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RECOVERING WAGNER V. INTERNATIONAL RAILWAY COMPANY

*Kenneth S. Abraham & G. Edward White**

INTRODUCTION

Benjamin Cardozo's 1921 opinion for the Court of Appeals of New York in *Wagner v. International Railway Co.*¹ has been called the "seminal case imposing liability on a tortfeasor for harm suffered by a person who came to the rescue of another."² The case is indeed seminal, but it did not become so on its own. Rather, in *Wagner*, Cardozo took a question on which there already was substantial precedent, and re-answered the question in a new, inimitable, and memorable way. As Cardozo put it in a now-canonical phrase, "Danger invites rescue."³ Then, precisely by virtue of the way Cardozo did this re-answering, *Wagner* became the leading decision on the subject.

In this Article we analyze Cardozo's accomplishment, and we show how his opinion in *Wagner* foreshadowed what he later accomplished in his even more celebrated opinion in *Palsgraf v. Long Island R.R. Co.*⁴ Part I extensively reviews the evidence and jury instructions at the trial in *Wagner*. Part II outlines the relevant New York case law at the time of the appeal. Part III identifies the ways in which counsel employed and characterized this case law and its application to the *Wagner* case on appeal. Finally, Part IV analyzes Cardozo's opinion in *Wagner*, explaining how he approached the

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¹ 133 N.E. 437 (N.Y. 1921).

² RESTATEMENT OF THE LAW (THIRD), TORTS: PHYSICAL AND EMOTIONAL HARM cmt. a (Am. Law Inst. 2010).

³ *Wagner*, 133 N.E. at 437.

⁴ 162 N.E. 99 (N.Y. 1928).

rescue issue, how he applied this approach to the facts, and why we believe that *Wagner* was a precursor to *Palsgraf*.

I. THE FACTS AND THE TRIAL

Arthur Wagner sued the International Railway Company, which operated trolley cars, for negligence.⁵ At trial, there was a jury verdict for the defendant.⁶ Wagner appealed, and the Appellate Division affirmed.⁷ Wagner then appealed to the Court of Appeals, where Cardozo sat. The case, which produced Cardozo's "danger invites rescue" proposition, arose out of a bizarre set of facts which Cardozo's opinion severely truncated. Here is Cardozo's statement of the facts in *Wagner*:

The action is for personal injury. The defendant operates an electric railway between Buffalo and Niagara Falls. There is a point on its line where an overhead crossing carries its tracks above those of the New York Central and the Erie. A gradual incline upwards over a trestle raises the tracks to a height of twenty-five feet. A turn is then made to the left at an angle of from sixty-four to eighty-four degrees. After making this turn, the line passes over a bridge, which is about one hundred and fifty-eight feet long from one abutment to the other. Then comes a turn to the right at about the same angle down the same kind of an incline to grade. Above the trestles, the tracks are laid on ties, unguarded at the ends. There is thus an overhang of the cars, which is accentuated at curves. On the bridge, a narrow footpath runs between the tracks, and beyond the line of overhang there are tie rods and a protecting rail.

Plaintiff [Arthur Wagner] and his cousin Herbert [Wagner] boarded a car at a station near the bottom of one of the trestles. Other passengers, entering at the same time, filled the platform, and blocked admission to the aisle. The platform was provided with doors, but

⁵ *Wagner*, 133 N.E. at 437-38.

⁶ *Id.* at 437.

⁷ *Id.* at 438.

the conductor did not close them. Moving at from six to eight miles an hour, the car, without slackening, turned the curve. There was a violent lurch, and Herbert Wagner was thrown out, near the point where the trestle changes to a bridge. The cry was raised, "Man overboard." The car went along the bridge, and stopped near the foot of the incline. Night and darkness had come on. Plaintiff walked along the trestle, a distance of four hundred and forty-five feet, until he arrived at the bridge, where he thought to find his cousin's body. Several other persons, instead of ascending the trestle, went beneath it, and discovered under the bridge the body they were seeking. As they stood there, the plaintiff's body struck the ground beneath them. Reaching the bridge, he had found upon a beam his cousin's hat, but nothing else. About him, there was darkness. He missed his footing, and fell.⁸

Scholars have shown that in both his *MacPherson* and *Palsgraf* opinions, Cardozo's treatment of the facts was artful to the point of possibly being disingenuous.⁹ In contrast, the above statement of the facts in *Wagner* contains only one detail that is not fully supported by the trial record: that there was a "violent lurch" when the electric car turned the curve as it ascended toward the bridge.¹⁰ Of all the witnesses who were present when Herbert Wagner fell off the car as it went around a curve, only one, Herbert himself, testified that just before he fell off, the car "lurched" and "somebody on the platform lurched with the car, and knocked up against me and swung me around and I lost my foothold [and fell]."¹¹ When the *Wagner* case was argued before the Court of Appeals, counsel for Wagner, Hamilton Ward (later to be the New York Attorney General under Governor Franklin D. Roosevelt), maintained in his statement of the facts that

[w]hen the car reached the curve to the left on top of the bridge it turned at such a rapid rate of speed as to cause

⁸ *Id.* at 437.

⁹ See JAMES A. HENDERSON, JR., TORTS STORIES 41-44, 51 (Robert L. Rabin & Stephen D. Sugarman eds., 2003); WILLIAM H. MANZ, THE PALSGRAF CASE: COURTS, LAW, AND SOCIETY IN 1920S NEW YORK ix-xi (2005).

¹⁰ *Wagner*, 133 N.E. at 437.

¹¹ Record on Appeal at 46, *Wagner v. International Railway Co.*, 133 N.E. 437 (N.Y. 1921) [hereinafter "Record on Appeal"].

the crowd to lurch toward plaintiff and his cousin, Herbert J. Wagner, throwing the latter off of the car. . . . The violence of the lurch was caused by the excessive speed of the car in making the turn.¹²

No other witness referred to a “lurch;” some, including Arthur Wagner himself, describing the car as “swaying” as it went around curves and the passengers as “swaying” with it.¹³

A characterization of the car’s having “violent[ly] lurch[ed]” was arguably helpful to Cardozo’s framing of the *Wagner* case, because it provided evidence that the car may have been driven at too rapid a rate of speed around a curve, especially since it was crowded, its back doors were open, and some passengers, unable to find seats inside, were hanging onto rails on its back platform’s steps. All of those factors helped Cardozo reach a conclusion that the railroad may have been negligent toward Herbert Wagner, which was a necessary step in his conclusion that it may have been negligent toward Herbert’s rescuer, Arthur, as well.¹⁴

But, for the most part, Cardozo’s bare-bones summary of the facts in *Wagner* was accurate. But because the summary was bare-bones, it has had the effect of depriving audiences of much of the human interest, and much of the evidence of Cardozo’s creativity, in the case. There was no opinion delivered by the trial judge in *Wagner*, and the Appellate Division of the Supreme Court of New York issued a one-paragraph opinion upholding the jury’s defense verdict in the case.¹⁵ To flesh out the scenario that resulted in Arthur Wagner’s being permanently disabled from his fall from the International Railway’s bridge, we must turn to the trial record, and to the briefs submitted to the Court of Appeals after Hamilton Ward appealed to that court.

Arthur Wagner was 30 years old, and his cousin, Herbert, was 24, when on August 20, 1916, the two men, who lived across from one another on Maple Street in Buffalo, New York, embarked on a pleasure outing to Grand Island on Lake Erie, just south of Niagara Falls and

¹² Brief of Appellant at 4, *Wagner v. International Railway Co.*, 133 N.E. 437 (N.Y. 1921) [hereinafter “Brief of Appellant”].

¹³ Arthur Wagner testified that “the crowd kind of swayed and . . . I turned around and just saw the shadow of man go overboard.” Record on Appeal, *supra* note 11, at 105-06. Another witness for the plaintiff said that as the car went around a curve “there was a little jar you could notice,” which counsel for the plaintiff got the witness to rephrase as a “little swaying.” Record on Appeal, *supra* note 11, at 79.

¹⁴ *Wagner*, 133 N.E. at 438.

¹⁵ Record on Appeal, *supra* note 11, at 291-92.

about ten miles north of Buffalo.¹⁶ Arthur was employed as an upholsterer, and Herbert was a bricklayer; both men were single.¹⁷ They left Buffalo around 2:30 in the afternoon of August 20, which was a Sunday, traveling on an electric railway car – a trolley – operated by the International Railway Company.¹⁸ Single “500”-type cars, approximately forty feet long and painted yellow, were used by the company on its Buffalo-Niagara Falls route, which included several stops and was typically busy with local and tourist passengers.¹⁹ Passenger service on the route appears to have been very frequent on Sundays in August, because when Herbert and Arthur attempted to board a car on their return trip, sometime after 8 P.M., at least one car passed by their station without stopping since it was full.²⁰

The electric railway route north from Buffalo to Grand Island had taken them through the towns of Tonawanda and North Tonawanda. The car had stopped at Payne’s Junction in North Tonawanda and then proceeded up the trestle, over the bridge, and down to the Edgewater stop, where the Wagners got off. At the stop there was a hotel, Fitch’s saloon, and a boat landing where a ferry took passengers to Grand Island. The Wagners arrived on Grand Island between 5 and 5:30 P.M. There was a saloon on the island itself, and Arthur and Herbert had drinks there, Herbert having a bottle and a half of beer and Arthur two bottles.²¹ On the island, the Wagners watched a ball game, walked around, and sat on the dock. They met a group of people they knew, composed of both men and women, and remained there until sometime between 7 and 7:30 P.M., when they took a ferry back to the Edgewater railway stop on the mainland.²² While waiting for the International Railway car, they again had drinks, Herbert Wagner having “two drinks of beer” and Arthur “two drinks of Alden water.”²³

¹⁶ Record on Appeal, *supra* note 11, at 98, 100-01.

¹⁷ Record on Appeal, *supra* note 11, at 99.

¹⁸ Record on Appeal, *supra* note 11, at 101.

¹⁹ Record on Appeal, *supra* note 11, at 49.

²⁰ Record on Appeal, *supra* note 11, at 102. Another witness, George William Reppentine, who was also a passenger on the return trip, said that “I was there at Edgewater waiting for the car about twenty minutes. There was two cars passed us, and we couldn’t get onto them on account of the crowd.” Record on Appeal, *supra* note 11, at 55.

²¹ Record on Appeal, *supra* note 11, at 53.

²² Record on Appeal, *supra* note 11, at 52.

²³ Record on Appeal, *supra* note 11, at 53.

