Palsgraf Revisited

William L. Prosser

University of California, Berkeley

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Torts Commons

Recommended Citation

Available at: https://repository.law.umich.edu/mlr/vol52/iss1/2

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Perhaps the most celebrated of all tort cases is *Palsgraf v. Long Island Railroad Company.*\(^1\) Certainly it is one of the most controversial. Thirteen judges in all passed upon the case, and seven of them were for the plaintiff, at least in the sense that they considered that the issue was one to be left to the jury. Four of the remaining six, sitting on the Court of Appeals of New York, had the final word, and they set aside the verdict, dismissed the complaint, and ordered judgment for the defendant.\(^2\) The Advisers of the *Restatement of Torts* debated the question long and vigorously and approved the case by a narrowly divided vote. Subsequent decisions, even when they cite *Palsgraf*, have remained in a state of disagreement and confusion, and the problem presented cannot be said by any means to be settled and disposed of. The legal writers\(^3\) have galloped off in all directions, in a tangle of duty,

\(^{*}\) This article is one of the Thomas M. Cooley lectures delivered by Dean Prosser at the University of Michigan Law School, February 2-6, 1953. The series, "Selected Topics on the Law of Torts," will eventually be published in book form by the University of Michigan Law School.-Ed.

\(^{†}\) Boalt Professor of Law and Dean of the Law School, University of California, Berkeley.—Ed.

\(^{1}\) 248 N.Y. 339, 162 N.E. 99 (1928).

\(^{2}\) The alignment was as follows: For the plaintiff: Humphrey, in the trial court; Seeger, Hagarty and Carswell, in the appellate division; Andrews, Crane and O'Brien, in the court of appeals. For the defendant: Lazansky and Young, in the appellate division; Cardozo, Pound, Lehman and Kellogg, in the court of appeals.

negligence, foresight, hindsight, direct and intervening causes, the di­
vision and classification of interests and injuries, liability without fault
or in excess of fault, social policy, the balancing of various claims to
protection or immunity, and everything else that inevitably becomes
involved in any discussion of "proximate cause."

It may be worse than useless to add another article to the spate. The
excuse must be the fascination which the case has for both teachers and
students of torts, the never-ending new facets which it offers year after
year in the classroom, and the fact that, if one may judge by what has
appeared in print, the writer is the one man alive who is not absolutely
and altogether sure of the answer. An expression of difficulties, uncer­tainties and doubts, arriving at no very definite conclusion, may at
least be something of a novelty.

Helen Palsgraf4 was standing on a platform of defendant's railroad5
after buying a ticket to go to Rockaway Beach. A train stopped at the
station, bound for another place. Two men ran forward to catch it.
One of the men reached the platform of the car without mishap, though
the train was already moving. The other man, carrying a package,
jumped aboard the car, but seemed unsteady as if about to fall. A guard
on the car, who had held the door open, reached forward to help him in,
and another guard on the platform pushed him from behind. In this
act, the package was dislodged, and fell upon the rails. It was a package
of small size, about fifteen inches long,6 and covered by a newspaper.
In fact it contained fireworks,7 but there was nothing in its appearance

Act'—Reconsidered,' 2 Rutgers L. Rev. 196 (1948); Morison, "A Re-examination of the
Duty of Care," 11 Mod. L. Rev. 9 (1948); Greenwell, "Re Polemis and Remoteness of
Damage in Torts," 24 Aust. L.J. 392 (1951); Eldredge, "The Role of Foreseeable Con­

4 The Record of the case is set out in Scott and Simpson, Cases on Civil Proce­
dure (1950) at pages 891-940. It will be referred to hereafter as Record. The plaintiff
was a Brooklyn janitress and housewife, 43 years of age. She was accompanied by her two
dughters, aged 15 and 12. Record, 901.
5 This was at the East New York station. Record, 902.
6 Actually a round or oval bundle, fifteen to twenty inches in diameter. Record, 909.
7 This is a conclusion from the event. It appears to rest chiefly on the testimony of the
plaintiff (Record, 903) that she heard "firecrackers shooting," and of another witness (917)
that there were several explosions. There was a "ball of fire," much noise, and a "mass of
black smoke" (903, 907, 909, 919, 921, 922). The smoke extended to where the plaintiff
stood, so that she and her daughter were "choked" in it. This lasted for an appreciable
interval, long enough for the plaintiff to say to her daughter, "Elizabeth, turn your back." Then
"the scale blew and hit me on the side" (903).

One witness testified that the explosion was not much like firecrackers; "there wasn't
much fire to it; there was mostly more smoke and noise" (919). The men running for the
train were Italians, and the one with the bundle hit a woman in the stomach in his hurry
(916). Although the train was stopped, and a bystander proposed to an officer to identify
him (909), he apparently did not come forward, and disappeared. Any incurable romantic
who visualizes the Mafia and an infernal machine is perhaps not entirely ruled out.
to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues." The date was not July 4, but August 24, 1924, and no one in the station except the man with the package and his companion had any reason whatever to suppose that he was carrying anything explosive.

The defendant offered no evidence and moved to dismiss the case. The trial court denied the motion, and instructed the jury that if the defendant's guards were careless and negligent in the way they handled the passenger boarding the train, the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff in the sum of $6,000. Defendant's motion for a new trial was denied, and judgment was entered on the verdict.

On the first appeal the judges of the appellate division saw nothing in the case but "proximate cause." Three of them, in a short

8 The package appears rather to have been set off by the wheels of the train. It fell between the platform and the train, and "like stuck there, and as the train kept on moving why, it caused it to explode" (Record, 919). About a second elapsed between the fall and the explosion, during which "about half a car went by" (911).

9 No witness saw this. There was testimony that afterward the scale was found to be "blown right to pieces and knocked down, the glass was busted and blown—just simply laid down on the platform" (Record, 910). It was evidently an ordinary penny scale of the railroad platform type, with a mirror, standing as high as Mrs. Palsgraf's head (902). She testified that there was "flying glass" (903), and her daughter said that she heard the scale "blow apart" (922). Notwithstanding all this, it is very probable, in line with the original theory of the plaintiff's complaint (896), that the scale was in fact knocked over by the stampede of frightened passengers (903). There was an appreciable interval after the "ball of fire" before the "scale blew" (903). With the explosion occurring in the pit between the platform and the train, or under the wheels (919), it is difficult to see how the scale would not be completely protected from it. Although the platform was crowded (902), there is no indication in the Record that any other damage whatever was done by the explosion itself.

10 The Record is annoyingly silent on this distance. The platform was twelve to fifteen feet wide (902, 917), but the plaintiff did not see where the package fell, and could not state how far away she was (907). No other witness was asked. Judge Andrews, at 248 N.Y. 356, says that it was "apparently twenty-five or thirty feet." There was no plat in evidence, and Andrews could not have known, unless there was some statement of counsel.

A motion for reargument was denied in 249 N.Y. 511, 164 N.E. 564 (1928). The court there said: "If we assume that the plaintiff was nearer the scene of the explosion than the prevailing opinion would suggest, she was not so near that injury from a falling package, not known to contain explosives, would be within the range of reasonable prevision."


12 Record, 901.
13 Record, 928.
14 Record, 929-930.
15 Record, 931.
opinion, said that the causal connection was similar to that in the *Squib Case*,\(^{17}\) and that the fact the guards did not know that the bundle contained an explosive was no defense. Two others, in even fewer words, said that the explosion was not a likely or natural result of the conduct of the guards, and that the negligence of the passenger carrying the explosive was an "independent intervening cause." The judgment for the plaintiff was affirmed. No one seemed to consider the case at all important.

It might never have been important if there had not occurred, at this point, one of those accidents which shape the course of the law. The opinion of the appellate division fell into the hands of Professor Francis H. Bohlen of Pennsylvania, who was at that time the Reporter of the American Law Institute for the *Restatement of the Law of Torts*. Bohlen was even then struggling with the problem of duty in negligence cases, and particularly with duty to the unforeseeable plaintiff. He was well aware of the confusion in the cases of "proximate cause," and he was disposed to accept the position, already advanced by Bingham\(^{18}\) and Green,\(^{19}\) that in such cases as this the question is essentially one of duty, and that unless the defendant's conduct involves some foreseeable risk to the plaintiff, the defendant is under no duty to him at all, whatever his duty may be toward anyone else. He had prepared, for submission to his advisers, a draft of a section\(^{20}\) which stated this view. *Palsgraf* provided a perfect illustration, and Bohlen added a statement of the facts to his explanatory notes.

