have been much on his mind. In *Hynes*, the court had to choose between two possible duties owed by a landowner: the duty to trespassers not to injure them by willful or wanton conduct and the duty to persons on adjacent public land to use reasonable care that the landowner's property not cause them injury.[78] A sixteen-year old boy, Harvey Hynes, was swimming in the Harlem River adjacent to a railroad's right of way. A plank, projecting over the river but fixed to the railroad's bulkhead, was used by neighborhood children as a diving board, without the railroad's objection.[79] Hynes climbed from the river to the bank and then onto the plank. While he was poised to dive, high tension wires from one of the railroad's poles fell, striking him and flinging him into the river to his death.[80] The lower courts unanimously viewed Hynes as a trespasser on the railroad's land (the plank) and, applying the trespasser rule of limited duty, denied recovery to his estate because the railway had not willfully harmed him. The New York Court of Appeals, 4-3, reversed and granted a new trial.[81]

Cardozo's opinion for the majority assumed the existence of a rule of limited duty owed to trespassers but never referred to it explicitly. He refused to view the situation as simply as the lower courts had done. He rejected the notion that the case could be decided by calling Hynes a trespasser because he was standing on a plank that protruded from the railroad's land. Cardozo adopted a more philosophic tone than he had used in earlier opinions. "This case is a striking instance of the dangers of 'a jurisprudence of conceptions' (Pound, Mechanical Jurisprudence, 8 Columbia Law Review 605, 608, 610), the extension of a maxim or definition with relentless disregard of consequences to

74. Greene v. Sibley, Lindsay & Curr Co., 177 N.E. 416, 417 (N.Y. 1931).

75. *Id.*

76. Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929).

77. 131 N.E. 898 (N.Y. 1921).

78. *Id.* at 889-90.

79. *Id.* at 898.

80. *Id.* at 899.

81. *Id.* at 899, 900.

'a dryly logical extreme.'"[82] "Rights and duties in systems of living law are not built upon such quicksands."[83] While Cardozo made a major rhetorical attack on a mechanical approach to rule-making, it was in the cause of a small achievement. Cardozo may have thought he needed to go all out with his colleagues because the vote was so close.

Cardozo emphasized the nature of the boy's activity as a bather in the public water, the intrusion of the plank into the area of public ownership (the air and water surrounding it), and the fortuity that the boy stood on the plank instead of below it or leaning against it where he would have been in equal danger from the falling wires. In the collision of rules, one of them being "highly technical and artificial," the more realistic rule was that "he is still on public waters in the exercise of public rights."[84]

Hynes demonstrated Cardozo's practice of the technique of decisionmaking that he had preached in his recent lectures. His words echoed the lectures: "We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption, and place him in the field of liability and duty."[85] "Analogy" consisted of Cardozo's allusions to the undoubted liability that would have resulted had the decedent been below or leaning against, instead of standing on, the springboard. "Convenience," "policy," and "justice" seemed to refer to the need for flexibility in applying the rule relating to categories of land users and the protection of the right to use the public waters for public purposes.[86]

Hynes was a strong example of Cardozo's pragmatic and progressive modernization of legal doctrine. But it was a limited ruling, however boldly phrased, with limited results. Cardozo was vague about the governing considerations of policy and justice, and he did not even suggest a general rule that the railroad was liable whenever its negligently maintained high tension wires caused injury to a trespasser. Cardozo was not ready for such a big step. Cardozo simply redefined the boy's status from that of a trespasser to that of a bather in public waters, thus enabling him to apply the protections accorded such persons. His normative sense of the railroad's appropriate duty in this

82. *Id.* at 900.

83. *Hynes*, 131 N.E. at 899.

84. *Id.* at 900.

85. *Id.*

86. He might have added to his *Hynes* list of factors that of custom (the method of tradition) from his *Nature of the Judicial Process* list for the discussion of protection of bathers in public waters was grounded in their traditional rights.

factual situation led him to conclude that a step onto private property in the course of using public property ought not extinguish the railroad's duty of care. He was willing to extend the duty of the railroad a little bit at the geographic boundary of the railroad's property without any suggestion that he wanted to undermine the general rule of nonliability to trespassers. Clearly, Cardozo was not making the railroad an insurer of injury caused by its wires. In *Adams v. Bullock*,[87] he wrote for a unanimous court in taking a verdict away from a twelve-year old boy who was injured by electricity when an eight-foot wire he was swinging off the edge of a bridge hit a trolley wire that ran underneath.[88]