By the time they returned to the Edgewater railway station, the sun had gone down and they found a number of people waiting for a southbound trolley car toward Buffalo. When one arrived, the car stopped before the place where they were waiting in the station, and they went past the front of the car to the back to get on the rear platform.²⁴ The people waiting had consisted of both men and women, and all the women were ushered into the interior of the car. There were doors closing off the platform from the outside, but they were left open, and several men -- Herbert Wagner speculated as many as ten -- chose to stand on the platform, smoking. Herbert had noticed that "the car wasn't crowded . . . when we walked past it to get on [the train] . . . you could see the whole aisle of the car was empty. When we got up to the car, the ladies all went inside and maybe one or two fellows had gone in."²⁵

When the Wagners eventually reached the steps of the car leading toward the rear platform, they found that they were the last people boarding the car. There were a sufficient number of men on the rear platform to initially prevent them from entering the interior of the car, so they first stood on the steps, eventually climbing up to the platform, where they stood near one another on the back edge of the platform, each holding on to a rail. "We tried to get up further [on to the platform]," Arthur Wagner testified, but "[t]here were too many people there."²⁶ At that point, with the Wagners both poised between the edge of the platform and its steps, the conductor of the car gave a signal to its motorman to start. The conductor testified that he had not observed the position of the Wagners when he gave the signal, but subsequently noticed that "there was someone on the step," and testified:

I got a couple of people to step off the back platform into the body of the car, and then I looked out and then when I see those men on the step I asked them to get up off the step so they wouldn't get hit going around the curve up on top of the trestle.²⁷

²⁴ Record on Appeal, *supra* note 11, at 103-04.

²⁵ Record on Appeal, *supra* note 11, at 44-45.

²⁶ Record on Appeal, *supra* note 11, at 105.

²⁷ Record on Appeal, *supra* note 11, at 218-19. One witness for the defendant stated that he had heard the conductor ask men on the steps of the platform to "come inside," apparently meaning into the interior of the car. Record on Appeal, *supra* note 11, at 138. Arthur Wagner

Almost immediately after leaving the Edgewater stop, the car line entered the trestle and moved upward at a rise of about six percent, eventually reaching a bridge about twenty-five feet above the tracks of the Erie Railroad. Before reaching the bridge, the track turned left on a curve, at an angle of sixty-four to eighty-four degrees.²⁸ According to the testimony of several passengers, the car's passing around the curve caused it to "sway," and some passengers who were standing "swayed" along with it.²⁹ Herbert Wagner, about to join the Army, was deposed before trial, and his deposition testimony was read into evidence at the trial. He testified as follows about the moments just before the car reached the bridge:

Q. When you got upon the platform, the car was going?

A. Half way up the trestle.

Q. And then what happened?

A. The car turned . . . , I stood at the left of my cousin, was at the back end of the car, and he was at my right . . . and the car turned, and I was holding on the car with . . . my left arm, and as the car turned, it swung; . . . and I went to reach with [my left] arm to grab ahold of something to steady myself, and as I did that, somebody on the platform lurched with the car, and knocked up against me and swung me around and I lost my foothold and dislocated my shoulder and I went down under the trestle.³⁰

Arthur Wagner was not initially aware that his cousin had fallen from the trolley car. As he put it:

The car started going up the grade, and when it got to the barn the crowd kind of swayed and [I] heard somebody . . . holler as though somebody wanted help, and I . . . turned around and just saw the shadow of a

subsequently testified that the conductor had said nothing to him. Record on Appeal, *supra* note 11, at 255.

²⁸ This testimony was by an assistant engineer in the City of Buffalo's Engineer's Office. Record on Appeal, *supra* note 11, at 17-18.

²⁹ Record on Appeal, *supra* note 11, at 40-41, 77-79.

³⁰ Record on Appeal, *supra* note 11, at 45-46.

man go overboard. . . . Then I looked right around to see who it was, to see where [Herbert] was, and I saw he was gone.³¹

Herbert Wagner had apparently fallen directly off the trestle to the ground below, a distance of at least 15 feet. The rear of the trolley car extended beyond the car's track as the car went around the curve and there was no barrier beyond the tracks. Therefore, there was nothing to prevent Herbert's falling into space.³² His body landed on or near the Erie tracks directly under the trestle, where he was subsequently found, unconscious from the impact of the fall.³³

After realizing that Herbert had fallen off the car, Arthur yelled, along with another passenger, "Man Overboard,"³⁴ and when the conductor heard them he rang a bell, a signal for the motorman of the car to stop at a "regular stopping place" on the track, near a car barn at the south end of the trestle.³⁵ After hearing the bell the motorman slowed the car, which proceeded approximately 550 feet across the bridge and down an incline, where it stopped at the foot of the trestle. At that point the conductor came around to the front of the car and told the motorman that a man had fallen from the car. The motorman then "fixed [his] car so it was safe to leave and took [his] lantern and went [to the] back [end of the car]."³⁶

At this point the testimony of central figures in the incident began to diverge. Arthur Wagner testified:

[after] the car slowed down and stopped . . . , I looked for the conductor and . . . the conductor . . . says, 'Show me where he fell,' and I stepped off the car, I walked up along the bridge, and the conductor with two or three other men followed me with a lantern about two or three feet behind me.³⁷

The conductor, Leo Beemer, testified, however, that after he heard the cry of man overboard, "I gave the motorman a bell," instructing him to "stop at the regular stopping place at the bottom of

³¹ Record on Appeal, *supra* note 11, at 105-06.

³² Record on Appeal, *supra* note 11, at 28-29.

³³ Record on Appeal, *supra* note 11, at 91, 174.

³⁴ Record on Appeal, *supra* note 11, at 107.

³⁵ Record on Appeal, *supra* note 11, at 219.

³⁶ Record on Appeal, *supra* note 11, at 177.

³⁷ Record on Appeal, *supra* note 11, at 107.

the trestle.”³⁸ Beemer then, he said, “went around [to the front of the car] and told the motorman that someone had fallen off the car on the trestle,” and then “left him and . . . went back into the car barns to get a lantern from the watchman there.”³⁹ Once he had the lantern, Beemer said, “I saw this other car coming over the top of the trestle,” and “when I [saw] him coming . . . I took the lantern and flagged him . . . on account of our car standing at the bottom of the incline . . . so that I would take no chance of him running into the back of our car.”⁴⁰ After telling the motorman of the second car that a man had fallen off the trestle, and that the first car had stopped so that a search for him could be conducted, Beemer said that he “started down the side of the dirt down between the street car barns and the trestle.”⁴¹ Asked whether anyone went with him, Beemer replied, “I was alone as far as I can remember.”⁴² Beemer made no mention of meeting Arthur Wagner, or having any conversation with him.

In contrast, Wagner testified that he and Beemer had walked “straight back” from the back of the car, on railroad ties, and that Beemer had a lantern. “We went up to the top of the trestle,” Wagner said, and “we found somebody that said ‘Here is his hat,’ and picked it up and then showed it to me and I identified it.”⁴³ Wagner then recalled that he “started to walk forward again,” and testified:

I suddenly discovered I was in the dark, . . . and then I turned around and I saw no light, . . . and waited then, perhaps thought I could see a light somewhere, and I waited another minute . . . until I saw a light way down below underneath . . . down below the trestle somewheres in front of me.⁴⁴

At that point, Wagner continued, “I hollered, and I took a few steps to go down [back to the car]. . . . I took a few steps and I fell through,” landing “on the ground below the trestle.” He dropped his cousin’s hat as he fell, and had not seen it since.⁴⁵

³⁸ Record on Appeal, *supra* note 11, at 219.

³⁹ Record on Appeal, *supra* note 11, at 220.

⁴⁰ Record on Appeal, *supra* note 11, at 222.

⁴¹ Record on Appeal, *supra* note 11, at 222-23.

⁴² Record on Appeal, *supra* note 11, at 223.

⁴³ Record on Appeal, *supra* note 11, at 108.

⁴⁴ Record on Appeal, *supra* note 11, at 108-09.

⁴⁵ Record on Appeal, *supra* note 11, at 109-10.

Beemer, however, said that when he arrived beneath the trestle, “I walked right on up as far as I could” to find “the motorman . . . with his lantern.”⁴⁶ He had just found the motorman, he recalled, when “some little girl said ‘Here’s the man,’ and I walked over to where he was then and the motorman was there too.”⁴⁷ Beemer then “went back to telephone the doctor, or the ambulance, at Payne’s Avenue [Junction].”⁴⁸

Asked “when you got off the car there at the rear end, did you say to anybody, ‘Show me where he fell,?’” Beemer said “No, I didn’t.” Asked “Did you at any time ask anybody to go up on the trestle?” Beemer said, “No, I didn’t.” Asked “Did you yourself go up on the trestle?” Beemer said “No, I didn’t go up on the trestle.”⁴⁹ He added that he had not flagged the second car down until it had passed over the bridge and was on its way down an incline.⁵⁰ Finally, Beemer stated that the second car had come over the bridge before “the second man,” Arthur Wagner, fell from it. Asked whether “there was [any] room for that second man to have stayed on [the] track [running over the bridge] when a car passed over it,” Beemer replied, “No, there was no room for him to stay there.”⁵¹ Thus, Beemer was “willing to swear that [the second] car passed over the bridge before [the] man fell down.”⁵²

No other witnesses testified about the actions of Arthur Wagner in walking up the trestle onto the bridge in search of his cousin. One witness appeared to corroborate Beemer’s having come out of the car barn with a lantern, having walked in the direction of the trestle, where a second car was approaching, and having “flag[ged] the other trolley coming.”⁵³ After doing so, the witness testified that Beemer “proceeded on and under the trestle,” where the witness lost sight of him.⁵⁴ Earl Roy, the motorman of the car from which Herbert Wagner had fallen, corroborated that Beemer had arrived underneath the trestle shortly after Roy and others had found Herbert Wagner’s body, and that Beemer had then gone to the car barn to use the

⁴⁶ Record on Appeal, *supra* note 11, at 223.

⁴⁷ Record on Appeal, *supra* note 11, at 223.

⁴⁸ Record on Appeal, *supra* note 11, at 223-24.

⁴⁹ Record on Appeal, *supra* note 11, at 224-25.

⁵⁰ Record on Appeal, *supra* note 11, at 225.

⁵¹ Record on Appeal, *supra* note 11, at 226.

⁵² Record on Appeal, *supra* note 11, at 226-27.

⁵³ Record on Appeal, *supra* note 11, at 210, 212.