Among the advisers who met to consider this draft was Chief Judge Cardozo of the New York Court of Appeals, who found himself suddenly and unexpectedly confronted with a discussion, by an eminent and entirely impartial group, of a lower New York decision which might very possibly be appealed to his court. He concluded that there would be no impropriety in his presence at the meeting, although he took no part in the discussion, and did not vote. He sat therefore as audience, to a long and lively debate, ranging over nearly all of the

\(^{19}\) Green, "Are Negligence and 'Proximate Cause' Determinable by the Same Test?" 1 Tex. L. Rev. 243 at 423 (1923); *Green, Rationale of Proximate Cause* (1927).
\(^{20}\) Finally adopted as §281 of the *Restatement of Torts*. The pertinent provisions are as follows:

"The actor is liable for an invasion of an interest of another, if:
(a) the interest invaded is protected against unintentional invasion, and
(b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion. . . ."
questions which since have surrounded *Palsgraf*, and going far beyond the scope of the arguments of counsel in the case, who were still foundering in the morass of proximate cause. The decision, by a narrow margin which may have consisted of a single vote, upheld the Reporter and approved his section.\(^{21}\)

Cardozo was convinced by the majority. When the appeal came on his return to Albany, he adopted their view, with the concurrence of three other judges of the court of appeals, as the law of the case. There was no liability, he said, because there was no negligence toward the plaintiff. Negligence must be a matter of some relation between the parties, some duty, which could be founded only on the foreseeability of some harm to the plaintiff in fact injured. "Negligence in the air, so to speak, will not do." The defendant's conduct did not become a wrong to Mrs. Palsgraf merely because it threatened injury to someone else. She must sue "in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." Assuming, without deciding, that negligence toward the plaintiff would entail liability for any and all consequences, however novel or extraordinary, there was no such negligence here. The conduct of the guards toward the passenger involved no foreseeable risk that the plaintiff might be injured; it was therefore no tort as to her, and as a matter of law she could not recover. Cardozo added: "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as e.g., one of bodily security. Perhaps other distinctions may be necessary. We do not go into the questions now."\(^{22}\)

\(^{21}\) The writer is indebted for this account of the meeting to Dean Young B. Smith of the Columbia Law School, who was present as one of the advisers.

\(^{22}\) 248 N.Y. 339 at 347, 162 N.E. 99 (1928). "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' (Pollock, *Torts* [11th ed.], p. 455 . . . ). . . . 'If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. 'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.' . . .

"The argument for the plaintiff is built upon the shifting meanings of such words as 'wrong' and 'wrongful,' and shares their instability. What the plaintiff must show is 'a
Judge Andrews, dissenting, met the issue head on. Negligence, he said, does not depend upon a relation between the defendant and the plaintiff; it is a wrong toward anyone in fact injured by the negligent act. There is a duty toward the world at large not to be negligent toward any person; and when an injury to the plaintiff results from a breach of this duty, she may have a cause of action. There are limitations upon this liability, but they are limitations of "proximate cause," and the remoteness of the damage. On this what the prudent might foresee may have a bearing, but it is only "some bearing, for the problem of proximate cause is not to be solved by any one consideration." It is not a question of logic, but of practical politics; and the courts do the best they can to draw an uncertain and wavering line, which will be practical and in keeping with the general understanding of mankind. The injury here was direct and immediate; the distance was short; there was no remoteness in time, little in space. It cannot be said as a matter of law that the plaintiff's injuries were not the proximate result of the negligence.23

wrong' to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one. . . .

"Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. . . ."

". . . We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. . . ." Cardozo, C.J., id. at 341-347.

23 "... The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? . . .

". . . In an empty world negligence would not exist. It does involve a relationship between man and his fellows. But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene. . . .

"The proposition is this. Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. . . . Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt. . . .
So ended the Palsgraf case. Before leaving the opinions, the comment may be ventured that, with due respect to the superlative style in which both are written, neither of them wears well on long acquaintance. Both of them beg the question shamelessly, stating dogmatic propositions without reason or explanation. If there is or is not a duty to the plaintiff not to injure her in this way, nothing else remains to be said. Both of them assume that there was no relation whatever between the defendant and the plaintiff on which a duty might be founded; both utterly ignore the fact, on which the appellate division laid stress, 24 that Mrs. Palsgraf was a passenger. From the moment that she bought her ticket the defendant did in fact owe her a duty of the highest care, one of the most stringent known to the law. The question was not one of injury to some stranger across the street, but of whether the duty to a passenger extended to the consequences of negligence threatening another passenger—which may very well be a different thing altogether.

There is, furthermore, the question left unanswered by Cardozo: what would have been the result if the explosion had injured the owner of the package, or had damaged his suitcase on a baggage truck? There is also the troublesome matter of the scale. It is difficult to escape the conclusion that anything on a railroad platform so easily knocked over, whether by a paltry explosion of fireworks which damaged nothing else, or by a jostling and panicky crowd, had no business being there; and if there was negligence in having the scale, it was certainly negligence toward the plaintiff herself, who was standing beside it. 25

"... But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. ... What we do mean by the word 'proximate' is, 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. This is not logic. It is practical politics. ... And here not what the [defendant] had reason to believe would be the result of his conduct, but what the prudent would foresee, may have a bearing. May have some bearing, for the problem of proximate cause is not to be solved by any one consideration." Andrews, J., dissenting in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 at 347-354, 162 N.E. 99 (1928).

24 "It must be remembered that the plaintiff was a passenger of the defendant and entitled to have the defendant exercise the highest degree of care required of common carriers." Palsgraf v. Long Island R.R. Co., 222 App. Div. 166 at 168, 225 N.Y.S. 412 (1927).

25 On this basis the question becomes one of negligence toward the foreseeable plaintiff, with the foreseeable result brought about by quite unforeseeable means. Here the decisions are all for the plaintiff. Johnson v. Kosmos Portland Cement Co., (6th Cir. 1933) 64 F. (2d) 193; Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53 (1925); Washington & G. R. Co. v. Hickey, 166 U.S. 521, 17 S.Ct. 661 (1897); McDowell v. Village of Preston, 104 Minn. 263, 116 N.W. 470 (1908); Munsey v. Webb, 231 U.S. 150, 34 S.Ct. 44 (1913); Dalton v. Great A. & F. Tea Co., 241 Mass. 400, 135 N.E. 318 (1922); Moore v. Townsend, 76 Minn. 64, 78 N.W. 880 (1899); Derouier v. New England Tel. & Tel. Co., 81 N.H. 451, 130 A. 145 (1925); Salisbury v. Herchenroder,
There is no mention of this at all, undoubtedly because the idea never occurred to counsel; but it occurs every year to some one of my law school freshmen, who then concludes that he is brighter than the New York Court of Appeals.

All this aside, the case must be taken as it stands. The aftermath was that Cardozo's opinion immediately became grist to the mill of Professor Bohlen, who dwelt upon it in presenting the Tentative Draft\textsuperscript{26} of the Restatement to the annual meeting of the American Law Institute. The meeting, without discussion or even mention of the problem, accepted the language of the draft and threw the weight of the Restatement behind the decision.\textsuperscript{27} It is not likely that any other case in all history ever elevated itself by its own bootstraps in so remarkable a manner.

The Restatement notwithstanding, it cannot fairly be said that subsequent history has determined the issue. It has become fashionable to cite Palsgraf in every kind of negligence case, and most of the long array of references to it in the Citator must be disregarded as insignificant and immaterial.\textsuperscript{28} Some courts have purported to follow the case, or to rely upon it, in situations which appear to be quite clearly distinguishable. Thus Ohio, Maryland, and Maine\textsuperscript{29} have applied it to


\textsuperscript{26}Torts Restatement, Tentative Draft No. 4 (1929), §165.

\textsuperscript{27}7 Proceedings of American Law Institute (1929), p. 171 (section 165: "no remarks").

There is a persistent legend that this meeting debated the Palsgraf case long and violently, and that the Reporter was finally upheld by the margin of a single vote. I have talked with gentlemen who were present, and who believed that they had a distinct recollection to this effect. It would have been most appropriate, since everything else connected with the case was decided by one vote. But if the Proceedings speak truth, which scarcely can be doubted, the still more remarkable fact is that the meeting of the American Law Institute did not consider the Palsgraf question to be worth any "remarks" at all.