Richard Weisberg, who has written admiringly of Cardozo the judge and Cardozo the literary stylist, has used *Hynes* as an example of Cardozo "overlooking precedents and challenging accepted norms on no more authority than that afforded by his formidable value system alone."[89] Put another way, he has interpreted *Hynes* as an example of Cardozo's bending the rules to do justice in an individual case. If so, it was not a typical Cardozo opinion. We have already seen a few cases where Cardozo ignored sympathetic circumstances in applying what he regarded as governing legal doctrine, and there are many more. Unless the case was one governed by the law of equity, Cardozo did not usually bend a rule for one case. He changed rules in a defined class of cases or else he upheld them and reached what he sometimes characterized as a harsh result. Rather than manipulate the old rule to do justice in this case by, say, finding that Hynes had not committed a trespass, Cardozo applied a new rule that the landowner's duty of care would apply to a person committing a brief, technical trespass at the boundary of public and private property when the trespasser's primary activity was to exercise his legal right to use the public waters. Cardozo changed the general rule, but not much, in accord with his view of what an informed public would view as a sensible accommodation in situations like this one.

In the mid-1920s, Cardozo was working on the problem of merging the geographic and temporal aspects of the causation issue into the concept of duty through the analytical device of foreseeability. That is, those aspects were treated as part of the primary task of deciding whether the dangers of a particular action or lack of action were to be anticipated. In other words, the literal causes of an injury were rele-

87. 125 N.E. 93 (N.Y. 1919).

88. *Id.*

89. Richard H. Weisberg, *Judicial Discretion, or the Self on the Shelf*, 10 CARDOZO L. REV. 105, 108 (1988).

vant to, but did not conclude, the larger end of deciding whether the injury was a foreseeable harm that the defendant should have a duty to prevent.

Thus, Cardozo's opinions up to 1928 indicate that, like the rest of the court, his views on the doctrinal limits of liability for negligence were in a process of evolution. His path-breaking *MacPherson* opinion and many others utilized an analysis that focussed on breach of duty to particular plaintiffs, with foreseeability as the key element in determining duty. But other opinions spoke in terms of older formulations of proximate cause, particularly when the case involved the physical aspects of causation or the issue of the geographic closeness of the location of the injury and the defendant's conduct. There was therefore some doctrinal confusion and an ad hoc quality to Cardozo's torts opinions through the mid-1920s, but he was focussing more and more on the notion of duty as central to his analysis.

I need not spend time at this conference on the culmination in *Palsgraf* of his effort to conceptualize a major part of the law of negligence. Whether negligence should be viewed relationally as he did or more open-endedly as Andrews did and what are the social and economic consequences of their differences is a matter for debate. So is the issue whether Cardozo in fact saw the facts accurately even under his own test. I think Mrs. Palsgraf was a lot closer to the act of negligence than Cardozo seemed to think, but poor lawyering certainly obscured the facts of *Palsgraf*. In some ways the most interesting thing about *Palsgraf* is that Cardozo, after years of writing torts opinions dealing with the *Palsgraf* issue on a more ad hoc basis and after several years of debating questions of negligence law, including this one, with the advisers involved in drafting the *Restatement of Torts*, felt sufficiently comfortable to attempt to resolve some questions of tort law that had been hanging fire in New York for at least seventy-five years. His *Palsgraf* opinion is not surrounded by the typical qualifications that mark so many Cardozo opinions. Nor did he put so many legs under the table to hold up his opinion, as he often did, that one cannot be sure what was the absolutely critical fact. Here is a second type of paradigmatic common law judge, one who is seeking to resolve a question of law unambiguously.

Palsgraf did not mark any fundamental change in approach by Cardozo toward the job of law-making. His well-known torts opinions after that case, *Moch v. Rensselear Water Works* and *Ultramares v. Touche*, both reflect the same kind of multi-factored analysis charac-

teristic of a typical Cardozo opinion.[90] Indeed, in *Ultramares*, Cardozo managed to exemplify his cautionary and his innovating tendencies in the same case. He refused to permit a creditor to recover damages from an accounting firm for a negligently prepared balance sheet of a company to whom the creditor had loaned money in reliance on the accountant's report of solvency when in fact the company was insolvent. Recovery for negligence in this case involved potential liability "in an indeterminate amount for an indeterminate time to an indeterminate class."[91] However, at the same time Cardozo was prepared to permit the plaintiff to recover in fraud if they could show that the accountants had not tested the correspondence between books and the balance sheet. The standard of proof—"reckless misstatement"—may have been higher than the standard for proving lack of due care, but expanding the boundaries of the action for fraud reopened the possibility of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" that he had just foreclosed earlier in the opinion.

Ultramares exemplifies a final feature of Cardozo's opinions and writings that explains to some extent the endurance of his reputation. His open-mindedness, his accommodationist tendencies, and the eclectic nature of his approach to judging lent an air of ambiguity to the results and to his theories of judging. He had, and has, something to say to everyone.

90. 247 N.Y. 160 (1931), 255 N.Y. 170 (1931).
91. *Ultramares*, 255 N.Y. at 179.