⁵⁴ Record on Appeal, *supra* note 11, at 213.

telephone.⁵⁵ Since Beemer—and the motorman Roy as well—⁵⁶ denied having ever said “Show me where he fell” to anyone, there was no apparent explanation for why Arthur Wagner would have gone up the trestle onto the bridge in search of his cousin, rather than underneath the trestle with the others involved in the search. Edward Franchot, representing the International Railway Company, noted on more than one occasion, as the case passed from the trial court to the Appellate Division and then to the Court of Appeals, that Arthur Wagner had been drinking before boarding the trolley car at the Edgewater stop, and speculated that perhaps Arthur had gone up the trestle because his judgment was impaired from being intoxicated.⁵⁷

The credibility of Beemer’s and Arthur Wagner’s accounts would end up being crucial to the outcome of the trial. It was the central issue posed by Judge Charles B. Wheeler’s instruction to the jury, subsequently to be discussed. But there was additional evidence presented at the trial about Leo Beemer’s actions, from witnesses who claimed that, in the period between the accident and the trial, Beemer himself had given a different account of what he did at the commencement of the search. Since the jury, in accepting Beemer’s testimony rather than Arthur Wagner’s, must have disregarded this evidence regarding Beemer’s prior inconsistent account, it seems worthwhile to review it in some detail.

Beemer was no longer a conductor for the International Railway Company at the time of the trial, which took place in April and May, 1918 (the accident had occurred in August, 1916). He was working for the Beaver Board Company in Buffalo, and had been doing so for five months.⁵⁸ While employed at the Beaver Board Company he was interviewed on March 22, 1918, by a Mr. Flynn, a partner of Wagner’s counsel Hamilton Ward. Also present at the interview was Carl J. Sturgis, the secretary to W.F. MacGlashan, the president of the company. In Ward’s cross-examination of Beemer in the *Wagner* trial, the following colloquy took place:

Q. Mr. Flynn, my partner, came out and called on you
at your place of employment, didn’t he?

⁵⁵ Record on Appeal, *supra* note 11, at 180.

⁵⁶ Roy was asked “after you got off the car and were on the ground, did you say to any man, ‘Where? You show me where he fell?’ and answered “No.” Record on Appeal, *supra* note 11, at 181.

⁵⁷ Record on Appeal, *supra* note 11, at 53-54.

⁵⁸ Record on Appeal, *supra* note 11, at 216.

A. Yes, sir.

Q. Where did you have that conversation?

A. In the office.

Q. Do you know Mr. Sturgis, the Secretary to the President?

A. I don't know him.

Q. Was he there when you had your talk with Mr. Flynn?

A. I couldn't say whether he was or not.

Q. Did you say to Mr. Flynn . . . that you asked the brother of the man who fell to come along with you? Did you tell Mr. Flynn that in Mr. Sturgis's presence?

A. No, I didn't.

Q. And did you tell them that when you and the brother got up on the trestle you couldn't see anybody around, and you started to go back, and the brother of the man who fell through the trestle said he was going back again? Did you tell Mr. Flynn and Mr. Sturgis that?

A. No, I didn't tell them that.

Q. Did you tell Mr. Flynn and Mr. Sturgis on the 22nd of March, at the place of your employment, that you went up on the trestle with the man that you thought was the brother of the injured person, and that you didn't see anything and came back?

A. No, I didn't tell him that at all.

Q. Did you mention anything about this man going with you to Mr. Flynn or Mr. Sturgis?

A. The gentleman I was talking with, I don't know what his name was, I told him I went up to the trestle there when I flagged this other car coming down.

Q. Did you tell him anything about going up with this man that you thought was the brother of the injured man?

A. I just don't remember what I told him.⁵⁹

After this exchange and the conclusion of Beemer's testimony, Ward called Carl Sturgis as a witness (apparently in rebuttal), and the following exchange took place:

Q. Were you there on the 22nd day of March, last, when Mr. Flynn, my partner, came out there to interview this conductor?

A. I was.

Q. And were you present at the conversation between Mr. Flynn and Mr. Beemer?

A. I was.

Q. Did Mr. Beemer say to Mr. Flynn this or this in substance: That after the car stopped he asked some man there to come along with him, and that they went upon the trestle?

A. Yes, he made the suggestion and they went back on the trestle.

Q. And did he say this to Mr. Flynn, or this in substance: That when he and the man got back on the trestle they

⁵⁹ Record on Appeal, *supra* note 11, at 227-29.

looked around and could not see anybody and he started to go back?

A. Yes.⁶⁰

Sturgis was then cross-examined by Edward Franchot, who unsuccessfully attempted to demonstrate that Sturgis had been coached by Flynn or Ward about the substance of Flynn's interview with Ward before his testimony, and that he may have seen a memorandum from Flynn to Ward summarizing the conversation Flynn had had with Beemer.⁶¹ Franchot was able to elicit two concessions from Sturgis, however, that could have called the credibility of Sturgis's testimony into question. Sturgis admitted that after witnessing Flynn's interview with Beemer, Sturgis expected to be called as a witness; and Sturgis acknowledged that, although he was a stenographer, he had taken no notes of the interview of Beemer.⁶²

Nonetheless, on its face, the direct testimony of Sturgis could have supported an inference that either Beemer's memory was faulty or that the parts of his trial testimony that conflicted with Arthur Wagner's account were false. Sturgis was an employee of the same company that employed Beemer, had never met Flynn before the interview, and had only appeared in court because Hamilton Ward's firm had subpoenaed him as a witness.⁶³ Yet in his testimony, Sturgis promptly agreed that Beemer had told Flynn, in substance, that he had asked "some man" to go upon the trestle with him in search of Herbert Wagner, and that when Beemer had not found anyone, Beemer had "gone back" toward the car from which Herbert Wagner had fallen.⁶⁴

Beemer had already testified, in recounting his activities after he rang the bell for the motorman to stop the car, that immediately after telling the motorman that someone had fallen off, he had gone in search of a lantern. Robert Hogg, after noting that he had seen Beemer with a lantern signaling the car, had also stated, on cross-examination, that it might have been as many as five minutes between the time he first saw Beemer with a lantern and the time the car stopped. So Beemer might have had time to meet Arthur Wagner, ask him to show him

⁶⁰ Record on Appeal, *supra* note 11, at 245-47.

⁶¹ Record on Appeal, *supra* note 11, at 247, 251-52.

⁶² Record on Appeal, *supra* note 11, at 248-49.

⁶³ Record on Appeal, *supra* note 11, at 248.

⁶⁴ Record on Appeal, *supra* note 11, at 246.

where the man might have fallen, started along with Wagner up the trestle to the bridge, shining his lantern, and when seeing nothing, abruptly turned around, depriving Wagner of light.

More than one witness who was present when Herbert and Arthur Wagner's bodies were found lying under the trestle stated that it was a very short interval of time between the discovery of Herbert's body and the subsequent discovery of Arthur's.⁶⁵ But one witness speculated that it may have taken as many as fifteen minutes for the search party, once having located Herbert's body, to have gotten back from that spot to the car.⁶⁶ Another witness, speaking of the journey from the car to where Herbert was found, said "there was some difficulty getting there. . . . [T]here is underbrush and burdocks, . . . and a good many things in the dark, a man has to go slow."⁶⁷ It was apparent that by the time both bodies were located, the second car had descended the trestle and was stopped behind the first car, because once both men were found, Herbert was carried to the second car and Arthur to the first.⁶⁸ So Beemer, after concluding that a search on the bridge would be futile, could have then headed back toward the car, noticed the arrival of a second car, and stopped to signal that car in an interval when Arthur was on the bridge without any light.

Two other features of Beemer's testimony about his conversation with Flynn and Sturgis could have undermined his credibility generally. One is that he said "I don't know" Sturgis, and he couldn't say whether Sturgis was "there or not" when he talked to Flynn. Given that Sturgis was the general secretary of the president of a company for which Beemer had worked for five months, and that Beemer surely recognized the significance of an interview with a lawyer about a case in which he was going to be called as a witness, both statements seem evasive. The other is that on cross-examination, Ward established that two or three weeks after his interview with Sturgis, Beemer met with Edward Franchot and an associate, who paid him for his time in the interview, and that Franchot had showed him a statement that Beemer had made "right after the accident." Ward and Beemer then had the following exchange:

⁶⁵ George W. Rappentine, who was one of the searchers who initially found Herbert's body, stated that it was "a minute or two" after he discovered the body that "somebody said, 'Here is another one.'" Record on Appeal, *supra* note 11, at 70.

⁶⁶ Record on Appeal, *supra* note 11, at 94.

⁶⁷ Record on Appeal, *supra* note 11, at 172.

⁶⁸ Record on Appeal, *supra* note 11, at 73.

Q. And then did you make up your mind that perhaps you had been mistaken in what you said to Mr. Flynn and Mr. Sturgis?

A. No, I didn't.

Q. Did you tell Mr. Franchot and [his associate] what you had said to Mr. Flynn and Mr. Sturgis?

A. I did.

Q. You didn't tell them anything about your going up on the trestle, did you?

A. Why, no, I didn't tell them I went up on it because I didn't go up there.

Q. You didn't. Did you tell them that you were asked this question?

A. I forget whether I did or not.⁶⁹

In light of all the other issues raised by the events that produced *Wagner v. International Railway*—whether the car was going at an excessive rate of speed around the curve just before Herbert was thrown off; whether the doors shutting off the back end of the car from the outside should have been closed; whether the car should not have started up an incline when passengers were still standing on its back platform, some of them partly on its outside steps; whether the conductor had taken sufficient steps to move the passengers standing on the platform into the interior of the car, where there apparently was room—why was so much attention paid to what Arthur Wagner and Leo Beemer had done, or not done, after Herbert was thrown off the train? That answer is that Edward Franchot had sensed that if he could persuade the trial judge that the sole basis of the International Railway's negligence toward *Arthur* had to be found in the conduct of Beemer after *Herbert* had fallen off the train and a search for him had begun, anything that had happened before that, whether it was

⁶⁹ Record on Appeal, *supra* note 11, at 231.

evidence of the line's negligence toward Herbert or not, was irrelevant to Arthur's case. Franchot's strategy was to focus on Arthur's conduct after his cousin disappeared, in order to show that no trolley car employee had been negligent toward him and that he had arguably been contributorily negligent, a complete bar to plaintiffs in negligence suits in New York at the time. Having shown that, Franchot would then rely on what was in effect a "proximate cause" argument: that even if the International Railway had been negligent toward Herbert, this was not negligence to Arthur; proof of separate acts of negligence were needed.