\textsuperscript{28}Apart from mere incidental mention, the following are typical of these more or less casual references to the case: Hatch v. Globe Laundry Co., 132 Me. 379, 171 A. 387 (1934) (cited for the proposition that the precise form of injury need not necessarily be foreseen, where a rescuer was found to be a foreseeable plaintiff); Morrison v. Medaglia, 287 Mass. 191 N.E. 133 (1934) (cited on the point that the conduct to be anticipated from a third person has a bearing on the defendant's duty, where some injury to the plaintiff was found to be clearly foreseeable); Mosley v. Arden Farms Co., 26 Cal. (2d) 213, 157 P. (2d) 372 (1945) (cited in concurring opinion of Traynor, J., on the point that "proximate cause" is properly a question of duty, where all of the court agreed that harm to the plaintiff was foreseeable); Louisville & Nashville R. Co. v. Vaughn, 292 Ky. 120, 166 S.W. (2d) 43 (1942) (cited on the duty point in a case of attractive nuisance).

\textsuperscript{29}Hetrick v. Marion-Reserve Power Co., 141 Ohio St. 347, 48 N.E. (2d) 103 (1943); Birkhead v. Mayor & City Council of Baltimore, 174 Md. 32, 197 A. 615 (1938); Andreu v. Wellman, 144 Me. 36, 63 A. (2d) 926 (1949).
cases where no injury to anyone was to be anticipated, and there was simply no negligence at all. New Hampshire, Wyoming, and Utah\textsuperscript{30} have relied on \textit{Palsgraf} in support of the familiar rule that a statute intended to protect only a particular class of persons, or to guard only against a particular risk or type of harm, creates no duty as to any other class or risk. The written law and the policy of strict construction which refuses to extend its effect beyond the legislative purpose seem definitely to set this apart from any court-made rule. Missouri\textsuperscript{31} has mentioned the case in holding that the duty of train men toward passengers and drivers at crossings does not extend to an employee at work beside the track; but here, as in the case of trespassers,\textsuperscript{32} and as the decision recognized, there is an element of assumption of risk or responsibility on the part of the plaintiff, which limits any duty to him. Pennsylvania\textsuperscript{33} has done the same in holding that a landlord's liability for breach of his covenant to repair does not extend to an employee of the tenant. Whether this be right or wrong—and the \textit{Restatement} itself does not agree\textsuperscript{34}—it is at most a refusal to extend a contract obligation, voluntarily assumed for a consideration, and traditionally limited to the responsibilities contemplated by the parties at the time.\textsuperscript{35}

Wisconsin, New Mexico, Georgia, New Hampshire, and Maryland\textsuperscript{36} all have followed \textit{Palsgraf} in holding that a plaintiff who is

\begin{footnotesize}
\begin{enumerate}
\item Torts \textit{Restatement}, §§357, 378. \textit{Accord}: Barron v. Liedloff, 95 Minn. 474, 104 N.W. 289 (1905); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N.W. 489 (1914); Merchants' Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916).
\item See McCormick, \textit{Damages}, c. 22 (1935).
\end{enumerate}
\end{footnotesize}
himself in a position of safety cannot recover for mental shock and injury brought about by the sight of harm or peril to another person, or to property, within the danger zone. Again, whether this be right or wrong, the field is one which the courts have long been reluctant to enter even where the mental injury is readily foreseeable; and the frequent mention of the difficulties of proof, the facility of fraud, and the problem of finding a place to stop and draw the line, suggests that here it is the nature of the interest invaded, the type of damage, which is the real obstacle. In the Second Circuit, Learned Hand has accepted Palsgraf fully in a decision holding that a defendant who negligently sinks a barge is not liable to underwriters who have insured it. One may question whether it is really so unforeseeable that any barge may have insurance, but if it is, the plaintiff's interest is one of contract, and there is ample authority, long before Palsgraf, that a contract interest is not entitled to protection against mere negligence.

It is difficult to conclude that such cases represent any established principle. For each of them, there are others to be found which come to the same conclusion on similar facts, but on other and better grounds. They suggest rather that duty in negligence cases is a very involved and complex problem, in which many factors interplay, and that the opinion of Cardozo perhaps greatly over-simplified the whole matter.

When we come to the cases which cannot be so distinguished, they are few and divided. Pennsylvania has accepted Palsgraf fully in a case where an automobile struck a pedestrian and hurled his body

---


38 Sinram v. Pennsylvania R. Co., (2d Cir. 1932) 61 F. (2d) 767.


against the plaintiff, who was behind a bus and in a position of safety. This type of case is an old one on which Pennsylvania has stood alone against a number of other jurisdictions.\footnote{Wood v. Pennsylvania R. Co., 177 Pa. 306, 35 A. 699 (1896), went off on proximate cause. \textit{Contra}, also on proximate cause, are Alabama Great Southern R. Co. v. Chapman, 80 Ala. 615, 2 S. 738 (1886); Solomon v. Bransman, 175 N.Y.S. 835 (App. Term 1919); Wolfe v. Checker Taxi Co., 299 Mass. 225, 12 N.E. (2d) 849 (1938); Robinson v. Standard Oil Co., 89 Ind. App. 167, 166 N.E. 160 (1929); Kommerstad v. Great Northern R. Co., 120 Minn. 376, 139 N.W. 713 (1913) and 128 Minn. 505, 151 N.W. 177 (1915). Cf. Pennsylvania R. Co. v. Hammill, 56 N.J.L. 370, 29 A. 151 (1894).} Rhode Island\footnote{Kane v. Burrillville Racing Assn., 73 R.I. 264, 54 A. (2d) 401 (1947).} has approved \textit{Palsgraf} in a dictum where a negligently hung fire extinguisher, upset by a third person, gave forth a hissing noise and caused a stampede, in which the plaintiff was injured. On the other hand, Tennessee\footnote{Jackson v. B. Lowenstein & Bros., 175 Tenn. 535, 136 S.W. (2d) 495 (1940).} has rejected the rule flatly in a case where a rubber mat overlapping the top step of a stairway in a department store caused injury to a customer who was around a corner at the bottom; and Arkansas\footnote{Missouri Pac. R. Co. v. Johnson, 198 Ark. 1134, 133 S.W. (2d) 33 (1939).} has rejected it, at least in dictum, where smoke from a fire on a railroad right of way aggravated the plaintiff's tuberculosis. These last two cases rebelled chiefly against the idea that the issue was to be taken from the jury.

Before \textit{Palsgraf} there were other cases which on their facts clearly presented the problem of the unforeseeable plaintiff.\footnote{Jackson v. Galveston, H. & S.A. R. Co., 90 Tex. 372, 38 S.W. 745 (1897);} Where the court expressly considered the duty theory it was sometimes held that there was a duty to one to whom no harm could be foreseen\footnote{Stevens v. Dudley, 56 Vt. 158 (1883); Wilson v. Northern Pac. R. Co., 30 N.D. 456, 153 N.W. 429 (1915); Hollidge v. Duncan, 199 Mass. 121, 85 N.E. 186 (1908); Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 P. 971 (1909); and see Poffenbarger, J., in Bond v. Baltimore & O. R. Co., 82 W.Va. 557, 96 S.E. 932 (1918).} and sometimes that there was none.\footnote{Goodlander Mill Co. v. Standard Oil Co., (7th Cir. 1894) 63 F. 400; Boyd v. Duluth, 126 Minn. 33, 147 N.W. 710 (1914); Trinity & B. V. R. Co. v. Blackshear, 106 Tex. 515, 172 S.W. 544 (1915). Cf. Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 71 N.H. 522, 53 A. 807 (1902).} More often the court went off on "proximate cause," and the greater number of the decisions found that the causal connection was sufficiently close or direct and allowed the plaintiff to recover.\footnote{See cases cited supra note 41. Also Ramsey v. Carolina-Tennessee Power Co., 195 N.C. 788, 143 S.E. 861 (1928); Walmsley v. Rural Tel. Assn., 102 Kan. 139, 169 P. 197 (1917); Jackson v. Galveston, H. & S.A. R. Co., 90 Tex. 372, 38 S.W. 745 (1897);} It would be easy to dismiss these last opinions on the ground...
that they never saw the point of duty, but there is in them so much explicit consideration of the bearing of foreseeability that they seem rather to have decided it, under another name.48

Such is the state of the law. It is one of troubled waters, in which any one may fish.

Duty

The first problem in Palsgraf with which one must come to grips is the significance of duty. It means, of course, an obligation, to which the law will give recognition and effect, to conform to some standard of conduct toward another. The concept as such is unknown to the continental law, which has got along comfortably enough on the basis that fault is absolute and not relative and a limitation only on the basis of the nature or remoteness of the consequences.49 It was apparently equally unknown to the early English law, which proceeded upon much the same basis.50 The fault which is absolute remains in the criminal law, and in the field of intentional torts, where the doctrine of "transferred intent" makes anyone who attempts to inflict physical injury upon another liable to any stranger whom he may accidentally injure instead.51 It was only when negligence began to take form as a


48 As illustrating the two approaches, compare Wood v. Pennsylvania R. Co., 177 Pa. 306, 35 A. 699 (1896), which went on proximate cause, with Dahlstrom v. Shrum, 368 Pa. 423, 84 A. (2d) 289 (1951), which went off on duty. Is there any difference between the two opinions, except one of terminology?

