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PALSGRAF V. LONG ISLAND R.R.: ITS HISTORICAL CONTEXT

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One of the most important opinions that Benjamin Cardozo ever wrote was *Palsgraf v. Long Island R.R.*[1] Unfortunately, the opinion often is misunderstood. By placing the *Palsgraf* decision in its historical context, this article seeks to show what Chief Judge Cardozo believed his opinion meant and what impact it had over time.

Throughout the long course of human existence, death, illness and injury were a random part of life that could strike tragically at any time. In 1900, for example, nearly one in every 200 people in the United States died from influenza and pneumonia, while another one in every 200 died from tuberculosis. Even more deadly was a well-recorded 1878 yellow fever epidemic in Memphis, Tennessee, which produced 5150 fatalities in a total population of 38,500, while 20,000 deserted the city.[2] As one family was starkly described, the mother was dead "with her body sprawled across the bed . . . black vomit like coffee grounds spattered all over . . . the children rolling on the floor, groaning."[3]

Accidents were even more devastating than disease. In the nineteenth-century, approximately ten percent of all coal miners died in mine accidents during the course of their careers, while at the turn of the century one in every 5000 factory employees died annually from

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[1] 248 N.Y. 339 (1928).

[2] FREDERICK LEWIS ALLEN, THE BIG CHANGE: AMERICA TRANSFORMS ITSELF, 1900-1950, 202 (New York: Harper, 1952).

[3] *Quoted in* OTTO L. BETTMANN, THE GOOD OLD DAYS—THEY WERE TERRIBLE 136 (New York: Random House, 1974).

accidents.[4] The worst victims of all were railroad employees: in 1901, one out of every 399 railroad employees was killed in an accident, while 1 out of every 26 was injured. For train crews in that year, one out of every 137 was killed, which translated into a nearly 20% probability of accidental death over a 25-year career.[5] These high accident rates resulted from coupling industry's "cavalier attitude" that "'[t]here's a dozen [new workers] waiting when one drops out'" as a result of "'his own bad luck,'"[6] with the real "hazards of axles, mules, stinging insects, boiling laundry kettles, tetanus-inducing rusty implements and barbed wire, impure water, and spoiled food."[7] Given the pattern of accidents and illness, it is not surprising that as late as 1920 average life expectancy in the United States was only 54.1 years.[8]

Because of the frequency of workplace accidents and injuries involving public transportation, conflict between investors and entrepreneurs, on the one hand, and laborers and other ordinary people, on the other, was endemic to the law of torts in the early decades of the twentieth century. During this period, the core principle underlying classical tort doctrine in New York, like much other common law, was the norm outlawing redistribution of wealth or other property.

In pursuit of this norm, the law enforced the "familiar principle[s]"[9] first, that a "violation of a legal right knowingly committed gives to the injured party a cause of action against the wrongdoer"[10] and second, "that one who acts must exercise due care not to do damage to another's person or property."[11] "If property [was] destroyed or other loss occasioned by a wrongful act, it [was] just that the loss should fall upon the estate of the wrongdoer rather than on that of a guiltless person."[12]

On the other hand, it stood "to reason that a person [could] not recover . . . [for] an inevitable accident. There [were] plenty of misfortunes to which people [were] subjected where they must suffer

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[4] YAIR AHARONI, THE NO-RISK SOCIETY 47 (Chatham, N.J.: Chatham House, 1981).

[5] ALLEN, BIG CHANGE, *supra* note 2, at 56.

[6] BETTMANN, GOOD OLD DAYS, *supra* note 3, at 71.

[7] *Quoted in* WILLIAM M. LOWRANCE, OF ACCIDENTAL RISK: SCIENCE IN THE DETERMINATION OF SAFETY 5 (Los Altos, Calif.: W. Kaufmann, 1976).

[8] AHARONI, NO-RISK SOCIETY, *supra* note 4, at 47.

[9] The No. 1 of New York, 61 F.2d 783, 784 (2d Cir. 1932).

[10] Bolivar v. Monnat, 248 N.Y.S. 722, 729 (App. Div. 1931).

[11] *The No. 1 of New York*, 61 F.2d at 784.

[12] Rozell v. Rozell, 8 N.Y.S.2d 901, 904 (App. Div.), *aff'd*, 281 N.Y. 106 (1939).

without recompense,"[13] and courts could not permit "sympathy, although one of the noblest sentiments of our nature," to "decide . . . questions of law" and thereby become a "basis of transferring the property of one party to another."[14] As the Court of Appeals had proclaimed in one mid-nineteenth century case, everyone in a "commercial" country "to some extent" ran the "hazard of his neighbor's conduct."[15]

In short, classical tort doctrine demanded that compensation be paid to a person whose injury was caused directly by another's wrongdoing, but not for an injury, however serious, resulting from innocent conduct or from causes other than conduct of a defendant. Two early cases are illustrative.

In *Laidlaw v. Sage*,[16] a burglar entered the business premises of defendant Russell Sage, demanded $1,200,000 and threatened to set off a bomb if he did not receive it. After he had discussed the matter with the burglar, Sage positioned another employee, the plaintiff, Laidlaw, between himself and the burglar and then, in essence, refused the demand. When the burglar set off his bomb, Laidlaw was severely injured but Sage was saved. Plaintiff recovered a jury verdict against Sage, but the Court of Appeals reversed, holding that the bomber had caused Laidlaw's injury and that there was "no evidence in the case of any necessary relation of cause and effect" between Sage's words and actions "and the explosion which caused his [Laidlaw's] injury."[17]

Pardington v. Abraham[18] was analogous. There the defendant department store owner maintained a swinging door which another customer pushed open, whereupon the door ricochetted back and struck and injured Eliza Pardington. In reversing a jury verdict for Pardington, the court found that the doors were no less safe than similar doors used in like establishments and that "carelessness in the use of any form of door may inflict injury upon one who happens to be sufficiently near it."[19] The court continued, "No doubt the plaintiff has

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[13] Morison v. Broadway & Seventh Ave. R.R., 8 N.Y.S. 436 (Sup. Ct. 1890), *quoted in* RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910, 60 (Ithaca: Cornell University Press, 1992).