After both parties rested and the jury was excused, both Ward and Franchot made several motions to Judge Wheeler in connection with his forthcoming instruction to the jury.⁷⁰ Wheeler subsequently gave an instruction to the jury that completely accepted Franchot's arguments in those motions, with the result that the irreconcilability of Arthur Wagner's and Beemer's testimony became the central focus of the jury's deliberations. Wheeler instructed the jury as follows:

In light of the view of the case which the court takes of each of the facts and of the law I charge you that if there was any negligence on the part of the [International] Railway Company in overcrowding the car without providing the passengers with seats, or if there was negligence in the operation of the car around these curves which caused injury to the cousin of the plaintiff, . . . in as much as the car afterward crossed the trestle and reached a place of safety and without injuring the plaintiff in this action in any way, that . . . if such negligence existed on the part of the company, such negligence is not available to the plaintiff in this action as the basis of any recovery; that he must base his right to recover upon what transpired after the car in question had crossed the trestle and reached the ground. . . .⁷¹

Now, then, I charge you if without any invitation or any request on the part of the defendant's conductor . . . if the plaintiff went upon this trestle, that is and of itself more or less dangerous under the conditions of darkness

⁷⁰ Record on Appeal, *supra* note 11, at 255-73.

⁷¹ Record on Appeal, *supra* note 11, at 275.

. . . if he, of his own motion and at his own suggestion . . . went there, and . . . fell from the trestle, then there can be no recovery in this action. . . . If, on the other hand, he went up there at the request of the conductor of the car . . . the conductor was . . . bound to exercise reasonable care under those circumstances for the safety of the man who went up there. . . . I am going to leave it to you to determine, first, whether as a matter of fact he went there at the request of the conductor, and, second, if he did . . . whether the conductor in fact left him in the darkness, without warning of [the conductor's] going, and whether such acts constituted negligence on the part of the conductor, whose negligence would be imputed to the railroad company itself. You will remember, though, that the conductor denies that he asked [the plaintiff] to point out where the accident happened. . . . These things present questions of fact for you to determine in the first instance whether was matter of fact the plaintiff's version is correct or the defendant's version is correct. . . . If [the plaintiff] did not . . . [go] on top of this trestle to point out the place of the accident at the request of the conductor . . . there can be no recovery in this action.⁷²

Wheeler's instruction precluded Arthur Wagner from recovering from the railroad by virtue of its negligence to Herbert Wagner. In Wheeler's view, although he did not express it in the language of proximate causation, once the car from which Herbert had fallen "reached a place of a safety without injuring [Arthur] in any way," a chain of events, the events that began with the successive actions of the railway in creating a risk that Herbert might fall from the car, had become complete.⁷³ A new chain had begun, if at all, in Wheeler's view, only when Beemer allegedly invited Arthur to accompany him on a potentially dangerous search for his cousin. The railroad's negligence did not cause that search in itself, Wheeler believed, and therefore the railroad could not be liable to Arthur Wagner unless it had been negligent after the trolley car had stopped. That is, the

⁷² Record on Appeal, *supra* note 11, at 276-77.

⁷³ Record on Appeal, *supra* note 11, at 275.

railroad could be liable to Arthur only if Beemer, after providing Arthur with light in a dangerous place in the darkness, had suddenly, without warning, abandoned their joint search and deprived Arthur of light.

Edward Franchot had outmaneuvered Hamilton Ward. Franchot had produced several witnesses who testified that after Herbert fell off the car, all the persons involved in the search for him, save Arthur, had gone under the trestle, rather than back up it toward the bridge, in their efforts to locate Herbert. Franchot had also produced at least one witness who claimed to have seen Leo Beemer emerge from a car barn with a lantern, head in the direction of the trestle, flag down an oncoming car, and then head *underneath* the trestle.⁷⁴ Cumulatively, that testimony served to isolate Arthur's search for his cousin on the trestle and bridge, suggesting that this search may have been foolish, and to confirm conductor Beemer's claim that he had never accompanied Arthur up the trestle with a lantern, or indeed had any contact with him after Herbert was thrown off. The image conveyed by those witnesses was that of Arthur Wagner going off on an inexplicable wild goose chase in search of his cousin, while all the other members of the search party, including Beemer, went to the logical place to search.

Consequently, even if Judge Wheeler had then instructed the jury that any negligence on the part of the railway was a "proximate cause" not only of risks to Herbert but also of risks to Arthur in his capacity of a rescuer, the jury would have had to find that Arthur was not contributorily negligent in going up the trestle to the bridge in the dark. The only evidence that Arthur had been invited to go up the trestle, and then deprived of light, came from Arthur's own testimony.⁷⁵ No one had seen Beemer on the bridge, or in the company of Arthur at any time. If Arthur had not been invited to go onto the bridge, he had gone there in the darkness, not knowing what conditions he might encounter. As Ward put in his exchange in connection with motions, "I haven't the slightest doubt [that] any intelligent man would know it was a dangerous place."⁷⁶ In short, it was plain, after the testimony of several witnesses, that a jury would need to believe Arthur's account, and disbelieve the accounts of all the other witnesses, to find that Arthur had not negligently contributed to his fall

⁷⁴ Record on Appeal, *supra* note 11, at 76.

⁷⁵ Record on Appeal, *supra* note 11, at 103-04.

⁷⁶ Record on Appeal, *supra* note 11, at 260.

from the bridge. Franchot had presented much stronger evidence of the defendant's version of the facts of *Wagner*.

But there was another way in which Arthur could have prevailed that was foreclosed by Wheeler's instructions to the jury. Had the injury to Arthur been proximately caused by the railway's original negligence in permitting Herbert to fall off the car, Arthur could have recovered unless he had been contributory negligent. But Wheeler, with some help from Franchot, decided, as a matter of law, that any possible negligence on the part of the railway towards Herbert had no causal connection to Arthur's injuries. Here are the relevant passages in the exchanges between Wheeler, Franchot, and Ward when the lawyers made motions for jury instructions after both sides had rested:

Mr. Ward: Does your Honor feel that the original negligence can not be charged to the defendant in this case?

The Court: I am inclined to think so, on the whole case.

Mr. Ward: I am very much interested in that question, and I am glad to have it come before your Honor.

The Court: It would be pressing the doctrine to an extreme.⁷⁷

Moments later, Franchot pressed further:

Mr. Franchot: I would like to make a further motion. I take it from what your Honor says that your Honor is going to withdraw from the jury all of the evidence with respect to the first accident: that is, any act of omission or commission on the part of the motorman or conductor up to the time when Herbert Wagner fell.

The Court: That is my present disposition.

Mr. Franchot: Withdraw that from the jury.

⁷⁷ Record on Appeal, *supra* note 11, at 257.

The Court: Without saying so finally now, but that is my disposition. That is what I think I shall do now . . . I will make it in the morning, whatever it is, but I think that you gentlemen, as I look at it now, unless I change my mind, may be prepared to sum it up along the lines I have laid down.

Mr. Franchot: And our summing up will be restricted to merely that one point [that is, whether Beemer invited Arthur to accompany him up the trestle and subsequently withdrew the lantern].

The Court: If I still adhere to it it will be. Let me have your briefs again, and I will look over your cases.⁷⁸

The next morning Wheeler announced the following ruling:

The Court: Mr. Stenographer, you may put upon the minutes that . . . the court sends the case to the jury upon the question whether the defendant's conductor asked the plaintiff to show him where the accident happened and accompanied him up onto the trestle and afterwards left him in the dark, whether those facts constituted negligence on the part of the defendant or not.⁷⁹

Franchot then pressed Wheeler about whether that charge asked the jury to find whether in fact Beemer had done any of those things, in addition to whether, if he did, they constituted negligence. Wheeler then confirmed this, stating that he was “withdrawing all other questions from the consideration of the jury, saving that of damages, of course.”⁸⁰ Ward then asked for an exception to Wheeler's ruling that he would not submit to the jury “questions of negligence arising out of the first accident,” and Wheeler granted it.⁸¹ The exchanges ended with Franchot confirming that “all consideration of what happened before the car stopped” would be withdrawn from the

⁷⁸ Record on Appeal, *supra* note 11, at 269-70.

⁷⁹ Record on Appeal, *supra* note 11, at 271-72.

⁸⁰ Record on Appeal, *supra* note 11, at 272.

⁸¹ Record on Appeal, *supra* note 11, at 272.

jury, and that “we are bound by your Honor’s ruling that no negligence can be found on that as a basis for liability in this case.”⁸²

Wheeler had said, in his instruction to the jury, that his instruction was premised on the assumption that after Herbert was thrown off, the car had “crossed the trestle and reached a place of safety and without injuring the plaintiff in any way,” and that therefore, Arthur “must base his right to recover upon what transpired after the car in question had crossed the trestle and reached the ground.”⁸³ Wheeler did not offer any reason for why he attached significance to the car’s having reached a “place of safety” without injuring Arthur, but it appears he had seen that event as breaking some “chain” of causation that began with the successive risks to which the railway’s actions, while the car was moving, had exposed Herbert and other passengers, and ended when the car stopped. A new “chain” thus began when the railway may have exposed Herbert to risks that caused his fall: that was the sole matter for the jury to consider.

It is interesting that Ward did not make more of an effort to convince Wheeler that the risk to Arthur in going up the trestle could be causally connected to the original negligence of the railway towards Herbert. As noted, Wheeler had given only cryptic reasons for his inclination to treat all of the alleged negligence toward Herbert as irrelevant to Arthur’s potential recovery, stating that “[i]t would be pressing the doctrine to an extreme.”⁸⁴ Perhaps Ward had concluded that it would have been futile to continue efforts to convince Wheeler that his analysis of proximate causation in the case was flawed, so he resolved to make exceptions to Wheeler’s charge and preserve them for appeal.

Given the testimony at trial and the way Wheeler framed the *Wagner* case in his charge to the jury, it was almost inconceivable that the jury would have found against the International Railway Company on this basis, and it did not. The result was that on April 15, 1918, Arthur Wagner was facing the prospect of living with serious and permanent physical injuries—in his instruction to the jury Wheeler described Arthur as “partially . . . paralyzed in his lower limbs” and unable to work as an upholsterer.⁸⁵ Arthur would not have had any medical insurance, and would have required constant medical attention

⁸² Record on Appeal, *supra* note 11, at 272-73.

⁸³ Record on Appeal, *supra* note 11, at 275.

⁸⁴ Record on Appeal, *supra* note 11, at 257.