49 So, at least, says Buckland, "The Duty to Take Care," 51 L.Q. Rev. 637 (1935). He analyzes, however, only the Roman law. My colleague, Dr. Ehrenzweig, considers that the requirement of "Rechtswidrigkeit" in German and Austrian law, and the doctrinal elements of the French "faute" come out at much the same place. See Lawson, NEGLIGENCE IN THE CIVIL LAW 30-31 (1950).


separate basis of tort liability that the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant, without which there could be no liability.\textsuperscript{52} We owe it to three English cases,\textsuperscript{53} decided between 1837 and 1842. The period of development was that of the industrial revolution, and it may be that duty was a device by which the courts were seeking, more or less unconsciously, to limit the responsibilities of growing industry within some reasonable bounds.

Every one agrees that a duty must arise out of some "relation" between the parties, but what that relation is no one ever has succeeded in defining. Lord Esher once attempted\textsuperscript{54} to reduce it to a formula in terms of foreseeability of harm to the plaintiff. He would have been quite at home in the \textit{Palsgraf} case; but ten years later\textsuperscript{55} he was forced to repudiate his own words. The last forlorn attempt at some general statement is that of Lord Atkin, in \textit{Donoghue v. Stevenson}:\textsuperscript{56}

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Apply this to the recovery of a husband, a thousand miles away, for loss of the services of his wife, injured in an automobile accident through the negligence of the defendant, and we are lost indeed.

What makes it all very perplexing is that our ideas of relations change, and duties with them. A little more than a century ago Lord Abinger\textsuperscript{57} foresaw that "the most absurd and outrageous consequences,

\textsuperscript{52} Winfield, "Duty in Tortious Negligence," 34 Col. L. Rsv. 41 (1934).
\textsuperscript{54} In Heaven v. Pender, 11 Q.B.D. 503 at 509 (1883): "Whenever any person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."
\textsuperscript{55} In Le Lievre v. Gould, [1893] 1 Q.B. 491.
\textsuperscript{56} [1932] A.C. 562 at 580.
\textsuperscript{57} In Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).
to which I can see no limit, would ensue," if it should ever be held that one party to a contract was under any obligation to anyone but his immediate promisee. All the progeny of MacPherson,58 with even the belated concurrence of Massachusetts,59 have now given the lie to those words in the case of the manufacturer who sells his goods; and the duty is steadily extending to other types of contractors.60 The question now is whether the liability of the contract itself shall be extended from the manufacturer to the ultimate consumer in the form of a warranty running with the goods.61 For more than two generations it has been repeated that there can be no duty toward an unborn child;62 now all of a sudden the cases on prenatal injury are going the other way.63 It used to be held that one who gets himself into danger owes no duty to a rescuer injured in saving him;64 now all at once the duty is there.65 It was once well settled law that one who negligently made misrepresentations could owe no possible duty to a third person into whose hands they might come;66 there is now respectable authority that in some situations such a duty can be found.67 It was once the law that a landlord leasing a small shop for the admission of the public owed no duty

60 Kalinowsky v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y.S. 657 (1933) (repairman); Hudson v. Moonier, (8th Cir. 1939) 102 F. (2d) 96 (same); Hale v. DePauw, 33 Cal. (2d) 223, 201 P. (2d) 1 (1948) (building contractor); McDonnell v. Wasmiller, (8th Cir. 1934) 74 F. (2d) 320 (same); Wright v. Holland Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932) (same); Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162 (1928) (same); TORTS RESTATEMENT §404.
61 Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 S. 305 (1927); Klein v. Duchess Sandwich Co., 14 Cal. (2d) 272, 93 P. (2d) 799 (1939); Dothan Chero-Cola Bottling Co. v. Weeks, 16 Ala. App. 639, 80 S. 734 (1918); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W. (2d) 828 (1942).
66 See, for example, Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621 (1879).
67 Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922); Anderson v. Spiessertbach, 69 Wash. 393, 125 P. 166 (1912); Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890); Economy Building & Loan Assn. v. West Jersey Title & Guarantee Co., 64 N.J.L. 27, 44 A. 854 (1899); Western Loan & Savings Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 P. 774 (1904); Mulroy v. Wright, 185 Minn. 84, 240 N.W. 116 (1931); Figuers v. Fly, 137 Tenn. 358, 193 S.W. 117 (1917).
to those who entered; all of the recent cases agree that the duty is clear.

These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, “always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.”

Does the railroad, then, owe a duty to Mrs. Palsgraf not to injure her in this way? Why, yes, if the court finds that it does. There is no other answer. Leaving out of account, as did the New York court, the fact that the woman was a passenger, there is still a relation to be found between the parties. It is the relation of close proximity in time, space, and direct causal sequence, between a negligent defendant and the person he injures. Many courts, in whatever language, have held this to be enough. If a count be made of all of the existing cases of “direct” physical injury to the unforeseeable plaintiff, the result is probably a slight majority in the plaintiff’s favor. Almost as many courts have said no. The problem remains unanswered.

It does not help to ask, what is the purpose of the rule which requires railroads to use proper care in aiding passengers to board trains; and is it to protect people on the platform from injuries brought about

---

68 See, for example, Bender v. Weber, 250 Mo. 551, 157 S.W. 570 (1913); Clark v. Chase Hotel Co., 230 Mo. App. 739, 74 S.W. (2d) 498 (1934); Torts Restatement §359.


by unexpected explosions? The answer is, yes, if we make it so. We are not dealing here with a statute, written down in express words and limited by policy and tradition to the accomplishment of a legislative purpose. It is the court itself which makes the rule. There is, as a matter of fact, no tort rule whatever that a railroad may not be as negligent as it pleases. There is only a rule that if it is negligent it will be liable for damage. It will be liable for some damage to some people, but not for all damage to everyone. In deciding whether it shall be liable for this particular damage, it is of no aid to ask whether the rule we make is to extend to it. That is merely a dog chasing its own tail.

**Foreseeability and Risk**

We come next to the effect on this nebulous “duty” of the fact that the damage was, or was not, reasonably to be foreseen by a reasonable man in the position of the defendant. It needs no argument to show that duty does not always coincide with the foreseeable risk. The expert swimmer, with a boat at hand, who sees another drowning before his eyes, may sit on the dock, smoke his pipe, and watch him drown. But it is still possible, as Cardozo contended, that the risk may be an outer boundary beyond which duty cannot extend, and that there is never any duty as to the unforeseeable plaintiff or the unforeseeable damage.

Over this there is an ancient controversy which goes back to Baron Pollock in 1850. One position, of which Professor Seavey is the modern protagonist, is that the risk which determines the existence of negligence in the first instance limits the recovery for it, and that the same factors which characterize the conduct as wrongful define the scope of liability for its consequences. The other is that what the defendant might foresee is important in determining whether he was at fault at all but is not decisive as to the extent of the consequences for which, once negligent, he will be liable.

---

76 The classic statement of this position is by Mitchell, J., in Christianson v. Chicago, St. P. M. & O. R. Co., 67 Minn. 94, 69 N.W. 640 (1896).
and vacillated between the two positions, and neither has been adopted with entire consistency or carried to all of its logical conclusions.

In support of the limitation of liability to the foreseeable risk, it has been contended that it is more just, since the damages are consistent with the fault, and negligence may be only a slight deviation from the social standard, while its consequences may be out of all proportion to it. It is certainly more just from the point of view of the defendant, but it may be doubted that the plaintiff will appreciate the justice. The plaintiff has been hurt and some one must bear the loss. Essentially the choice is between an innocent plaintiff and a defendant who is admittedly at fault. If the loss is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence. If it is unjust to the defendant to make him bear the loss which he could not have foreseen, it is no less unjust to the plaintiff to make him bear a loss which he too could not have foreseen and which is not even due to his own negligence but to that of another. In these cases there is no justice to be had.

It has been said that the limitation is more rational, since it is more consistent with the "underlying theory" of negligence. This is true if we postulate an underlying theory of negligence in the abstract without its consequences; but there is no such thing. A cause of action for negligence must include damages as well as fault; and when we come to state a theory as to whether the plaintiff's damage is included as compensable, we are once more begging the question. Once again the dog chases its tail.