[14] Laidlaw v. Sage, 158 N.Y. 73, 104 (1899).

[15] Ryan v. New York Central R.R., 35 N.Y. 210, 217 (1866). *Accord*, BERGSTROM, COURTING DANGER, *supra* note 13, at 172.

[16] 158 N.Y. 73 (1899).

[17] *Id*. at 102.

[18] 87 N.Y.S. 670 (App. Div. 1904), *aff'd* on opinion below, 183 N.Y. 553 (1906).

[19] *Id*. at 671.

been the victim of a lamentable accident; but it is attributable, as it seems to me, not to any fault of the defendants, but rather to the hasty carelessness of a third person, over whose movements and conduct they had no control."[20]

By the opening decades of the twentieth century, however, classical judicial doctrine could no longer claim to be the only plausible approach to issues of causation in tort. Randolph Bergstrom, whose valuable book on New York tort litigation covers a forty-year period almost immediately prior to the period here under study, shows that a competing "popular conception of liability" was emerging slowly in the years around and after the turn of the century. The evidence available to Bergstrom did not permit him to elaborate this popular paradigm in detail, but there can be little doubt, in view of a growing tendency of jury verdicts to diverge from judges' views and of the hostile reaction of judges and leaders of the bar to the divergence, that a competing paradigm existed and disturbed profoundly those adhering to the traditional one.[21] In the words of Judge M. Bruce Linn, for example, the law was "menaced by those who would completely transform it," with "no regard for its history; no reverence for its traditions; no conception of its obligations; and no appreciation for its ideals,"[22] while Judge William Hornblower worried about the frequency with which juries "yield[ed] to local sentiment . . . [producing] erroneous decisions in accordance with the popular idea of the demands of justice."[23]

This new "popular conception of liability . . . was never clearly articulated" by its proponents,[24] at least in part because the juries which administered it could speak only through general verdicts. The best efforts at definition thus came from the mouths of lawyers who opposed the new view. Clearest of all, though guilty of exaggeration, was Eli Hammond, who wrote that the new popular conception was "in favor of looting any public or quasi-public treasury in aid of private suffering or private want."[25] The distinguished Elihu Root believed

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[20] *Id.*

[21] BERGSTROM, COURTING DANGER, *supra* note 13, at 142-43, 166, 171-78.

[22] M. BRUCE LINN, THE LAWYER AN OFFICER OF THE COURT: A LECTURE BEFORE THE STUDENTS OF THE ALBANY LAW SCHOOL 15 (Albany: Albany Law School, 1912), *quoted in* BERGSTROM, COURTING DANGER, *supra* note 13, at 173.

[23] William B. Hornblower, *New York State Bar Association Minutes*, American Lawyer, 1 (1893), 49, *quoted in* BERGSTROM, COURTING DANGER, *supra* note 13, at 171.

[24] BERGSTROM, COURTING DANGER, *supra* note 13, at 172.

[25] *Quoted in* BERGSTROM, COURTING DANGER, *supra* note 13, at 171 n.12.

that "[d]istorted and exaggerated conceptions [were] disseminated by men . . . overexcited by contemplating unhappiness and privation which perhaps no law or administration could prevent,"[26] and one H.T. Smith agreed that "[j]uries are naturally sympathetic and . . . inclined to take the view that an employee should be compensated when injured no matter what the judge tells them about the law."[27]

As juries and others adopted the new paradigm holding that victims of injury should receive compensation from some source, they simultaneously rejected the older, nineteenth-century world view that injury, death, and other sudden calamities were inevitable, random, and frequent events attributable to cosmic rather than human agency. Whereas nineteenth-century judges had not traced out complex chains of causation in order to identify the human agent most responsible for a disaster but had instead typically let "losses . . . lie where they fell," early twentieth-century jurors "came to assign cause differently."[28] The newly emerging tort paradigm, to quote from the findings of Randolph Bergstrom, contained

> an understanding of cause and effect that included a fuller sense of remote causation -- that actors not at the site of an event could create the conditions that cause the event. . . . The scope of the search for liability was pushed beyond immediate contact to outlying areas where those who created the conditions that caused injury worked. Understanding cause to spring from sources remote as well as immediate, New Yorkers brought suit over injuries from commonplace causes that "ordinarily were never noticed hitherto," and that had previously been considered the random working of fate. In doing so, they defined anew the "inevitable" event as a compensable injury, conceiving it as the cause and responsibility of someone else.[29]

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[26] Elihu Root, *Judicial Decisions and Public Feeling: Address as President of the New York Bar Association at the Annual Meeting in New York City*, 5, (Jan. 19, 1912) (Washington, D.C.: U.S. Government Printing Office), *quoted in* BERGSTROM, COURTING DANGER, *supra* note 13, at 172-73.

[27] H.T. Smith, *Liability Investigations and Adjustments*, *in* LIABILITY AND COMPENSATION INSURANCE 67 (Hartford: Insurance Institute of Hartford, 1913).

[28] LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 57-59 (New York: Russell Sage Foundation, 1985).

[29] BERGSTROM, COURTING DANGER, *supra* note 13, at 175.