⁸⁵ Record on Appeal, *supra* note 11, at 279.

to keep his feet from deteriorating further. Wheeler stated in his instruction that Arthur's life expectancy at the time of trial was approximately 30 years, and that if the jury found that he could recover, he would be entitled not only to lost wages and medical expenses but to pain and suffering.⁸⁶ Given the nature and consequences of Arthur's injury, the sum of \$50,000 in damages that he requested, while a large amount for 1918, does not seem to be a particularly inflated amount of compensation.

Ironically, Herbert Wagner, who had apparently been thrown completely clear of the tracks, bridge, and trestle, landing approximately 20 feet on the ground beneath the trestle and then rolling onto the Erie tracks, was not seriously injured. Herbert testified that he dislocated his shoulder when he was jostled off the car, but by the spring of 1918, when he was deposed, he was healthy enough to have been drafted into the U.S. Army, and was planning to join a corps of engineers encamped at Ayre, Massachusetts.⁸⁷ Although Herbert had emerged from his accident on August 20, 1916 comparatively unscathed, Arthur had certainly not. He testified that after falling from the bridge he had remained in the hospital for about nine months and a half, being able to move around on crutches only in the middle of June, 1917; that at the time of trial he had "no strength" in his legs, could not bend his ankles or move his feet, and could not walk without crutches; and that he continued to have trouble with his bowels.⁸⁸ Arthur had very little to lose by appealing to the Appellate Division of the Supreme Court of New York, and on May 11th of 1919, Hamilton Ward filed an appeal, moving for a new trial.

The appeal was heard by the Appellate Division, a five-member court at the time, on October 6, 1919.⁸⁹ A majority of the Appellate Division denied Ward's motion for a new trial, upheld the jury verdict against Arthur, and ordered the plaintiff to pay costs in both courts, an amount that came to \$196.94.⁹⁰ One judge, John S. Lambert, dissented, concluding both the question of Arthur's contributory negligence and that of any possible negligence on the part

⁸⁶ Record on Appeal, *supra* note 11, at 279-80.

⁸⁷ Record on Appeal, *supra* note 11, at 40.

⁸⁸ Record on Appeal, *supra* note 11, at 114-16, 118.

⁸⁹ Record on Appeal, *supra* note 11, at 291-92. The Appellate Division judges who heard the appeal were Frederick W. Kruse, the Presiding Justice, and Associate Justices Pascal C.J. DeAngelis, Nathaniel Foote, Irving G. Hubbs, and John S. Lambert.

⁹⁰ *Wagner v. Int'l Ry. Co.*, 189 A.D. 925, 925 (N.Y. App. Div. 1919), *rev'd*, 133 N.E. 437 (1921).

of Beemer should have been submitted to the jury.⁹¹ The Appellate Division's order was entered on October 20, 1919, and on March 9, 1920, Ward filed a further appeal from that judgment to the New York Court of Appeals.⁹²

II. THE GOVERNING CASE LAW

The trial in *Wagner* had been concerned with the facts, plus the trial court's (partially stated) conception of the applicable law, as reflected in its instructions to the jury. Before the Court of Appeals, however, only the applicable law could be the subject of contention. To understand the parties' strategies on appeal, as well as the significance both of what Judge Cardozo did and did not say in his opinion in *Wagner*, it is necessary to understand the state of the New York case law on liability to rescuers at the time of the appeal.

In the decades before *Wagner* was decided, the courts of New York had analyzed cases involving rescue in traditional proximate cause terms. The question was whether the negligence of a defendant that endangered one party was, or could be found to be, a proximate cause of harm to the endangered party's rescuer. The test for proximate cause was stated in a standard phrase which identified one act or event as a "proximate cause" of another event (such as an injury suffered by a rescuer) if the latter followed from the former in a "natural and probable" sequence.

One of the most prominent New York cases articulating the "natural and probable sequence" test for proximate causation was *Laidlaw v. Sage*.⁹³ At least part of the reason for *Laidlaw's* prominence, we think, is that the case, and the facts that generated it, were notorious. On May 26, 1892, an individual named Norcross had entered the lower Manhattan offices of Russell Sage, a well-known industrialist, and handed Sage a note.⁹⁴ The note threatened to detonate a bomb Norcross said he had in a carpet bag he was carrying, if Sage did not give him \$1.2 million.⁹⁵ Shortly thereafter, Norcross

⁹¹ *Wagner*, 189 A.D. at 925.

⁹² *Wagner*, 133 N.E. at 437.

⁹³ 52 N.E. 679 (N.Y. 1899). See the discussion of *Laidlaw* in WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, 95 (2001).

⁹⁴ *Laidlaw*, 52 N.E. at 680.

⁹⁵ *Id.*

did detonate the bomb.⁹⁶ Laidlaw, another individual in Sage's offices at the time, was injured by the explosion. Laidlaw sued Sage, alleging that just before the explosion, Sage had placed Laidlaw between himself and Norcross in order to protect himself.⁹⁷ The explosion received widespread publicity.⁹⁸

Laidlaw's suit against Sage was tried four times, and appealed three times.⁹⁹ In the last appeal, one of the issues was whether, even assuming that Sage had done what Laidlaw alleged, Sage's actions were a proximate cause of Laidlaw's injuries.

The opinion in *Laidlaw*, which runs twenty pages in the fine print of the Northeastern Reporter of the time, is not completely coherent to the modern reader. At points, the opinion conflates cause in fact with proximate cause, and the absence of causation with remote cause.¹⁰⁰ But Laidlaw's statement about proximate cause seems to have become canonical: "The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produce that event, without which that event would not have occurred."¹⁰¹ Ward's Brief on Appeal to the Court of Appeals quoted this passage from *Laidlaw* twice;¹⁰² Franchot's brief cited *Laidlaw* three times.¹⁰³

Laidlaw was not a rescue case: its statement about the nature of proximate cause was a predicate, or premise, for particular arguments about rescue. However, a number of New York cases, decided both before and after *Laidlaw*, had addressed rescue. Each had held in favor of the plaintiff-rescuer. In addition, as would prove important for purposes of the appellate arguments in *Wagner*, each involved a rescue taking place virtually immediately after another person was placed in danger.

Each of the New York rescue cases employed the chain of causation reasoning that was reflected in *Laidlaw*'s reference to a

⁹⁶ *Id.* at 681.

⁹⁷ *Id.*

⁹⁸ *See, e.g., A Crazy Man's Lawful Act*, N.Y. TIMES, December 5, 1891.

⁹⁹ *Laidlaw*, 52 N.E. at 682.

¹⁰⁰ *Id.* at 688 ("A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. From the remote cause the effect does not necessarily follow.") (quoting an uncited anonymous article in the *American Law Review*).

¹⁰¹ *Id.* at 688 (quoting Sher. & R. Neg. § 26).

¹⁰² Brief of Appellant, *supra* note 12, at 9, 16.

¹⁰³ Brief of Respondent at 11-12, 14, *Wagner v. International Railway Co.*, 133 N.E. 437 (N.Y. 1921) [hereinafter "Brief of Respondent"].

“sequence, unbroken by any new cause.”¹⁰⁴ For example, in *Gibney v. State*,¹⁰⁵ a father had attempted to rescue his son from a canal. The defendant argued that its negligence toward the son could not be regarded as the cause of the father’s death. The court rejected this argument, on the ground that the “peril to which the father exposed himself was the natural consequence of the situation” and that there was therefore no “break in the chain of causes.”¹⁰⁶

Similarly, in *Donnelly v. Piercy Contracting Co.*,¹⁰⁷ the deceased was killed while trying to rescue a horse endangered by the defendant’s negligence. Judge Andrews, previewing the approach he would employ in his *Palsgraf* dissent ten years later,¹⁰⁸ and citing to *Laidlaw*, said that the question was whether “the act of the defendant gave rise to the stream of events which culminated in the accident,” asked whether there was “an unbroken connection between the wrongful act and injury,” and answered that there was “no such break as a matter of law in the causal connection in the case before us.”¹⁰⁹

A handful of other New York cases took essentially the same position.¹¹⁰ Cases in other states had predominately reached the same conclusion. Thus, although there was not a long line of New York cases holding that negligence toward one party could generate liability to that party’s rescuer when the rescuer acted instinctively and quickly, there was no contrary New York authority, and other states had taken the same position. There was not quite a firm “rescue doctrine,” but it was certainly established that there could be liability in negligence to rescuers.

It is important to note that this body of cases addressed the plaintiff’s *prima facie* liability in rescue situations. There was a separate question, addressed in a different line of authority, whether, even if a defendant had *prima facie* liability to a rescuer, the defendant could avoid liability under the defense of contributory negligence. This line of cases stretched back at least to the 1871 case of *Eckert v.*

¹⁰⁴ *Laidlaw*, 52 N.E. at 688.

¹⁰⁵ 33 N.E. 142 (N.Y. 1893).

¹⁰⁶ *Id.*

¹⁰⁷ 118 N.E. 605 (N.Y. 1918).

¹⁰⁸ See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews J., dissenting).

¹⁰⁹ *Donnelly*, 118 N.E. at 606.

¹¹⁰ See, e.g., *O’Brien v. Erie R. Co.*, 139 A.D. 291, 295 (N.Y. App. Div. 1910); *Waters v. Taylor*, 112 N.E. 727, 728 (N.Y. 1916) (dealing with the issue under workman’s compensation).

Long Island R.R. Co.,¹¹¹ well-known and frequently cited at the time of *Wagner* and today. *Eckert* held that the question of whether a rescuer was contributorily negligent was typically for the jury, and that errors in judgment made under conditions of emergency did not bar recovery.¹¹² *Eckert* also involved a rescue that occurred virtually immediately after the person being rescued had been placed in danger.¹¹³

III. THE ARGUMENTS MADE TO THE COURT OF APPEALS

At the Court of Appeals, Ward made the issue of proximate causation the centerpiece of his argument.¹¹⁴ By that point, Ward had assembled a number of cases, including the New York cases we discussed above, in which rescuers had recovered from defendants who had placed others in danger. Of the 33 pages in his brief, Ward devoted approximately 15 of them to such cases, using them in support of his eventual conclusion that “it was certainly not for the court to say as a matter of law that Arthur Wagner[‘s] . . . attempt [to rescue Herbert] did not result from the negligent act of the defendant in injuring Herbert Wagner and placing him in peril.”¹¹⁵

One of the main challenges for Ward was that, unlike past cases, Arthur Wagner’s attempted rescue was not literally instinctive and immediate. Arthur did not see Herbert fall and immediately act to help him. Instead, he first had to wait for the trolley to move several hundred feet and stop.¹¹⁶ Then, under his account, he talked with the conductor and made his way back toward the point where he thought he might find Herbert. None of the rescue cases on which Ward relied involved a delayed rescue of this sort, although none expressly limited liability to situations involving immediate and instinctive rescues only.