It has been said finally that the limitation is easier to administer, since it fixes the nearest thing to a definite boundary that is possible and gives us a degree of predictable certainty in the law. Predictable certainty and facility of administration are very desirable things if they are not purchased at too great a price. What degree of certainty does the limitation of foreseeable risk bring to these cases?

It is relatively easy to say that the total risk, made up of the aggregate of all the possibilities of harm, large or small, probable or fantastic, is so great that the reasonable man of ordinary prudence would not drive at an excessive speed. It is quite another matter to say that any one fragment of that risk, consisting of the particular consequences that have in fact occurred, would have been sufficient in itself for the reasonable man to have it in mind and be deterred, or that it is so significant a part of the whole that liability should attach to it. Herein lies the distinction between the original fault and its results.

It is clearly foreseeable that the speeding driver may hit another car
and kill a man. But what of the possibility that he may only bruise a shin, and cancer may develop from the bruise? Or that the car with which he collides may be thrown out of control and hit a third car, or even a fourth? Or that he will hit a man, whose body will be thrown several feet through the air and injure a person on the sidewalk? Or that he will narrowly miss a pregnant woman, who will be frightened into a miscarriage, or that he will injure her unborn child? Or that he will endanger a child in the street, and its rescuer will sustain a broken arm? Or that the person he injures may be left helpless in the street and be run over by another car? Or that he will hit a power line pole, mix up electric wires and start a fire, or kill a workman operating a machine two miles away? Or that he will hit a man carrying a shotgun, and the gun will be discharged, and a bystander be shot in the leg? There is a mathematical chance of all of these possibilities. All of them have occurred, and can occur again; and all of them have been held "proximate" by some court. But which of them are "foreseeable" in the sense of being a significant part of the risk recognizable in advance?

Such piecemeal foresight is a rope of sand, and offers neither certainty nor convenience, as the floundering in the cases seems to show. Here is Learned Hand, a great judge, blandly assuring us that it is beyond reasonable anticipation that a barge with which the defendant collides will sink, and will be carrying insurance. Here is Pennsylvania, twice asserting that no reasonable man could foresee that any

87 Sinram v. Pennsylvania R. Co., (2d Cir. 1932) 61 F. (2d) 767.
88 Wood v. Pennsylvania R. Co., 177 Pa. 306, 35 A. 699 (1896); Dahlstrom v. Shrum, 368 Pa. 423, 84 A. (2d) 289 (1951). With the Wood case in mind, I once asked the engineer of a fast train what would happen if he hit a man. He said, "Well, last week we
object struck by a speeding train or bus would fly off at an angle and hit a person not directly in its path. Here is Wisconsin,\textsuperscript{89} affirming that when a child is run down in the street there is no recognizable risk that its mother, in the vicinity, may suffer mental shock. Here is New York,\textsuperscript{90} solemnly declaring that the foreseeability of the spread of fire ends at the first adjoining house. I do not believe these things. I think they are rubbish. At the other extreme is another New York case,\textsuperscript{91} finding it all foreseeable when a collision forced a taxicab over a sidewalk and into a building, and loosened a stone, which fell upon a bystander and killed her, while the taxicab was being removed twenty minutes later by a wrecking car. There is also Texas,\textsuperscript{92} which had no difficulty at all in foreseeing that a mudhole left by a defendant in a highway would stall a car, that a rescuer attempting to tow it out would get his wooden leg stuck in the mud, and that a loop in the tow rope would lasso his good leg and break it. Illustrations might be multiplied, as every negligence lawyer knows, but surely these are enough.

Foreseeability of risk, in short, carries only an illusion of certainty in defining the consequences for which the defendant will be liable. The attempt\textsuperscript{93} to broaden it by talking instead of consequences which are “normal” to the risk, or reasonably attachable to it, or “not highly extraordinary” in the light of it, seems in part at least to abandon the original reasoning and adds nothing in the way of definiteness. One of my students told me once that all this meant to him was that what happened should not be “too cockeyed and far-fetched.” If that is true, why not look to the cockeyed consequences themselves rather than to the original fault?

\textit{Transferred Negligence}

The question to which Cardozo and Andrews devoted most of their argument was whether negligence can be transferred—that is to say,

\begin{itemize}
  \item hit a pig. It flew off at an angle of nearly 45 degrees for almost a hundred yards, and narrowly missed a fellow in a field.\textsuperscript{94} I refuse to believe that this particular hazard is unknown to the railroads.
\end{itemize}

\textsuperscript{89} Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).
\textsuperscript{91} In re Guardian Casualty Co., 253 App. Div. 360, 2 N.Y.S. (2d) 232 (1938).
\textsuperscript{92} Hines v. Morrow, (Tex. Civ. App. 1921) 236 S.W. 183. Morris, in “Proximate Cause in Minnesota,” 34 Minn. L. Rev. 185 at 193 (1950), points out the extent to which a skillful advocate may influence the court’s view as to what is foreseeable by his statement of the facts. He illustrates this by the Texas peg-leg case, where the court quoted the following statement of the facts from the plaintiff’s brief: “The case stated in briefest form, is simply this: Appellee was on the highway, using it in a lawful manner, and slipped into this hole, created by appellant’s negligence, and was injured in attempting to extricate himself.”
whether Mrs. Palsgraf, who was in no way foreseeably endangered, could base her cause of action on the railroad’s negligence toward the man with the package. “Transferred intent” is familiar enough; the defendant who intentionally shoots at A is liable when he unforeseeably hits B instead.94 The fault is regarded as absolute rather than relative, and the fact that a new person has entered the picture makes no difference. The doctrine comes down from the action of trespass, with its criminal origin, and it has been more or less strictly limited to the direct and immediate application of force to person or property.96 Its survival may be due to the close association of intentional torts such as battery with the criminal law. It may be due rather to a definite feeling that the intentional wrongdoer should make good the direct and immediate damage to a stranger. From the cases, it is impossible to say.

Transferred negligence is not altogether unknown to the law. There are, for example, the “derivative” actions of a husband or parent for loss of the services of his injured wife or child;96 and it is still good law that an employer has a similar action for a negligent injury to his employee.97 These are ancient actions, long antedating the whole idea of duty, and they are founded upon a special relation, amounting to legal status, between the defendant and the third person, and upon actual injury to the latter. Certainly there is no general rule that negligence is transferred; but are these the only instances in which recovery may be based upon negligence toward another?

Let us take a case. The defendant, delivering a parcel, drives his truck up a private driveway to the back door of a home. On the way up he notices at the side of the driveway a large paper box or carton, open and visibly empty. Two minutes later, coming down the driveway, he negligently runs over the box. Negligently, because he knows it is there, it may be owned by some one, and it has some small value. In the meantime a two-year-old child, whose presence could not reasonably

94 See cases cited supra note 51.
95 Cf. Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869 (1930), where the defendant wrongfully shot at a dog and hit the plaintiff, with Renner v. Canfield, 36 Minn. 90, 30 N.W. 435 (1886), where he merely frightened the plaintiff.
96 It is generally held that the contributory negligence of the wife or child will prevent the plaintiff’s recovery. Chicago, B. & O. R. Co. v. Honey, (8th Cir. 1894) 63 F. 39; Winner v. Oakland, 158 Pa. 405, 27 A. 1110 (1893); Cawley v. La Crosse City R. Co., 106 Wis. 239, 82 N.W. 197 (1900); Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198 (1925); Wueppesahi v. Connecticut Co., 87 Conn. 710, 89 A. 166 (1913); Bonefant v. Chapdelaine, 131 Me. 45, 158 A. 857 (1932).
be anticipated, has concealed himself in the box. Is the defendant liable for the death of the child?

I cannot believe that any court ever will say no.\(^\text{98}\) If in the interval the owner of the box had filled it with Dresden china, no one would have any difficulty; nor can I see that it would make the slightest difference if the china were owned by a stranger. The connection between the box and its contents is too close, too obvious, too inseparable. The defendant has not run over an empty box; he has run over a box with something in it. Why should the fact that a new person has entered the case make all the difference? The situation is not unlike that of the unborn child in the body of its mother, where recent decisions have allowed recovery,\(^\text{99}\) and so far as I can discover recovery never has been denied on the ground that the plaintiff's presence was not to be foreseen. Or, if one wishes to be really fanciful, take the case of the Siamese twins, where the defendant sees only one head and can foresee only one person, but injures two.