By 1920, these newly emerging, though not uniformly accepted ideas of causation and tort liability had begun to attain legitimacy even in judicial circles. As a result, classical doctrine no longer provided easy answers in every case, and judges began to recognize that issues of liability and causation involved policy choice. Competition between the new and old paradigms left no doubt that determining when a plaintiff had "a legal right" or when a defendant had committed "a wrongful act" required courts to consider whether there was "a relationship between the parties of such a character . . . that as a matter of good faith and general social policy" the defendant had a duty not to harm the plaintiff.[30] More specifically, judges came to understand that they had "to harmonize the necessities of a competitive industrial system of business with the teachings of morality"[31] -- that is, they had to harmonize capitalism with "the sense of universal justice exemplified in the Golden Rule,"[32] all "without too radical a departure from recognized legal rules."[33]

The Court of Appeals sought to work out the tension between the competing paradigms of liability in the pacesetting case of *Palsgraf v. Long Island R.R.*[34] Not surprisingly, the court did not adopt either paradigm wholesale, but instead strove to elaborate a compromise position entailing recognition of the reformers' demands for social justice, but only within the confines of existing precedent. Thus, it adhered to the traditional doctrinal approach that "some culpability on the part of a defendant"[35] was the key factor that rendered conduct tortious. At the same time, however, it defined culpability more expansively and thereby increased the range of cases in which victims of injury could obtain compensation.

Still studied by all first-year law students under the rubric of proximate cause, the majority opinion in *Palsgraf* by Chief Judge Cardozo has never been examined by scholars in the context of the ongoing conflict between supporters of the new and supporters of the old paradigm of tort liability. Such an examination suggests that Cardozo wrote his *Palsgraf* opinion with the conflict in mind, that he

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30 Bolivar v. Monnat, 248 N.Y.S. 722, 729 (App. Div. 1931).

31 Rozell v. Rozell, 8 N.Y.S.2d 901, 904 (App. Div. 1939), *aff'd*, 281 N.Y. 106 (1939).

32 Gould v. Flato, 10 N.Y.S.2d 361, 368 (Sup. Ct. 1938).

33 M.L. Stewart & Co. v. Marcus, 207 N.Y.S. 685, 691 (Sup. Ct. 1924).

34 248 N.Y. 339 (1928).

35 Pease v. Sinclair Refining Co., 104 F.2d 183, 185 (2d Cir. 1939).

embraced the new paradigm, but that he also recognized a need to limit the range of liability to which defendants might be subjected thereby.

The case arose when the plaintiff, Helen Palsgraf, who had purchased a ticket from the railroad and was waiting for a train, was injured through a fall of scales dislodged as a result of an explosion of fireworks at the other end of the station's platform. The explosion had occurred when two railroad employees had knocked a small package out of the hands of another passenger while helping him board a moving train. The package contained the fireworks, "but there was nothing in its appearance to give notice of its contents."[36]

The classical understanding of negligence and proximate cause was elaborated by Judge Andrews in a dissent that would have affirmed the opinion of the Appellate Division directing judgment for the plaintiff. In Andrews's view, "[e]very one owe[d] to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[37] Negligence consisted in breach of this duty, and the railroad had been negligent in *Palsgraf* when its employees permitted a man to board a moving train and even assisted him in doing so. But "[o]bviously," as Judge Andrews himself had observed in another case, negligence liability had to have "its limits."[38]

The limit was the doctrine of proximate cause. By virtue of this doctrine, negligence did not invariably give rise to a cause of action for damages, unless the damages were "so connected with the negligence that the latter may be said to be the proximate cause of the former."[39] By "proximate" Andrews meant "that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point," not as a matter of "logic" but of "practical politics."[40] In determining proximate cause, it was necessary to ask questions such as "whether there was a natural and continuous sequence between cause and effect," whether "the one was a substantial factor in producing the other," and whether there was "a direct connection between them, without too many intervening causes."[41] For Andrews, inquiries into

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[36] *Palsgraf*, 248 N.Y. at 341.

[37] *Id*. at 350 (Andrews, J., dissenting).

[38] International Products Co. v. Erie R.R., 244 N.Y. 331, 337, *cert. denied*, 275 U.S. 527 (1927).

[39] *Palsgraf*, 248 N.Y. at 351 (Andrews, J., dissenting).

[40] *Id*. at 352.

[41] *Id*. at 354.

proximate cause always involved "question[s] of fair judgment" and could lead at best not to a clear rule but only to "an uncertain and wavering line" that would yield "practical" results "in keeping with the general understanding of mankind."[42]

Andrews's language about "public policy," "a rough sense of justice," and "practical politics" was not the language of the nascent legal realist movement, as other scholars have suggested.[43] It surely was not the language of sociological jurisprudence -- the language employed by Cardozo -- out of which realism was emerging. It would be two more years before the realists would break clearly from sociological jurisprudence and receive their name and designation as an intellectual movement in Karl Llewellyn's famous article, "A Realistic Jurisprudence -- the Next Step."[44] Even then, legal realists did not often use the words quoted above that were used by Andrews. Andrews's language, as I have argued elsewhere,[45] was more typically the language of the descendants of the realists in the aftermath of World War II, not the language of first-generation realists in the decade of the 1930s. It makes more sense, in my view, to understand

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[42] *Id.* at 350-52; 354-55.

[43] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 61 (New York: Oxford University Press, 1992); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 98-99 (New York: Oxford University Press, 1980).

[44] Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 175-76 (Chicago: University of Chicago Press, 1997), states that realism emerged during the course of a debate between Llewellyn and Pound and their friends set off by Llewellyn's 1930 article. On the other hand, Laura Kalman, LEGAL REALISM AT YALE, 1927-1960, 3-44 (Chapel Hill, N.C.: University of North Carolina Press, 1986), sees the emergence of legal realism as a lengthier process, stretching back into the 1920s.