Consequently, Ward did not have a precedent that settled the question whether this kind of immediacy mattered, or instead was a distinction without a difference. That is why he first argued, based on *Laidlaw*, *Donnelly*, and other rescue cases, that the rescue had taken

¹¹¹ 43 N.Y. 502 (1871).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Brief of Appellant, *supra* note 12, at 5. Both parties filed essentially identical briefs at both appellate levels.

¹¹⁵ Brief of Appellant, *supra* note 12, at 21-22.

¹¹⁶ Brief of Appellant, *supra* note 12, at 4-5.

place in unbroken sequence.¹¹⁷ Then, relying on the literal language of *Laidlaw*, he deemphasized the lack of immediacy of the rescue and argued that, under the circumstances, Arthur's attempted rescue of Herbert was "instinctive, natural, and necessary."¹¹⁸

Ward focused on the nature of Arthur's motivation rather than the length of time he had to decide what to do. He noted that the cases that had allowed rescuers to recover had drawn no distinction between "instinctive" and "deliberate" rescue attempts: the sole criterion had been whether, when an effort to "preserve human life" was being attempted, the attempt had been made "under such circumstances as to constitute rashness in the judgment of prudent persons."¹¹⁹ Ward argued that it had been error for Wheeler to refuse to instruct the jury to that effect, and that it had been error to instruct the jury that there could be no recovery if Arthur had gone onto the trestle and bridge without an invitation from the defendant.¹²⁰

Franchot, in contrast, made exactly the arguments that Ward anticipated. He contended that actions by rescuers that were not "instinctive" amounted to deliberate, voluntary assumption of the risk in rescuing, and that injured rescuers who deliberated before undertaking rescue efforts should therefore be barred from recovery. He pointed out that Arthur had walked over 600 feet up the trestle to the bridge, and "[d]uring every step of the way and every instant of the time he had a chance to think."¹²¹

Franchot's brief recognized that the proximate causation argument was Ward's strongest, and developed a two-prong strategy to refute it. First, he argued that in every proximate cause case cited by Ward in his brief, there were two elements lacking in *Wagner*: "an actual impending peril to the life or limb of either the plaintiff himself or some other person or persons," and evidence that "[t]he plaintiff, seeing the actual peril, acted instinctively and impulsively, or at least in a reasonable manner under the circumstances."¹²² In *Wagner*,

¹¹⁷ Brief of Appellant, *supra* note 12, at 9-10.

¹¹⁸ Brief of Appellant, *supra* note 12, at 22.

¹¹⁹ Brief of Appellant, *supra* note 12, at 21-22, 28-29.

¹²⁰ Brief of Appellant, *supra* note 12, at 24, 28, 30, 32. Ward also argued that the court should have allowed him to recall Arthur to establish that he believed Herbert was somewhere on the trestle, and that there was no evidence that Arthur was intoxicated at any time on August 20, 1916, as Franchot had suggested. Brief of Appellant, *supra* note 12, at 30, 32. Neither of those arguments played any part in the Court of Appeals' decision in *Wagner*.

¹²¹ Brief of Respondent, *supra* note 103, at 25, 32.

¹²² Brief of Respondent, *supra* note 103, at 25.

Franchot maintained, “the peril to Herbert Wagner was over There was nothing except [Arthur’s] conjecture or belief that could have lead him up onto the trestle, a belief which nobody else present entertained and which we contend it was entirely unreasonable and improper for him to entertain.”¹²³

The second prong of Franchot’s proximate cause argument was that Ward had confused proximate causation with contributory negligence. In most of the “proximate cause” cases Ward had cited, “the negligence of the defendant[’s] [having] proximately caused the accident was assumed . . . without consideration or discussion,”¹²⁴ and the issue was the contributory negligence of the plaintiff. In his summary of the cases, Franchot claimed that

[I]t will be seen that the various cases cited by the plaintiff . . . may be authority for relaxing the rule as to contributory negligence in deference to the noble instinct or impulse of human nature to render assistance to others in peril, or in deference to the instinct of self-preservation which leads a plaintiff to act sometimes foolishly or recklessly under the stress of an immediate emergency, but they have no authority on the question of proximate cause which is now under consideration: in each and every one of them, the relation of cause and effect between the negligent act of the defendant and the injury to the plaintiff was clear, natural, and necessary under all the rules, and in fact the question of proximate cause was hardly discussed. The decisions can be supported upon the doctrine that impulsive, instinctive, and, therefore, automatic human action does not break the chain of cause and effect. . . . As previously pointed out, the action of the plaintiff in this case . . . was deliberative; he had time for reflection and did reflect; during every instant of time while was walking back from the car throughout the distance of 600 feet to the place where he fell, he had chance for thought.¹²⁵

¹²³ Brief of Respondent, *supra* note 103, at 27.

¹²⁴ Brief of Respondent, *supra* note 103, at 29.

¹²⁵ Brief of Respondent, *supra* note 103, at 31-32.

This may have been true of some of the cases, but not the important ones. For example, two of the central New York cases, *Gibney*¹²⁶ and *Donnelly*,¹²⁷ expressly singled out proximate cause for separate treatment.

Franchot further argued that under New York law, whether the proximate cause requirement was satisfied was always a question of law.¹²⁸ This also was not the case, although there was some language in the case law supporting the proposition. Then, based on this (dubious) proposition, Franchot contended that any negligence of the defendant toward Herbert Wagner was not a proximate cause of the injuries to Arthur Wagner, as a matter of law.¹²⁹ Franchot based this last argument on two propositions he gleaned from *Laidlaw*: (1) there was not an unbroken sequence between any negligence on the part of the trolley car line toward Herbert and Arthur's injury; and (2) because no one but Arthur thought that Herbert's body could be found on the tracks rather than below, Arthur's attempt at rescue was neither "necessary" nor "natural."¹³⁰

Point (2) was a clever and artful, though ultimately unsuccessful, effort to avoid the *Eckert* line of cases. Franchot was attempting to turn what the Court of Appeals might well decide should be a question of fact -- whether Arthur had been contributorily negligent in the manner in which he undertook the rescue -- into a question of proximate cause, and then to have that question decided as a matter of law in the defendant's favor, thus preventing any remand for a new trial.

After the briefs in *Wagner* were submitted, it was clear that there were two central issues remaining in the case. One was whether Wheeler's ruling that none of the original acts of negligence of the railway could be made a basis for recovery by Arthur Wagner was correct. The other was whether, even if Beemer's alleged conduct toward Arthur had amounted to negligence which caused Arthur's fall and injury, Arthur could not recover, because his supposedly bizarre search for Herbert on the tracks either negated proximate cause as a

¹²⁶ 33 N.E. at 142 ("It is contended by the attorney general that the negligence of the state . . . cannot be regarded as the cause of the death of the father. . . . But . . . the peril to which the father exposed himself was the natural consequence of the situation.").

¹²⁷ 118 N.E. at 606 ("Nor do we think that the intervention of the deceased prevents the original act of negligence being the proximate cause of the accident.").

¹²⁸ Brief of Respondent, *supra* note 103, at 11.

¹²⁹ Brief of Respondent, *supra* note 103, at 11.

¹³⁰ Brief of Respondent, *supra* note 103, at 14.

matter of law, or was contributorily negligent as a matter of law. Both issues turned on the treatment of injured rescuers at common law.

This was the posture in which *Wagner v. International Railway Co.* was submitted to the Court of Appeals for decision.

IV. THE OPINION IN WAGNER

Cardozo handed down the opinion in *Wagner* in 1921, when he was in the seventh of his eighteen years (1914-32) on the New York Court of Appeals. He had already written a book on judging – his celebrated *The Nature of the Judicial Process*.¹³¹ He had also written a number of significant tort decisions: *MacPherson v. Buick*¹³² five years earlier, *Adams v. Bullock*¹³³ two years earlier, and *Hynes v. New York Central R.R. Co.*¹³⁴ earlier that same year. He was, in short, a seasoned and self-conscious appellate judge who was not new to deciding tort cases. But he was a judge, not an academic,¹³⁵ and torts cases were just one set of cases that appeared on the quite diverse docket of the Court of Appeals. Cardozo's opinion in *Wagner* should be understood in this context. He was deciding the case, responding to the arguments the parties had made to the Court, and explaining the basis of his decision, as he sought to do in all his opinions. But one of Cardozo's instincts, as a judge, was to establish doctrinal propositions that he hoped could give guidance across a range of cases. *Wagner* would give him an opportunity to lay down such a proposition for cases involving tort actions by rescuers.

A. Cardozo's Approach

In his opinion, Cardozo first recited the facts in the passage that we quoted at the outset of Part I. He then identified the assignment of error on appeal. This was the passage in the trial court's jury instruction containing the "limitation" on the defendant's liability to

¹³¹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921). *Wagner* was decided on November 22, 1921. Consequently, the book certainly had already been written and put to bed, and the odds are that it had already been published.

¹³² 111 N.E. 1050 (N.Y. 1916).

¹³³ 125 N.E. 93 (N.Y. 1919).

¹³⁴ 131 N.E. 898 (N.Y. 1921) (decided May 31).

¹³⁵ See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 133 (1990) (discussing the reasons judicial opinions are not often regarded by academics as reflecting high-quality scholarship).

Arthur “unless” two conditions were satisfied: that Arthur had been invited to attempt to rescue Herbert, and that the conductor (Beemer) had accompanied him. As Cardozo put it, “Whether the limitation may be upheld, is the question to be answered.”¹³⁶

This way of posing the issue was accurate, but it also contained the implied (and accurate) suggestion that there was, in general, liability to rescuers, and that something unusual might have occurred in the case. Otherwise, the term “limitation” would not have been completely accurate. If, as a general matter, there was no liability to rescuers in cases where there was sufficient time for an invitation to rescue to be issued, and for a prospective rescuer to deliberate on his own about whether to attempt a rescue, a time interval’s being “immediate,” or a rescuer’s reaction being “instinctive,” would have been more accurately termed a “prerequisite” or “precondition” to liability, rather than a “limitation” on liability. From the outset, then, Cardozo implied that the trial court may have been swimming against the current by doing something unusual or special in imposing a “limitation” on liability that commonly extended to rescuers.