Obviously what we have here is a very close connection, almost identity, between the thing threatened and the person hit. Extend the connection slightly; put the child outside of the box, but concealed behind it—will the result be different? Not everyone will agree, but I would say no. The child is still almost part of the box;\(^\text{100}\) the defendant has run over no ordinary box, but a box which conceals a child. Extend the connection still further; the child is five feet away and behind a bush, invisible and unforeseeable, and the box flies against him and injures him. Here, with the exception of those of Pennsylvanıa,\(^\text{101}\) the cases are agreed that the plaintiff can recover.\(^\text{102}\) The connection is one of close proximity in time and space, and direct and immediate application of force. It is the connection of the old action of trespass and of the cases of “transferred intent.” Nor is this process of extension merely a piece of professor's classroom sleight of hand. It is the process of the early cases on “proximate cause,” in which the Squib Case\(^\text{103}\) bulked very large.

---

\(^{98}\)The facts stated are somewhat altered from those in Meeks Motor Freight v. Ham's Admr., 302 Ky. 71, 193 S.W. (2d) 745 (1945), where the driver had no specific reason to believe the box to be empty. The court ignored any question of negligence toward the owner of the box, apparently assuming it to be abandoned property, and made the instruction turn on some notice to the driver that there might be something inside it.

\(^{99}\)See cases cited supra note 63.

\(^{100}\)Cf. John C. Kupferle Foundry Co. v. St. Louis Merchants' Bridge Terminal R. Co., 275 Mo. 451, 205 S.W. 57 (1918) (tank, with factory behind it).

\(^{101}\)See cases cited supra notes 40 and 41.

\(^{102}\)See cases cited supra note 41.

How far can the process be carried? Does it extend to Mrs. Palsgraf? Once more the answer is, it does if we make it so. Put the child thirty feet away, and dynamite in the box, and you have the case in its essence. Once it is conceded that negligence can be transferred to closely connected plaintiffs, the question becomes only one of where to draw the line. We have reached the area of disagreement. There are many cases\textsuperscript{104} which, under the name of “proximate cause,” have allowed recovery to persons and consequences even more remote.

The quest of the “proximate” does not solve the problem. It adds nothing in the way of certainty or convenience; if anything, it only increases our difficulties, although perhaps not as much as the illusory certainty of the “area of risk” would suggest. All that it does is to direct attention to the plaintiff as well as the defendant, to the role of the consequences as well as that of the fault. The one approach is at least as logical as the other; but whether we adopt one or the other we can only beg the essential question, whether the negligent defendant shall be liable for the damage he has done.

Reduced to its lowest terms, the problem is one of the imposition of liability without fault, or in excess of fault, over and above the liability consistent with the fault. When a man with a weak heart is struck a light and glancing blow and drops dead, we have no trouble in saying that the liability must exceed the fault.\textsuperscript{105} The connection is too close, and too clear. Nor is there any difficulty where the result that was to be expected is brought about in a fantastic manner—as, for example, where a passenger is endangered in a railroad collision, and an engine is thrown out of control, runs around a circular track, and injures him in a second collision instead.\textsuperscript{106} It is when we get a different kind of injury that our troubles begin. No one doubts that the man with the package, to which alone harm was threatened, could have recovered for the destruction of his fireworks. That is the child in the box. But what if the explosion had put out his eye?

\textsuperscript{104} See cases cited supra notes 41, 45, 47.
Cardozo "assumes without deciding"\textsuperscript{107} that he would recover. On the basis of the very close and obvious connection, and the very direct causal sequence, I should say that he would; and I know of no case that has said, in a parallel situation, that he would not. This is the situation of \textit{In re Polemis},\textsuperscript{108} itself apparently approved by the \textit{Restatement},\textsuperscript{109} where a plank dropped into the hold of a ship might have been expected to smash cargo but instead set off an explosion of petrol vapor which destroyed it by fire. But if the man with the package can recover for the loss of his eye, I cannot see that there is any sense, except as an arbitrary rule to get rid of the case, in a distinction according to the \textit{person} who is injured. There is a fundamental and foolish inconsistency in saying that a defendant who threatens injury to \textit{A} is liable for unforeseeable consequences to \textit{A}, whether they be death from a weak heart or loss of an eye, but is not liable for the same unforeseeable consequences to \textit{B}, who is standing beside \textit{A} and virtually in his shoes. Put Mrs. Palsgraf on the train beside the passenger, with both of them injured by the explosion; is it not utter nonsense to say that recovery turns on which of them owns the package?\textsuperscript{110}

Nor can I find any support whatever in the decisions for the suggestion of Cardozo,\textsuperscript{111} which was originally Bohlen's,\textsuperscript{112} that an arbitrary distinction is to be drawn according to the type of interest invaded, and that there is a difference between person and property, between the package and eye.\textsuperscript{113} Professor Goodhart has expressed alarm at "the terrifying prospect of a whole new series of cases in which it will be necessary to consider whether or not a person has the same interest in his foot and his eye, in his two adjoining houses, in his ship

\textsuperscript{108} \textit{In re Polemis and Furness, Withy & Co.,} [1921] 3 K.B. 560.
\textsuperscript{109} \textit{Torts \textit{Restatement} \textsection 433, comment e.}
\textsuperscript{110} "The distinction is acutely presented when the actor has committed a wrong to one person, which in a train of unpredictable events involves another. In Palsgraf v. Long Island R.R. Co., . . . the court held that the defendant was not liable to the second person. If not, it is hard to see why it should make a difference that a single person is twice injured, once in a way that entails liability, and second, in such a way, as standing alone would be too remote. If he is so liable, a difference in ownership of the two pieces of property, successively injured, might exonerate a wrongdoer as to that injured last, though he would be liable, had both been owned by a single person—scarcely a relevant distinction." Learned Hand, C.J., in \textit{The Glendola}, (2d Cir. 1931) 47 F. (2d) 206 at 207.
\textsuperscript{112} Cf. \textit{Torts \textit{Restatement} \textsection 281, comment g.}
\textsuperscript{113} Cf. \textit{John C. Kuperle Foundry Co. v. St. Louis Merchants' Bridge Terminal R. Co.}, 275 Mo. 451, 205 S.W. 57 (1918) (tank and factory); Knowlton v. New York & N.E. R. Co., 147 Mass. 606, 18 N.E. 580 (1888) (two adjoining lots). The contention of the \textit{Restatement} was advanced by the dissenting opinion of Jaggard, J., in \textit{Lesch v. Great Northern R. Co.}, 97 Minn. 503, 106 N.W. 955 (1905), where the plaintiff recovered for mental anguish following the invasion of her property; but it was rejected by the majority of the court.
and the cargo which it carries.”\textsuperscript{114} This has been dismissed with scorn as “the usual cry of the reactionary when faced with a new development,”\textsuperscript{115} but if so, the new development is one as yet unknown to the courts.

Where I come out, I think, is with the conclusion that the despised word “proximate” has more in the way of meaning and merit than it usually is given credit for; that all this is utterly incapable of reduction to any formula; and that the formula of the scope of the risk and the foreseeability of either the plaintiff or the consequences is as vague, as empty, as unworkable, and as unsatisfactory an explanation of what is actually in the cases as even the physical mechanics of Beale.\textsuperscript{116}

\textbf{The Problem of the Place to Stop}

So far this has been a brief for Andrews; but more remains to be said. There is still the problem of an end to liability, of a place to stop. It is still unthinkable that any one shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would “set society on edge and fill the courts with endless litigation.”\textsuperscript{117} To causation there is no end at all; and the preoccupation of the courts with the mechanism of causation is the source of much of our woe. Unless we can find some other way to limit liability short of what the act has clearly caused, we may be forced back to the scope of the foreseeable risk, unsatisfactory as it is, as the only available alternative to unlimited liability. It is of no aid to say, with Andrews,\textsuperscript{118} that the question is one of “practical politics,” or with Edgerton\textsuperscript{119} that it is merely one of “justice.” All of the law is a combination of both, and neither ever has been defined to the satisfaction of anyone. It is cold comfort either to the lawyer seeking to decide whether to settle his case, or to the judge seeking to decide how to decide it, to be told that there is “little to guide us other than common sense.”\textsuperscript{120}

\textsuperscript{114} Goodhart, “The Unforeseeable Consequences of a Negligent Act,” 39 YALE L.J. 449 at 467 (1930).
\textsuperscript{117} Mitchell, J., in North v. Johnson, 58 Minn. 242, 59 N.W. 1012 (1894).
The only alternative to the "scope of the risk" to be found in the cases is "direct causation." This comes down to us from the old action of trespass and the Squib Case, and it represents the earliest attempt, still pursued by many courts, to find some close connection between the defendant's act and the damage done. "Direct causation" is easier of comprehension than of definition. "Direct" consequences are those which follow in unbroken sequence from the effect of the defendant's act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which come into active operation later. There is an analogy, often mentioned, to knocking over the first of a row of blocks, after which all of the rest fall down without the aid of any other force. Palsgraf is a typical case of direct causation: the guard knocked loose the package, its fall caused the explosion, the explosion knocked over the scale, the scale hit the plaintiff. Nothing intervened. Many courts have said, at least, that "direct" consequences are always proximate, and recoverable, whatever their nature and whoever the plaintiff may be. Andrews does not go so far; but his chief reason for permitting Mrs. Palsgraf to recover is that the injury to her was direct.