Ultimately, one's view of the time of realism's origin depends on one's definition of realism. In my view, realism involved more than the rejection of Langdellian conceptualism. The core tenet of realism was not simply that the law follows "an uncertain and wavering line" reflective of "public policy" and "a rough sense of justice." Cardozo knew that, and Andrews knew that. So did Holmes thirty years earlier, as did most other judges. But, for Cardozo and Andrews, at least, the line the law followed was one "in keeping with the general understanding of mankind." For later realists like Judge Charles Clark, in contrast, judicial decisions on issues like proximate cause depended not on society's, but on the individual judge's "values and his notions of sound and desirable social policy." Pease v. Sinclair Refining Co., 104 F.2d 183, 185 (2d Cir. 1939).

Thus, the core tenet of realism is not that law reflects social policy but that judges make policy choices. Cardozo and Andrews rejected that tenet; later realists like Clark and William O. Douglas embraced it. As of 1930, no one had fully articulated it.

[45] *See* WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980, 143-47 (Chapel Hill, N.C.: University of North Carolina Press, 2001).

Andrews, a conservative whom the realists never accepted as one of their own, to be describing conservative tort doctrine of recent decades, of which he was intimately aware, rather than a jurisprudential movement which he perhaps anticipated but which at the time of his writing was still in gestation.

In addition to the *Sage* and *Abraham* cases discussed above, a 1921 decision from the Second Circuit strongly supported Andrews' views.[46] The plaintiff was the widow of a deceased alien who had been arrested and imprisoned on the orders of Attorney General A. Mitchell Palmer.[47] She alleged that her husband had been subjected to physical and mental torture by his federal captors until he committed suicide as the only means of escape. Nonetheless, two out of the three judges sitting on the Second Circuit panel voted to dismiss her complaint, declaring that it would be "a most unreasonable inference . . . to say that suicidal mania can be regarded as the natural and probable consequence of either mental or physical torture."[48] The dissenter, in contrast, thought it obvious "that the infliction of such wrongs continuously over a long period of time might naturally and probably would lead to . . . self destruction."[49] However, as the dissenting judge further observed, the concept of "natural and probable consequence" over which the court was battling was a mere "expression . . . to explain the reason for the decision on the facts."[50]

Of course, authority also existed for the reform principle favored by Cardozo and the *Palsgraf* majority -- the principle that, "where one undertakes to do something involving a dangerous situation, he must do it with reasonable care."[51] Cardozo himself had taken a preliminary step toward that view in *Glanzer v. Shepard*,[52] in which a public weigher who had weighed beans at the request of a seller was held liable to the buyer for weighing them erroneously. As Cardozo explained, the "controlling circumstance" in determining whether or not tort liability existed was "not the character of the consequence" but "the thought and purposes of the actor,"[53] and in

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[46] *See* Salsedo v. Palmer, 278 F. 92 (2d Cir. 1921).

[47] *Id*. at 93.

[48] *Id*. at 99.

[49] *Id*. at 100 (Mayer, C.J., dissenting).

[50] *Id*. at 101.

[51] Miller v. City of Rochester, 188 N.Y.S. 334, 336 (App. Div. 1921).

[52] 233 N.Y. 236 (1922).

[53] *Id*. at 240.

Glanzer, the possibility of harm to the buyer should have been within the thoughts of the weigher. Thus, the weigher was liable.[54]

Writing for the *Palsgraf* majority, Chief Judge Cardozo expanded on his holding in *Glanzer* and further embraced the reform position as the underlying principle for the law of torts. Proclaiming that a finding of negligence "would entail liability for any and all consequences, however novel or extraordinary," the Chief Judge held that the doctrine of proximate cause would not limit liability as Andrews' dissent suggested it had traditionally done in New York law; in Cardozo's words, "[t]he law of causation, remote or proximate, is thus foreign to the case before us." When this holding was added to the ruling in *Glanzer* that liability depended on the mental state of actors rather than the consequences of their actions, the reform principle was complete. Cardozo and a majority of the Court of Appeals had rendered people in positions of power responsible in damages if they foresaw harm resulting from their actions, however remote the harm might be and by whatever indirection it might be produced.[55]

But, at the same time that Cardozo and his brethren brought the reform program to fruition, they also imposed limits upon it. Cardozo and his colleagues were no radicals. They appreciated the uncertainties that entrepreneurs, who could always foresee harm, would face if they were liable in damages whenever harm, however remote and indirect, occurred. "Proof of negligence in the air," Cardozo thus wrote, would "not do."[56] Defendants who were negligent would not be liable for all harms in the world, but only for damages suffered by those at whom their negligence was directed. "Negligence," Cardozo continued, was not an open-ended concept, but "a term of relation," pursuant to which "[t]he plaintiff sue[d] in her own right for a wrong personal to her, and not as the vicarious

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[54] *Id*. at 240-42. *Glanzer* was later read as support for a far-reaching rule that "a negligent statement may be the basis for a recovery of damages," International Products Co. v. Erie R.R., 244 N.Y. 331, 337 (1927), and that rule, in turn, was held to permit a damage suit by an African-American who purchased a bus ticket from Buffalo, New York to Montgomery, Alabama on an oral assurance of the ticket agent that he would not be discriminated against on the basis of his race. *See* Battle v. Central Greyhound Lines, Inc., 13 N.Y.S.2d 357 (Sup. Ct. 1939).

[55] *Palsgraf*, 248 N.Y. at 346. Note should be taken of the parallelism between Cardozo's rulings in *Glanzer* and *Palsgraf*, on the one hand, and MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916), on the other.