The next sentence is the most famous in the opinion: “Danger invites rescue.”¹³⁷ In many of his opinions, Cardozo moved abruptly and without preliminaries from his statement of the facts to the legal conclusion that resolved a case. Explanation of the basis for the legal conclusion stated at the outset then followed. For example, in *Palsgraf*, the first sentence after his statement of the facts was “The conduct of the defendant’s guard, if a wrong in relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away.”¹³⁸ And in *Adams v. Bullock*, the first sentence after the statement of facts was “We think the verdict cannot stand.”¹³⁹

But that is not what happened in *Wagner*. “Danger invites rescue” may count as a legal conclusion today, but it was not yet a legal conclusion when Cardozo wrote the phrase. Rather, Cardozo moved abruptly and without preliminaries from a statement of the facts to what, at that point, was an explanation. The next sentence confirms this, for it was no more “legal” than the first: “The cry of distress is a summons to relief.”¹⁴⁰ Rather, these two sentences were “taken over

¹³⁶ *Wagner*, 133 N.E. at 437.

¹³⁷ *Id.*

¹³⁸ *Palsgraf*, 162 N.E. at 341.

¹³⁹ *Adams*, 125 N.E. at 93.

¹⁴⁰ *Wagner*, 133 N.E. at 437.

from the facts of life,” as Cardozo would say in a later tort case, writing for the U.S. Supreme Court.¹⁴¹ He thus began, not with a rule or a legal conclusion, but with facts of which he seemed almost to take judicial notice. The major premise of his *Wagner* opinion came from a sense of the way the world actually works rather than a doctrinal proposition of tort law.

Reading those two sentences, Edward Franchot would already have known that he had lost. Even before expressly addressing Franchot’s proximate cause argument, Cardozo had dispensed with it. But just to be clear, he then gave that argument the back of his hand, moving from the facts of everyday life to the law:

The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and the probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.¹⁴²

There then followed, in the same paragraph, descriptions of and citations to prior cases so holding, *Gibney* most prominently.

Notably, Cardozo never cited *Laidlaw* in *Wagner*. When he chose to speak in doctrinal, rather than factual terms, he only gestured obliquely in *Laidlaw*’s direction, using the phrase “natural and probable,” but emphasizing the nature of the defendant’s wrong rather than a causal connection: a “wrong to the imperiled victim . . . is a wrong also to his rescuer.”¹⁴³

Cardozo’s omission of any citation to *Laidlaw* had to have been a considered decision on his part. The explosion that gave rise to *Laidlaw* took place in New York City when Cardozo was 22 years old, and received widespread publicity: Sage’s prominence alone would have ensured that it came to Cardozo’s attention. The multiple trials of the resulting suit against Russell Sage occurred while Cardozo was a young lawyer in New York. In their briefs, both Ward and Franchot had cited *Laidlaw* multiple times.

In our view, the reason Cardozo did not cite *Laidlaw* is that he wanted to avoid as much as possible the “chain of causation” conception of proximate cause that Franchot had presented to the

¹⁴¹ *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104 (1934).

¹⁴² *Wagner*, 133 N.E. at 437.

¹⁴³ *Id.*

court, that Ward had tried to sidestep, and that *Laidlaw* reflected. To do this, he talked mainly about the rescue cases, and when it was necessary to speak of what amounted to proximate cause, he nonetheless did not use that term and did not talk about “chains” of causation.

Rather, as Warren Seavey suggested long ago, Cardozo focused in *Wagner* on the nature of risk.¹⁴⁴ The risk in question was the risk to potential rescuers of persons endangered by a party’s negligence. This concern with risk was also evident in *MacPherson*, in which the risk he identified was to users of a product from negligent manufacture of the product. In *Palsgraf*, Cardozo also spoke in the language of risk. In that case, the concern was with the absence of any apparent risk to a party who is not foreseeably endangered by an act that is negligent to someone else.

It would be possible to describe Cardozo’s focus on risk in *Wagner* as another way of discussing the duty of a negligent party to rescuers of those whom the party has endangered. But it would be anachronistic to do this: to see Cardozo as concerned, one way or the other, with the nature or independent status of duty as an element of the cause of action in *Wagner* would be to read something into the case that is not there.¹⁴⁵ Cardozo’s opinion does not reflect any preoccupation with, or even interest in, the duty concept. As an abstract proposition, Cardozo’s identification and characterization of the relevant risk in *Wagner* might be thought consistent with recognizing duty as an independent element of a cause of action in tort, but it would take a big leap to read such recognition into the *Wagner* opinion itself. That today “rescue” cases are analyzed by some commentators in terms of duty, breach, and causation, does not mean that Cardozo did so.

¹⁴⁴ Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 *YALE L.J.* 390, 398-99 (1939). John Goldberg and Benjamin Zipursky have contended that the concept of duty was central to Cardozo’s earlier opinion in *MacPherson*. Whatever may have been the case in *MacPherson*, the concept of duty is not present in his *Wagner* opinion. See John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 *U. PA. L. REV.* 1733, 1823 nn.355-56 (1998).

¹⁴⁵ Beginning with his 1941 treatise on tort law, Prosser contended that duty was essentially a conclusory and unnecessary category. WILLIAM L. PROSSER, *PROSSER ON TORTS* 180 (1941). Goldberg and Zipursky have famously taken issue with him on this score, and less famously with each of us. *The Moral of MacPherson*, *supra* note 144, at 1745-46 n.45 (White), 1770 (Abraham). But Prosser only began taking issue with the duty concept two and half decades after *MacPherson*, and more than a decade after *Palsgraf*. Goldberg and Zipursky’s attack on Prosser came more than five decades after that.

For Cardozo, however, the risk at issue was definitely relational.¹⁴⁶ The whole point of the phrase “Danger invites rescue” was that risking harm to a potential victim also risked harming a potential rescuer. Approaching risk in this way contrasted with the “chain of causation” conception in *Laidlaw*, and with Franchot’s use of that conception in arguing the defendant’s case. And as we will suggest below, this approach also foreshadowed Cardozo’s much more extensive analysis of risk in *Palsgraf*.

After stating and supporting the major premise of the opinion, that danger invites rescue, Cardozo turned directly to Franchot’s arguments. As to the asserted requirement that a rescue be instinctive, he was willing to assume that the peril to the first victim and rescue “must in substance be one transaction . . . that there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences.”¹⁴⁷ But instinctiveness was not required. “Continuity in such circumstances is not broken by the exercise of volition.”¹⁴⁸ Rather, it was “enough that the act, whether impulsive or deliberate, is the child of the occasion.”¹⁴⁹ These sentences were the full extent of Cardozo’s engagement with Franchot’s lengthy attempts at trial to establish the factual predicate for his proximate cause position and with his extensive arguments on appeal regarding that position, phrased in terms of what was not “natural” or “necessary.”

In fact, Franchot’s argument that it was preposterous for Arthur to search for Herbert on the tracks rather than below -- and that, as a consequence, the causal link between the defendant’s negligence in causing Herbert’s fall and Arthur’s injury had been broken -- apparently did not merit a direct response. Cardozo refused even to engage with this argument in the language of proximate cause. For Cardozo, the substance of this contention went to Arthur’s possible contributory negligence, not to the defendant’s negligence or proximate cause.

On that issue, Franchot had argued that Arthur was contributorily negligent as a matter of law in undertaking a rescue of his cousin on the trestle and bridge tracks rather than below the trestle. Cardozo also dismissed that argument: “We think the quality of

¹⁴⁶ See *The Moral of MacPherson*, *supra* note 144, at 1744 (arguing that duty is a relational concept).

¹⁴⁷ *Wagner*, 133 N.E. at 438.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

[Arthur's] acts in the situation that confronted him was to be determined by the jury."¹⁵⁰ Arthur had a basis for thinking that Herbert's body might not actually have fallen to the ground below, and the decision he made was in the circumstance of an emergency: "The plaintiff had to choose at once, in agitation and with imperfect knowledge."¹⁵¹

In conclusion, therefore, the lower courts were reversed: "Whether Herbert Wagner's fall was due to the defendant's negligence, and whether plaintiff, in going to the rescue, as he did, was foolhardy or reasonable in light of the emergency confronting him, were questions for the jury."¹⁵² What was not a question for the jury, however, was whether the defendant's negligence as to Herbert was also negligence as to his rescuer, Arthur. It was, as a matter of law.

Was *Wagner* a case whose peculiar facts revealed that a new approach to questions of proximate causation was required, one that side-stepped inquiries into "chains" of causation and their breakage, or "superceding" causes, for inquiries about the creation of risks through negligence and their scope? Or was it a case that sought to carve out an enduring exception, for human rescuers of other humans in peril, to the principle that unreasonable exposure to risks, whether voluntary or not, barred injured persons from recovering against those who had negligently created the risks?

Actually, it was both: a case in which Cardozo signaled that where rescuer plaintiffs were concerned, traditional limitations on recovery in tort law based on proximate causation or on contributory negligence were, in many cases, going to be ignored. After *Wagner*, "danger invites rescue" was not only a fact of everyday life, the premise of Cardozo's approach, but also a legal principle.

B. Foreshadowing *Palsgraf*

We think that the decision in *Wagner* contains virtually everything necessary to its more celebrated offspring, *Palsgraf*. The latter case is rightly considered to be Cardozo's foremost statement on the nature and reach of liability for negligence. But seven years before *Palsgraf*, *Wagner* had already done essentially everything that *Palsgraf* would later do and be remembered for.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Wagner*, 133 N.E. at 438.

First, *Wagner* explained, albeit in more summary fashion, the centrality of risk-analysis to questions involving what others had analyzed in terms of proximate cause. The risk to a victim was also a risk to his or her rescuer. Cardozo might instead have said, “risking harm to a victim is a proximate cause of harm to his or her rescuer, as a matter of law.” And he might have said, “a party with a duty to exercise reasonable care toward someone also has a duty to his rescuer.” But Cardozo did not say either of these things. He spoke in terms of risk and wrong. He spoke about the nature of the defendant’s negligence. That is precisely what he would later do in *Palsgraf*. As he memorably said there, “The risk reasonably to be perceived defines the duty to be obeyed. . . .”¹⁵³ Rescue is a risk “reasonably to be perceived” when a potential victim is endangered: “Danger invites rescue.” Danger to Mrs. Palsgraf, in contrast, was not reasonably to be perceived.