This has been condemned, and rightly so, as laying an entirely undue emphasis on mere physics. It has been pointed out that any application of a theory of "direct causation" may require an arbitrary disregard of a number of intervening factors, and a selection of those to be regarded as significant. This is true, but it may not be too important. Actually the courts have had little difficulty with it. When a man is given poison it is easy enough to ignore all the complex chemical reactions brought about in his stomach by the food he puts into it for the next week and to concentrate on the simple fact that the poison killed him.\(^{121}\)

The difficulty is rather that direct causation draws no satisfactory line. Its consequences may go entirely too far. It is true that they are limited, not by foreseeability, but by the existing situation on which the defendant acts, the way the stage is set. They are not infinite but they may still be fantastic. Recognizing this, Andrews proposes a limitation based on the foreseeability of each step in the series, looking forward from the last.\(^{122}\) Given the explosion, is it foreseeable that it will knock


\(^{122}\) "... What should be foreseen? No human foresight would suggest that a collision itself might injure one a block away. On the contrary, given an explosion, such a possibility might be reasonably expected. I think the direct connection, the foresight of which the courts speak, assumes prevision of the explosion, for the immediate results of which, at least, the chauffeur is responsible." Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 at 355, 162 N.E. 99 (1928).
over the scale? Given the falling scale, is it foreseeable that it will strike Mrs. Palsgraf? It needs only a moment's reflection to see where this goes. Mrs. Palsgraf falls on another package, which explodes and knocks over a more distant scale, which hits Mrs. O'Shaughnessy, who falls on another—but what we are getting is a Rube Goldberg cartoon.

Nor, of course, is "direct causation" of any help once we pass the boundary of directness and consider the effect of other causes which intervene later in point of time. In determining whether they supersede the defendant's liability, the courts have been forced back to something like the foreseeable risk, although actually they have gone far beyond the limits of what any reasonable defendant would actually contemplate as the consequences of his act. The rescuer,\textsuperscript{123} the negligent doctor who aggravates the original injury,\textsuperscript{124} the pneumonia which carries off the victim while he lies in the hospital,\textsuperscript{125} the second injury which occurs while he is trying to walk on crutches,\textsuperscript{126} the frantic effort to escape which results in injury to the person threatened\textsuperscript{127} or to another,\textsuperscript{128} the second collision with the car thrown across the road,\textsuperscript{129} the second driver who runs over the man left helpless in the highway,\textsuperscript{130} are at least not possibilities that any reasonable man could be expected to contemplate, think about, or have in mind while he is driving an automobile. They have to be justified by calling them "normal" consequences, which appears to mean only that they are not unreasonably

\textsuperscript{124}Sauter v. New York Central R. Co., 66 N.Y. 50, 23 Am. Rep. 18 (1876); Selleck v. Janesville, 100 Wis. 157, 75 N.W. 975 (1898); Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30 (1924).
\textsuperscript{126}Wagner v. Mittendorf, 232 N.Y. 481, 134 N.E. 539 (1922); Hoose v. Preston Mill Co., 49 Wash. 682, 96 P. 423 (1908); Hyvonen v. Hector Iron Co., 103 Minn. 331, 115 N.W. 167 (1908); Squires v. Reynolds, 125 Conn. 366, 5 A. (2d) 877 (1939).
\textsuperscript{128}Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 P. 954 (1915); Griffin v. Hustris, 234 Mass. 95, 125 N.E. 387 (1919); Gedeon v. East Ohio Gas Co., 128 Ohio St. 335, 190 N.E. 924 (1934).
\textsuperscript{130}Morrison v. Medaglia, 287 Mass. 46, 191 N.E. 133 (1934); Thornton v. Eneroth, 177 Wash. 1, 30 P. (2d) 951 (1934); Adams v. Parish, 189 Ky. 628, 225 S.W. 467 (1920).
disconnected with the defendant's conduct. Neither the risk theory nor "directness" is of any real help in dealing with them.

For reasons such as these, the opinion of Andrews is as barren as is Cardozo's. It does, I think, come closer to a recognition of the difficulties of the problem and the many factors that may bear on it, and it is less arbitrary in postulating an ironclad rule; but the formula it offers is no better as a universal solvent or a philosopher's stone.

What is the true reason that so many of us feel that the case was correctly decided, and that Mrs. Palsgraf should not recover? It is not, I think, that no harm to her was to be foreseen in the first instance. It is that what did happen to her is too preposterous. Her connection with the defendant's guards and the package is too tenuous; in the old language, she is too remote. The combination of events and circumstances necessary to injure her is too improbable, too fantastic; it is, as my freshman so happily put it, "too cockeyed and far-fetched." He may have given us a clue. The Restatement,\(^1\) groping for the same idea, says that in retrospect it must not appear "highly extraordinary" that the defendant's conduct has brought about the result. The Restatement's comment\(^2\) is unfortunate in the stress which it lays on retrospective knowledge of all the facts, for to omniscience any event whatever must appear not only probable but quite inevitable; but the basic idea is there, that liability must stop somewhere short of the freakish and the fantastic.

If there is any middle ground between the restricted scope of the original risk on the one hand and the extreme lengths to which even direct causation may be carried on the other, it must lie in some reasonably close connection between the harm threatened and the harm done. If the connection clearly exists, as where the man with the weak heart drops dead after a slight blow,\(^3\) quite unforeseeable consequences are readily recoverable. Where it is more distant, consisting only of proximity in time and space and direct causal sequence, as where the object struck by the vehicle flies off at an angle and hits a bystander on the sidewalk, events of a more or less routine and ordinary kind may lead to recovery even though the court regards them as unforeseeable. When

\(^{131}\)Torts Restatement §433. Cf. Pfeifer v. Standard Gateway Theater, (Wis. 1952) 55 N.W. (2d) 29 at 34: "Logic seems to be on the side of the dissenting opinion [in Palsgraf], yet the majority opinion can be justified from the standpoint that judicial policy warranted the result. The conscience of society might be shocked by imposing liability in such a case."

\(^{132}\)Torts Restatement §433, comment e.

\(^{133}\)This seems to be the obvious explanation of Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931).
we reach Mrs. Palsgraf and the nightmare accident which injured her, it may be time to stop.

All this answers no questions, provides no formula, and does not help to state a rule. It is at most an approach, which may explain most but not all of the cases, and may appeal to those who are happy neither with Andrews nor with Cardozo. It suggests that the old words "proximate" and "remote," for which no one has had a kind word for half a century, may provide the best available answer after all, and that, as is sometimes the case where the courts continue to use a word for more than a century, they mean just what they say.

The Riddle of the Palsgraf Case

We come at last to the riddle\(^{134}\) of the Palsgraf case: how can we state a rule? Preliminary to this is the question, can the matter be reduced to a rule at all; and preliminary to both is the question, what value would a rule have if we could state it?

We are in a field of freak accidents, of crazy concatenations of circumstances, no one of which ever has been duplicated or ever will occur in exactly the same way again. It is not likely that there will be another Mrs. Palsgraf before judgment day. As a precedent her case is utterly worthless unless we can extract from it some generalization, some guide to a method of dealing with freak accidents, some prediction for the unpredictable. But freak accidents, in the aggregate, follow no pattern at all; and even where some superficial resemblance can be found, the details will vary so greatly and significantly from case to case that we may very well come to different conclusions.\(^{135}\) A rule for the unpredictable is itself a contradiction in terms.

For what proposition of law does the Palsgraf case really stand? Professor Cowan, in a sadly neglected article, has stated it as follows:

"... a railroad does not owe to an intending passenger the duty to refrain from permitting its guards to push upon a moving train another passenger carrying a package which, though innocent in appearance, contains fireworks, and which, if joggled from the boarding passenger's arm, will fall to the tracks, explode, shake the platform, knock down the scales, and thus injure the intending passenger."\(^{136}\)

\(^{134}\) See Cowan, "The Riddle of the Palsgraf Case," 23 MINN. L. REV. 46 (1938).