[56] *Palsgraf*, 248 N.Y. at 341.

beneficiary of a breach of duty to another."[57] Cardozo concluded that no negligence had occurred toward the plaintiff and hence she could not recover damages for her injury since, at least "to the eye of ordinary vigilance," the act of helping a passenger onto a moving train was "innocent and harmless . . . with reference to her."[58]

In cases before and after *Palsgraf*, the Court of Appeals elaborated the rule that in order "[t]o be negligent, a defendant must have acted or failed to act in such a way that an ordinary reasonable man would have realized that certain interests of certain persons were unreasonably subjected to a general but definite class of risks."[59] Conversely, a person could not "be held liable in negligence for failing to provide against a danger he could not have reasonably foreseen."[60] In a case decided in the same month as *Palsgraf*, the Court of Appeals, with only Andrews in dissent, wrote that "[n]egligence is gauged by the ability to anticipate."[61] "The risk reasonably to be perceived define[d] the duty to be obeyed."[62] The "one fundamental rule," according to still another opinion from which only Andrews dissented, was "that the act of a party sought to be charged is not to be regarded as a proximate cause . . . unless it could have been reasonably anticipated that the consequences complained of would result from the alleged wrongful act."[63]

In light of this principle, the court decided cases such as *Wagner v. International Ry.*,[64] where it found a railroad liable to a plaintiff who had gone upon a trestle to rescue his cousin, who had fallen from a train; the reasoning, in another famous Cardozo opinion, was that "[d]anger invites rescue."[65] Since a rescue attempt was "within the range of the natural and probable" and hence foreseeable reactions to the possible peril of an injured man lying on railroad tracks, the court held the railroad liable when the person attempting the rescue was injured.[66]

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[57] *Id.* at 342.
[58] *Id.* at 341-42, 345.
[59] Payne v. City of New York, 277 N.Y. 393, 396 (1938).
[60] *Id.*
[61] McGlone v. William Angus, Inc., 248 N.Y. 197, 199 (1928).
[62] Storm v. New York Telephone Co., 270 N.Y. 103, 108-09 (1930).
[63] Saugerties Bank v. Delaware & Hudson Co., 236 N.Y. 425, 430 (1923).
[64] 232 N.Y. 176 (1921).
[65] *Id.* at 180.
[66] *Id.*

Of course, damage remained "the very gist and essence of the plaintiff's cause," and that damage had to flow "from an infraction of a duty, to the injured party, from an invasion of his legal rights," in order for "legal liability" to be imposed.[67] There could "be no actionable negligence in the absence of a legal duty to the plaintiffs."[68] And, determining the scope of citizens' duties to each other was a difficult matter which could not "be tested by pure logic."[69]

There were some matters on which the New York courts reached agreement. They agreed that citizens were under no duty to provide assistance to each other, but that they came under a duty if they volunteered to provide help or entered into a contractual relationship.[70] Indeed, a duty arising out of a contract could sometimes "inure to a third person"[71] -- someone other than a party to the contract -- "under certain circumstances."[72] What, however, were those circumstances? When would a water company that had made a contract with a city to provide water to its residents be liable to them for damage resulting from a failure to provide the water? When would an accountant who had audited a firm's books be liable to a person who had lent money to the firm in reliance on the audit?

Cardozo addressed these questions in two leading opinions: *H.R. Moch Co. v. Rensselaer Water Co*.[73] and *Ultramares Corp. v. Touche*.[74] His concern was that the "field of obligation" not "be expanded beyond reasonable limits."[75] Although "[t]he assault upon the citadel of privity" -- of tort upon contract -- was "proceeding . . . apace,"[76] Cardozo was unwilling to expose contracting parties to "the involuntary assumption of a series of new relations, inescapably hooked together" and thus "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class,"[77] all out of concern that the "hazards of a business conducted on these terms"

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[67] Comstock v. Wilson, 257 N.Y. 231, 235 (1931).

[68] Gambon v. City of New York, 271 N.Y.S. 244, 248 (Sup. Ct. 1934).

[69] *Comstock*, 257 N.Y. at 234-35.

[70] Zelenko v. Gimbel Bros., Inc., 287 N.Y.S. 134 (Sup. Ct. 1935), *aff'd*, 287 N.Y.S. 136 (App. Div. 1936).

[71] Franklin Fire Ins. Co. v. Weinberg, 181 N.Y.S. 15 (App. Term 1920), *aff'd*, 188 N.Y.S. 610 (App. Div. 1921).

[72] Harriman v. N.Y., Chi. & St. Louis R.R. Co., 253 N.Y. 398 (1930).

[73] 247 N.Y. 160 (1928).

[74] 255 N.Y. 170 (1931).

[75] *H.R. Moch Co*., 247 N.Y. at 164.

[76] *Ultramares Corp*., 255 N.Y. at 180.

[77] *H.R. Moch Co.*, 247 N.Y. at 168.

would be too "extreme."[78] He was unwilling, in short, to permit large business entities to become vehicles for the redistribution of their shareholders' and customers' wealth to random sufferers of damage whose susceptibility thereto could not have been specifically foreseen and prevented; he was prepared to impose liability only on those who callously let others get hurt.

Keeping true to *Palsgraf*, Cardozo held that in the absence of "reckless and wanton indifference to consequences measured and foreseen"[79] or of "reckless misstatement . . . or insincere profession of opinion . . . liability for negligence . . . [would be] bounded by the contract."[80] Whether a defendant had acted insincerely or recklessly toward individuals who might be damaged by its negligent performance of a contract so as to become liable to them in tort presented a question of fact for juries and for future divisions on the Court of Appeals, the precise outcome of which could not readily be predicted.[81]

Despite the difficulties involved in its application in borderline cases such as *Moch* and *Ultramares*, the foreseeability standard elaborated by the *Palsgraf* majority and numerous other New York cases during the 1920s and 1930s had significant doctrinal consequences in comparison with the alternative articulated by the *Palsgraf* dissent.

A first consequence was to give juries less freedom than the approach of Judge Andrews in dissent might have allowed.[82] After allowing a jury first to inquire whether the defendant had committed an act that "unreasonably threaten[ed] the safety of others," Andrews next required the jury to make a "fair judgment" about where to "draw an uncertain and wavering line" marking the point where "because of

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[78] *Ultramares Corp*., 255 N.Y. at 179-80.