Second, *Wagner* rejected the causal-chain analysis that Judge Andrews would later employ in his *Palsgraf* dissent. The defendant in *Wagner* argued, among other things, that Arthur Wagner’s considered decision to search for Herbert on the tracks, rather than below, broke the chain of causation between the negligence of the defendant in causing Herbert to fall and Arthur’s own rescue-related injury. Cardozo would have none of this. “Danger invites rescue” was really the only proposition he needed, though he did assume for purposes of argument that there might not be liability when there was not “unbroken” continuity between the first wrong and a rescue.¹⁵⁴

Finally, *Wagner* applied the distinction between a question of law and a question of fact in this area. “Danger invites rescue” is a rule of law at a high level of generality. In stating this rule, *Wagner* constitutes more than a mere holding about what questions were and were not for the jury under the facts of that case. Much like the thin-skull rule, *Wagner* articulated a rule that a particular risk -- being injured in a rescue of a party negligently endangered -- is automatically associated with negligence. Similarly, *Palsgraf* articulates a rule about a particular risk -- conversely, a particular risk that is automatically *not* associated with negligence -- the risk of injuring an unforeseeable party in the course of endangering a foreseeable party. But this approach to classifying, as a matter of law, risks that are or are not

¹⁵³ *Palsgraf*, 162 N.E. at 344.

¹⁵⁴ *Wagner*, 133 N.E. at 438.

associated with negligence did not originate in *Palsgraf*; it had already been adopted in *Wagner*. In short, in a very real sense it is *Wagner*, not *Palsgraf*, that is Cardozo's seminal decision in this area of tort law.

C. *Wagner's* Subsequent History

Wagner quickly became a staple principal case in the torts casebooks.¹⁵⁵ The first RESTATEMENT OF TORTS recognized its holding, though limiting it to “normal” efforts to rescue.¹⁵⁶ The case remains a standard in contemporary casebooks.¹⁵⁷ The third Restatement devotes a separate section to “rescue,” eliminating the “normal efforts” qualification of its predecessors.¹⁵⁸ However, most treatments of rescue, then and now, continue to deal with the subject under the rubric of causation, typically providing or explaining why a rescue ordinarily is not a superseding cause that precludes imposition of liability on the party that negligently endangered the victim being rescued.¹⁵⁹ The chain-of-causation approach apparently cannot be banished from thinking about liability to rescuers, although the effect of *Wagner* on that approach is to reject outright the argument that a decision to rescue a negligently endangered person can break some chain of causation. The chain-of-causation reasoning that Cardozo sought to avoid in *Wagner* keeps rearing its arguably-ugly head.

CONCLUSION

Wagner v. International Railway has disappeared from prominent coverage in contemporary torts casebooks, although *Palsgraf* remains highlighted. We believe that *Wagner* should be given prominent treatment, and paired with *Palsgraf*. A comparison of the two cases could illustrate several doctrinal and jurisprudential propositions that might give current students some entry points into the

¹⁵⁵ See, e.g., FRANCIS H. BOHLEN, CASES ON THE LAW OF TORTS 266 (2d ed. 1925); LEON GREEN, THE JUDICIAL PROCESS IN TORTS CASES 840 (1931); WILLIAM M. HEPBURN & ARCHIBALD H. THROCKMORTON, CASES ON THE LAW OF TORTS 586 (2d ed. 1935); HARRY SHULMAN & FLEMING JAMES, JR., CASES AND MATERIALS ON THE LAW OF TORTS 326 (1942); and EDWARD S. THURSTON & WARREN A. SEAVEY, CASES ON TORTS 363 (1942).

¹⁵⁶ RESTATEMENT OF TORTS § 445 (Am. Law Inst. 1934). By this it apparently meant, not extraordinary. See *id.* at § 443.

¹⁵⁷ See, e.g., RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 417 (11th ed. 2016).

¹⁵⁸ See RESTATEMENT (THIRD), *supra* note 2, at § 32.

¹⁵⁹ See sources cited *supra* notes 155 and 157.

typically bedeviling issue of proximate causation and its relationship to duty, negligence, and contributory negligence.

First, the facts of *Wagner*, when compared with those of *Palsgraf*, readily demonstrate the arbitrariness of analyses of “proximate” causation that emphasize broken or unbroken “chains” of causation, or “superceding” or “intervening” causes. In both *Wagner* and *Palsgraf*, there was no doubt that the negligence of the defendant—the series of careless actions on the part of employees of the trolley car line that resulted in Herbert Wagner’s falling from the car, or the conduct of the Long Island Railroad’s guard in dislodging a package when he helped passengers board a moving train—was a factual cause of the injuries to Arthur Wagner and Helen Palsgraf. Herbert fell off the car because of the negligence of Beemer and possibly Roy, and Arthur attempted to rescue Herbert because Herbert was obviously in peril after falling off. Helen Palsgraf was injured because the dislodged package, which contained fireworks, exploded when it hit the ground, and the subsequent explosion caused a heavy scale on an adjacent railroad platform to topple, coming into contact with Palsgraf, who was standing near the scale with her daughters while preparing to board another train.

A “chain” of factual causation between a defendant’s negligence and a plaintiff’s injury was thus intact in both cases. “But for” the negligence of Beemer and possibly Roy in *Wagner*, and the guard in *Palsgraf*, the plaintiffs in those cases would not have been injured. To claim otherwise—to assert that the negligent acts of the trolley car employees had somehow “come to rest” when Roy brought the car to a stop at the foot of the trestle, or that the explosion of the fireworks or the toppling of the scale had somehow “intervened” to eliminate any possible liability on the part of the guard toward Palsgraf, was simply to attach a label to a normative judgment. Whether a cause was “superceding,” or whether an action “broke a chain” of causation, in those circumstances, depended only on a court’s identifying it as such.

Cardozo implicitly recognized the arbitrariness of analyses that emphasized “chains” of causation, or “superceding” causes, in both *Wagner* and *Palsgraf*. He eschewed both analyses by stressing that where the negligence of a defendant toward a foreseeable victim ended up injuring another victim, the proper technique for determining whether liability should extend to the other victim was not to posit a prospective chain of causation from the defendant to the injured party

and then ask whether it had been “broken” or “superceded” by some other act. The proper technique was to ask whether the defendant’s negligent conduct could fairly be described as posing a risk to the party who ended up being injured. In *Wagner*, Cardozo answered “yes” to that question by announcing that “danger invites rescue,” and thus prospective rescuers of persons endangered by the conduct of negligent defendants were within the category of victims exposed to risks by that conduct. In *Palsgraf*, he answered “no” to the same question, stating that Palsgraf, standing far from the site where a guard had caused a package with no notice that it contained fireworks to fall to the ground, could not fairly be said to be within the class of persons put at risk by the dislodging of the package.

In *Palsgraf*, Cardozo put his “risk” analysis in terms of duty and foreseeability: “[t]he risk reasonably to be perceived” defined the duty of the guard. It was “risk to another or to others within the range of apprehension,” and Helen Palsgraf, “standing far away” from the site where the guard dislodged the package, was outside that range. In *Wagner*, his risk analysis was more categorical: he simply stated that as a matter of law, prospective rescuers of persons endangered by negligent defendants were also placed at risk by that conduct. Had Cardozo employed his *Palsgraf* language in *Wagner*, he would have said that the risk of harm to a rescuer was “reasonably to be perceived” by a party whose negligence placed someone in peril, and thus the negligent party owed a duty not to expose the rescuer to injury.

Cardozo also said in *Palsgraf* that “the law of causation, remote or proximate” was “foreign to the case.” He did not say that in *Wagner*, but neither did he use the language of proximate causation to capture the relationship between the negligent trolley car line and the rescuer, Arthur Wagner. Nor did he say, explicitly, that the International Railway company owed a duty of care toward rescuers of persons endangered by the negligent conduct of its employees. Nor, for that matter, did he use the language of foreseeability in defining the relationship between the negligent trolley line and Arthur. But it was plain that his “danger invites rescue” proposition meant that negligence which created a risk to a passenger on a trolley car line also created a risk to that passenger’s rescuer. It was also plain, after *Palsgraf*, that the reason that Arthur Wagner might have expected to recover for his injuries after the Court of Appeals decision, but Helen Palsgraf could not, was that a risk to Arthur stemming from the

defendant's negligent conduct was "reasonably to be perceived," but that a risk to Helen Palsgraf was not.

We thus think that *Wagner* and *Palsgraf* have more in common than commentators may have suspected, and that taken together they offer a way of making sense of a good many "proximate cause" cases. The defining feature of such cases, and the principal reason they can be confounding, is that they combine a factual connection between a defendant's conduct and injury to a plaintiff with the unexpectedness of that injury, either in its type, its extent, its manner, or in the class of injured victim. Risks that might reasonably be thought to arise from the defendant's conduct do not result in the injuries being complained of; instead other risks eventuate in those injuries. In *Wagner*, risks resulting from failing to close a door on a trolley, failing to move passengers away from an exposed platform on that trolley, and the operation of the trolley at excess speed around a curve might reasonably have resulted in a passenger on that platform being thrown off, and that risk occurred. But it was not Herbert Wagner who ended up being seriously injured; it was his cousin, Arthur, in the role of Herbert's rescuer. And in *Palsgraf*, it was not an injury to the package or its contents that produced a negligence suit against the Long Island Railroad, but physical and emotional injuries to Helen Palsgraf from coming into contact with the scale.

Both cases thus produced injuries that were factually connected to the negligent conduct of the defendant, but were suffered by unexpected classes of persons: rescuers and bystanders. Both were classic "proximate cause" cases, but deciding the cases by declaring one injury to be a "proximate" and the other a "remote" cause of the defendant's negligence was as arbitrary as declaring a "chain" of causation to remain intact in one case and to have been broken in another. In fact, the cases were both about small risks that were factually connected to the large risk that made the defendant negligent. Cardozo decreed in *Wagner* that the small risk of injury to a rescuer was sufficiently connected to the large risk of injury to a passenger to send the question of the trolley line's negligence to the jury. He decreed in *Palsgraf* that the small risk of injury to Palsgraf from coming into contact with toppling scales was insufficiently connected to the large risk of injury to the package or its contents to permit recovery. He claimed that *Palsgraf* was not a proximate cause case, and he did not use the language of proximate causation in *Wagner*. But both cases were proximate cause cases, and both were about the

connection between the large risks that make conduct negligent and the seemingly smaller risk that ends up producing associated injury. When paired with *Palsgraf*, *Wagner* furnishes a vivid illustration of two cases in which Cardozo employed risk analysis to distinguish one category of proximate cause cases from another. For all its prescience, Cardozo's opinion in *Wagner* concealed that fact as much as it revealed it.