[79] *H.R. Moch Co*., 247 N.Y. at 169.

[80] *Ultramares Corp*., 255 N.Y. at 190.

[81] State Street Trust Co. v. Ernst, 278 N.Y. 104 (1938).

[82] Normally Cardozo favored the empowerment of juries. His position in *Palsgraf* was not, in fact, inconsistent. He normally favored giving power to juries in contexts where jury power would assist plaintiffs; in *Palsgraf*, Andrews sought to give juries which had already decided the preliminary issue of wrongdoing in favor of plaintiffs the additional issue of proximate cause, which they could then resolve in favor of defendants. Moreover, it is not clear that Andrews, despite the language of his opinion, truly intended to let juries pass on the policy questions implicit in the proximate cause issue; given the extensive body of precedent that existed in New York, he may have expected judges to take proximate cause issues away from juries and rule on them as a matter of law. If such was Andrews's expectation, then Cardozo's *Palsgraf* approach was more empowering of juries.

convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[83] In performing these tasks, juries would not have recourse to facts or "logic," but would be engaging in "practical politics."[84] In contrast, the approach of Cardozo and most New York judges pointed juries to a coherent factual inquiry -- did the defendant know or have reason to know that its activities posed a risk of injury to the plaintiff or to the class of people of which the plaintiff was a member. This standard, which did not involve any "balance of probabilities" but only "the existence of some probability of sufficient moment to induce action to avoid it," was a simple test that did not empower juries or judges to make any practical political decisions or other balancing judgments.[85]

A second consequence of the Cardozo approach was an almost total absence of mention in the cases of today's popular calculus of risk standard, detailed by Learned Hand in the 1947 case of *United States v. Carroll Towing Co*.[86] By not encouraging juries to balance the foreseeability of injury against the utility of the defendant's conduct, New York law during the 1920s and 1930s largely avoided utilitarian cost-benefit analysis as part of the negligence determination. During the two decades in question, New York negligence law almost uniformly was not utilitarian. It remained committed only to the cause of social justice, although there were alternative views about the meaning of justice: on the one hand, a commitment that "sympathy" not become a "basis of transferring the property of one party to another,"[87] and on the other hand, a simple moral insight that it was the obligation of those who used "people . . . for gain and profit, to be vigilant in their efforts to protect such people."[88]

A federal admiralty case, *The No. 1 of New York*,[89] uniquely emphasizes the nonutilitarian character of New York doctrine. In *The No. 1 of New York*, a New York City drawbridge operator who had

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[83] *Palsgraf*, 248 N.Y. at 347-52 (Andrews, J., dissenting).

[84] *Id*. at 350-55.

[85] Pease v. Sinclair Refining Co., 104 F.2d 183, 186 (2d Cir. 1939). Of course, difficult issues could arise at the edges when it became necessary to determine whether a plaintiff was a member of the class on which risk was imposed or whether the injury was of the nature which the defendant should have anticipated. *See, e.g.*, Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

[86] 159 F.2d 169 (2d Cir. 1947).

[87] *Laidlaw*, 158 N.Y. at 104.

[88] Schubert v. Hotel Astor, Inc., 5 N.Y.S.2d 203, 207 (Sup. Ct. 1938), *aff'd*, 8 N.Y.S.2d 567 (App. Div. 1938), *aff'd*, 281 N.Y. 597 (1939).

[89] 61 F.2d 783 (2d Cir. 1932).

opened a bridge for a tug and its tow then closed it to permit fire engines to pass, with the result that one of the barges in tow collided with the bridge. The court held that "a bridge owner" who had once opened a bridge could "not withdraw his consent to the passage, even in the exigency of a demand by fire apparatus responding to an alarm, at a time when withdrawal should be foreseen as endangering the vessel."[90] The noteworthy fact about this opinion is that the court, consisting of Judge Swan and the two Hand cousins, never asked what seemed quite likely -- whether the harm that would have been done by not allowing the fire engines to pass outweighed the harm that occurred to the barge. All that mattered was that the bridge operator, having undertaken a duty to the tug and its tow, could not fail to perform that duty even when it could foresee that greater harm would result from its failure.

Only one federal case, *Sinram v. Pennsylvania R.R.*,[91] cannot be reconciled with the New York mainstream. On the issue whether a tug which rammed and damaged an empty barge above the waterline was liable for loss of a subsequently loaded cargo of coal which caused the barge to take on water through the damaged area and thereafter to sink, Judge Learned Hand declared that "we are not bound to take thought for all that the morrow may bring, even though we should foresee it."[92] Although a tug operator who thought enough about "the precise train of events" that might follow a collision would have foreseen the sinking, the foreseeability "canon," according to Hand, was "more equivocal than appears on the surface," and "ignore[d] the excuses for much conduct . . . likely to involve damage to others."[93] Duties, Hand continued, were "a resultant not only of what we should forecast, but of the propriety of disregarding so much of it as our own interests justify us in putting at risk."[94]

Since *Sinram* was decided the same day by the same unanimous three-judge panel that resolved *The No. 1 of New York*, it is difficult to interpret it as an explicit, early statement of the calculus of risk standard later put forward by Hand in *Carroll Towing*. Hand did not totally reject the *Palsgraf* principle of liability for all foreseeable harm. At most, *Sinram* implied that a tug operator's

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[90] *Id*. at 784.
[91] 61 F.2d 767 (2d Cir. 1932).
[92] *Id*. at 771.
[93] *Id.*
[94] *Id.*

interest in getting its job done quickly and efficiently outweighed the costs of theoretically foreseeable but highly improbable accidents, such as the one that had occurred when the damaged barge was loaded without any inspection for potential leaks. In any event, while *Sinram* may have anticipated the calculus of risk standard, it was a unique case prior to the 1940s. And, its author was an unusually prescient judge who, perhaps because of his life-tenure appointment on the federal bench, did not participate in the reform effort of state judges like Cardozo, but instead agreed with the conservatives that it was "monstrous" to "ruin a man for a momentary dereliction" by "attribut[ing] to an act every consequence which is likely to result."[95]

Except for this prescient opinion by Hand, Andrews's equally prescient dissent in *Palsgraf*, and Cardozo's acquiescence in contractual limitations on tort liability, New York tort theory by the late 1920s reflected, on the whole, the reform view that people who intended harm to others or who acted toward others in ways which they foresaw would produce harm were liable for any harm they brought about. If harm to others was either intended or foreseen, no interest on the part of an actor -- however strong that interest might be -- would justify a refusal to pay damages for infliction of the harm. Only if harm was neither intended nor reasonably foreseeable was it not compensable.

By so depriving those who administered tort law of the capacity to engage in balancing and instead tying them to a strict principle of moral obligation, the New York reformers sought to insure that classes of people within the ordinary bounds of foreseeability, such as workers, consumers of most products, and people on public highways, would recover damages when they suffered injury. They thereby transformed the doctrine of proximate cause, which had been a

[95] American Law Institute, Torts Conference Minutes, I, 39-43, *quoted in* ANDREW L. KAUFMAN, CARDOZO 290-91 (Cambridge, Mass.: Harvard University Press, 1998). Balancing the utility of conduct against the risk of harm to which it might lead was not novel in contributory negligence cases; in New York, it dated back at least to the nineteenth century case of *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871). Moreover, reasons of policy called for cost-benefit analysis in contributory negligence while prohibiting it in negligence. Declaring people contributorily negligent for taking risks warranted by self-interest would have interfered excessively with individual freedom of choice, but holding them negligent for profiting from risks they imposed on others merely made them pay for their callousness. For these reasons, the use of cost-benefit analysis in contributory negligence cases was easily reconcilable with the general tendency of New York law during the 1920s and 1930s to impose tort liability on those who intended to impose or foresaw that they would impose harm on another.

discretionary political principle that conservative judges had used in a wide range of cases to set aside jury verdicts awarding damages against wealthy and powerful entrepreneurs, into an incomprehensible rule applicable only in weird cases. While insuring entrepreneurs that they would not be liable in an indeterminate amount for an indeterminate time to an indeterminate class merely by conducting business, the New York reformers did their best to make tort law consistent with popular conceptions of justice, which had emerged in the early twentieth century, that victims of injury should recover damages from those who had created the conditions that had caused them to be hurt.

Much specific tort doctrine conformed during the 1920s and 1930s almost precisely to the culpability standard of *Palsgraf*. Product liability law was one such body of doctrine. The then recently decided case of *MacPherson v. Buick Motor Co.*,[96] which held a manufacturer liable to a purchaser of its product for negligent defects that had foreseeably led to injury, even when the purchaser had obtained the product through a retail dealer and thus was not in privity of contract with the manufacturer, was followed in several cases during the two decades under analysis. Indeed, in one case, which held manufacturers of component parts liable to consumers for injuries caused by defects in the final manufactured product, the *MacPherson* rule was even extended.[97]

In its adherence, however, to the culpability standard later codified in *Palsgraf*, *MacPherson* applied only to products "inherently beset with danger and . . . reasonably certain to imperil life or limb if carelessly made,"[98] not to products where "injury was [merely] a possible consequence of the defective construction," but "not a probable result."[99] A manufacturer could "not be charged with negligence where some unusual result" occurred that could not "reasonably be foreseen" and was "not within the compass of reasonable probability."[100]

Other limitations on *MacPherson* were also consistent with the underlying purposes of the Court of Appeals in *Palsgraf*. For example,

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[96] 217 N.Y. 382 (1916).

[97] *See* Genesee County Patrons Fire Relief Ass'n v. Sonneborn Sons, Inc., 263 N.Y. 463 (1934). *Accord*, Smith v. Peerless Glass Co., 259 N.Y. 292 (1932).

[98] Creedon v. Automatic Voting Machine Corp., 276 N.Y.S. 609, 611 (App. Div. 1935), *aff'd*, 268 N.Y. 583 (1935).

[99] Cook v. A. Garside & Sons, Inc., 259 N.Y.S. 947, 948 (Sup. Ct. 1932).

[100] Boyd v. American Can Co., 291 N.Y.S. 205 (App. Div. 1936), *aff'd*, 274 N.Y. 526 (1937).

the limitation that the *MacPherson* rule applied only to suits involving physical injuries and not to commercial loss[101] fit well with the underlying goals of tort reformers, who sought to protect workers, consumers, and highway users, but not business entrepreneurs. A second limitation -- that the rule applied only to claims of negligence and not to suits for breach of warranty, where privity of contract between consumer and manufacturer was still required[102] -- similarly reflected Cardozo's concerns in *Moch* and *Ultramares* that the "field of obligation" not "be expanded beyond reasonable limits"[103] and that contracting parties not be exposed to "the involuntary assumption of a series of new relations, inescapably hooked together," since the "hazards of a business conducted on these terms" would be too "extreme."[104]

General negligence law was also consistent with *Palsgraf*, its controlling authority. In any negligence case, "the burden rest[ed] upon the plaintiff to show by a fair preponderance of the evidence" that an "accident was caused by the fault of defendant."[105] The most notable exception to the ordinary requirement that plaintiffs provide evidence of fault occurred with the doctrine of *res ipsa loquitur*, which allowed negligence to be proved by less than "positive and direct evidence," when "circumstances" could be "shown" from which a "reasonable inference" could be drawn that an "injury resulted from negligent acts."[106] Ultimately, *res ipsa loquitur* advanced the new tort paradigm advocated by reformers -- namely, that a defendant not be permitted to "carry on its undertaking without making good any loss that occurs to the business or property of another"[107] and that no one be allowed "rightly [to] levy toll upon the legal rights of others" by carelessly and callously advancing his or her own interests.[108]

Cardozo and other judges also advanced the cause of tort reformers with their holdings concerning the weight to be accorded to

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[101] *See* A.J.P. Contracting Corp. V. Brooklyn Bakers Supply Co., 15 N.Y.S.2d 424 (App. Div. 1939), *aff'd*, 283 N.Y. 692 (1940).

[102] *See* Chysky v. Drake Bros. Co., 235 N.Y. 468 (1923).

[103] H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 164, 166 (1928).

[104] Ultramares Corp. v. Touche, 255 N.Y. 170, 179-80 (1931).

[105] Lane v. City of Buffalo, 250 N.Y.S. 579, 582 (App. Div. 1931).

[106] Warner v. New York, O. & W.R.R., 204 N.Y.S. 607, 609 (App. Div. 1924), *aff'd*, 239 N.Y. 507 (1924).

[107] Loesberg v. Fraad, 197 N.Y.S. 229, 232 (Mun. Ct. 1922).

[108] Rochester Gas & Electric Co. v. Dunlop, 266 N.Y.S. 469, 473 (County Ct. 1933).

statutes. The basic rule, laid down by Cardozo in *Martin v. Herzog*,[109] was that breach of a statute is "more than some evidence of negligence. It *is* negligence in itself."[110] This rule, which was reiterated in many cases,[111] reflected the extreme deference of New York judges during the 1920s and 1930s to legislative alterations of the usually pro-business rules of the common law. The consequence of the rule was that, whenever reformers had sufficient political success to obtain enactment of legislation on their behalf, they could count on the ready translation of that success into results in individual cases.

Thus, much change occurred in New York tort law during the 1920s and 1930s as judges announced their preference for an emerging reform paradigm of tort liability, which held that victims of injury should receive compensation from some source, rather than the traditional paradigm, which permitted compensation to be paid only when a person was injured directly by another's wrongful act. But we must not overestimate the extent of change. Led by Cardozo, the New York judiciary did not favor the new paradigm completely, but instead strove to accommodate both paradigms. Cardozo, in particular, seems to have wanted both to preserve the fairness values underlying the traditional paradigm while simultaneously incorporating significant elements of the reform program into the body of New York case law.

Even so, it seems clear that, to the extent that courts reconsidered particular legal doctrines, they tended to favor the newer reform values rather than the older traditional ones, even if they did not adopt the new values in their entirety. The direction of doctrinal development in New York's personal injury law during the 1920s and 1930s was toward the reform program and away from classic nineteenth century values. However, as a result of the doctrine of stare decisis, which meant that in the absence of explicit reexamination old law remained in place, litigants continued to confront mostly nineteenth century rules. Whatever changes occurred as a result of the efforts of reformers, they were overwhelmed in the larger picture of 1920s and 1930s by established rules, dealing with assumption of

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[109] 228 N.Y. 164 (1920).

[110] *Id.* at 168 (emphasis in original).

[111] For one reiteration, *see* Tedla v. Ellman, 280 N.Y. 124, 131 (1939) (dictum).

risk,[112] contributory negligence,[113] tort liability of landowners,[114] and joint and vicarious liability,[115] which remained in place through sheer inertia. These established rules all continued to reflect the traditional paradigm's concern that people be held responsible only for harms they had directly caused.

In short, personal injury law during the era of Cardozo entered upon a process of change, but it was not completely transformed. Judges with conservative sympathies, like Andrews and Hand, continued to elaborate theories of liability which, in the short term, were largely ignored but which, in later decades, would be widely endorsed. Reformers frequently placed their imprint on specific doctrines for which they could obtain judicial reconsideration, but much old doctrine, which reflected nineteenth-century assumptions of limited liability, remained unexamined. Thus, personal injury law at the end of the 1930s remained what it had been three decades earlier -- a battleground between conservative and reform agendas.

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[112] On assumption of risk, *see* Dougherty v. Pratt Institute, 244 N.Y. 111 (1926).

[113] On contributory negligence, *see* Camardo v. New York State Ry., 247 N.Y. 111 (1928). There were occasional ameliorations of the rule that contributory negligence totally barred a plaintiff's recovery, such as the doctrine of last clear chance, *see* Dino v. Eastern Glass Co., 246 N.Y.S. 306 (App. Div. 1930), and the statutory rule transforming contributory negligence into comparative negligence in FELA cases. *See* Caldine v. Unadilla Valley Ry., 246 N.Y. 365 (1927), *rev'd on other grounds*, 278 U.S. 139 (1928).

[114] On liability of landowners, *see* Miller v. Gimbel Bros., Inc., 262 N.Y. 107 (1933).

[115] On joint liability, the basic starting rule was that "a person [was] responsible only for his own torts." Hennessy v. Walker, 279 N.Y. 94, 98 (1938). There were exceptions to this general rule, however, although they were construed narrowly during the 1920s and 1930s. The first exception arose in "[t]he case of master and servant," where "the negligence of the servant, while acting within the scope of his employment, [was] imputable to the master." Dunne v. Contenti, 4 N.Y.S.2d 148, 150 (Sup. Ct. 1938), *aff'd*, 9 N.Y.S.2d 248 (App. Div. 1939). The second exception occurred when two or more people had control over an instrumentality and both acted negligently in operating it or when the negligence of two or more people otherwise "concurred in contributing to the accident." Murphy v. Rochester Telephone Co., 203 N.Y.S. 669, 672 (App. Div. 1924), *aff'd*, 240 N.Y. 629 (1925). Then all or both might be liable.