\(^{135}\) Compare Kommerstad v. Great Northern R. Co., 120 Minn. 376, 139 N.W. 713 (1913), affd. 128 Minn. 505, 151 N.W. 177 (1915), where a horse struck by a train flew 195 feet through the air, bounced, and hit the plaintiff, working in a field, with Dahlstrom v. Shrum, 368 Pa. 423, 84 A. (2d) 289 (1951), where the plaintiff was a few feet away, in the street and behind a bus. Of course it does not simplify matters that the first case allowed recovery, while the second did not.

\(^{136}\) Cowan, "The Riddle of the Palsgraf Case," 23 MINN. L. REV. 46 at 56 (1938).
As a guide to the decision of future cases, this is of course ridiculous. There will be no such cases. But when we try to state the proposition in more general terms we begin to include so many unpredictable factors which may affect our decision in any specific case that, as the rule approaches sweeping generalization, it loses all validity as a rule. No one would say, on the basis of the Palsgraf case, that a plaintiff can never recover for an injury brought about by an explosion. No one would say that there can be no recovery unless the event itself and the manner of its occurrence could reasonably have been foreseen. It may be quite as hazardous and unsound to say that no plaintiff can ever recover unless harm to that plaintiff was to be foreseen. A rule can have validity only as it applies to situations that recur without significant differences. Freak accidents do not recur, and the differences which can arise in them are virtually unlimited.

Take the problem of the carrier which delays goods in transit, with the result that they are destroyed by an unforeseeable flood beyond all human experience. The federal rule, which controls as to interstate commerce, is that the carrier is not liable; many of the state courts hold that it is. As a practical matter recovery may turn on the destination of the goods, which makes no sense. But however the problem is to be decided it cannot be divorced from the fact that the defendant is a carrier, and its responsibility for the goods is that of an insurer against everything but "the act of God and the King's enemies." If the carrier deviates from the prescribed route it becomes liable when the goods are destroyed by an act of God in the course of the deviation; if it fails to make delivery of the goods after arrival it becomes liable when the goods are so destroyed during the delay. The question is whether this responsibility extends to an act of God during delay in transit. How can any rule as to the "scope of the risk" evolved from two guards, a package of fireworks and a scale aid in the slightest degree in the solution of this question? Is it proper, in Palsgraf itself, so utterly to ignore the fact that the plaintiff was a passenger, a person toward

138Bibb Broom Com Co. v. Atchison, T. & S.F. R. Co., 94 Minn. 269, 102 N.W. 709 (1905); Green-Wheeler Shoe Co. v. Chicago, R.I. & P. R. Co., 130 Iowa 123, 106 N.W. 498 (1906); Alabama Great Southern R. Co. v. Quarles, 145 Ala. 436, 40 S. 120 (1906).
140 Richmond & D. R. Co. v. Benson, 86 Ga. 203, 12 S.E. 357 (1890); East Tennessee V. & G. R. Co. v. Kelly, 91 Tenn. 699, 20 S.W. 312 (1892).
whom the defendant had undertaken an unusual obligation of protection, requiring the highest care and perhaps extended liability? It may be that it makes no difference; but until the question is decided, is Palsgraf really definite authority even for Palsgraf? Might not another court, confronted by some miracle with a repetition of the facts, go off on the point that was ignored?

Even where the problem appears to be essentially the same, two courts may have widely differing views on the desirable result as a matter of social policy. New York holds that the liability of a railroad which negligently sets a fire terminates after the first adjoining building. Kansas, carrying direct causation to an extreme, holds that it extends for at least four miles. New York is a state whose prosperity depends upon railroads, heavy industry and similar enterprises, and its courts always have been solicitous and fearful of an undue burden. They have had in mind urban communities, in which most property of any value carries fire insurance, and the possibility of a windfall for the insurance companies in the form of subrogation claims. Kansas has miles of uninsured wheat and its community attitude toward railroads is by no means the same. Who is to say that each decision is not defensible for the particular state? And what reason is there that the two jurisdictions must come to one and the same conclusion?

As has been pointed out before, the defendants in these cases of "proximate cause" are in large measure railroads, public utilities, municipal corporations, industrial enterprises, automobile owners and others who are in a position, through rates, taxes or liability insurance, to pass the inevitable damages resulting from their activities on to the general public, or at least to distribute them over a relatively large group.

144 "It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid." Ryan v. New York Central R. Co., 35 N.Y. 210 at 217, 91 Am. Dec. 49 (1866).
145 A count made in 1936 of 279 Minnesota cases on "proximate cause" revealed the following list of defendants: railroads and street railways, 129; other public utilities, 24; manufacturers, industrial concerns and public stores, 54; municipal corporations, 19; automobile owners, 20; other defendants (including physicians, individual employers, charitable corporations and others who might well have carried liability insurance), 33.

A similar count made in 1950 of a total of 672 California cases resulted in the following list: railways, street railways and other carriers, 137; steamship lines, 8; public utilities, 68; manufacturers, industrial concerns and sellers of goods, 78; owners and occupiers of land, 75; employers, 31; municipal and other government corporations, 24; contractors, 39; automobile drivers, 137; physicians and surgeons, 22; notaries and other bonded officers, 13; other defendants (including several who might well have carried liability insurance), 48.
In the decision whether a particular loss is to be borne by such a defendant, originally at fault if only in a lesser way, or by the innocent and helpless plaintiff, it cannot be supposed that this factor will be entirely disregarded by the courts, nor can it be expected that all defendants and all losses will be treated by all courts according to any one formula or rule.

The bold and imaginative attempt of Professor Ehrenzweig to reduce all this to "enterprise liability," and to hold the defendant liable without fault, or at least in excess of his fault, for those damages which are "typical" of the "enterprise," but not for other damages not "typical," does not seem to me to provide the answer. It may be, and no doubt will be, the law of the year 2100, but it is not the present law, and the effort to make out a case for it as already prevalent is too labored, and calls far too many isolated and sporadic instances, ignoring far too much that looks the other way. It is easy enough to say that these defendants should pay for all "typical" losses regardless of their fault, and distribute them by insurance; it is quite another matter to say that society is ready to impose upon even some such defendants the possibly ruinous expense of that insurance. One has only to look at the experience in the legislatures with proposals for compulsory automobile insurance to see where the difficulty lies and why any general progress in this direction must be slow. I must confess also that I find considerable difficulty in determining what is to be an "enterprise," and in applying that concept to the farmer in his Ford; and that when it comes to a fire which spreads three hundred yards from a railroad track, I have quite as much uncertainty in deciding whether it is "typical" of a railroad enterprise as I do in dealing with it in any other way.

The sole function of a rule of limitation in these cases is to tell the court that it must not let the case go to the jury. Yet we are in a realm where reasonable men do not agree. At least if judges and legal writers be reasonable men, they have not agreed. *Palsgraf* itself is the perfect illustration. When thirteen judges divide, and seven of them are with the final dissent, when the Advisers of the Institute divide, when the issue is repeatedly decided by a single vote and writers debate the case for twenty-five years without unity, there is something a bit cavalier and unreliable about Cardozo's conclusion that no reasonable man could find for the plaintiff. Granted that the technical issue was whether the jury should have the case, it was not debated along those lines, but upon

---

whether the plaintiff should recover. Granted further that somewhere a line must be drawn at which the case must be taken from the jury, Palgrafi may well serve as an example and a warning to appellate courts to proceed with caution where facts vary so greatly and to avoid arbitrary rules which purport to be of universal application. We are not yet, in the middle of this century, so well settled and agreed on the basis and extent of tort liability that we can safely close and nail up the door.

Conclusion

The reader was warned at the outset that he would be offered no formula, no rules, and no conclusion. It has been, I think, always the formula, the generalization which has been at fault, in a field where it seems impossible to generalize at all. "The mule don't kick according to no rule." Direct causation, the scope of the risk, the unforeseeable plaintiff, the last human wrongdoer, the distinction between cause and condition, limitations of time and space, substantial factors, natural and probable consequences, mechanical systems of multiple rules, and all the rest of the rigmarole of "proximate cause," all have been tried and found wanting in situations that inevitably arise to which they do not and cannot provide a satisfactory solution. There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be. In this respect Leon Green has been for a quarter of a century a voice crying in the wilderness; and as one of the original scoffers at his doctrine, I make him belated obeisance.

What we are left with is at most an approach to the problem, an attitude, a beginning—a vague, rough and general statement of what we are looking for. For this purpose, I doubt that all the manifold theories of the professors really have improved at all upon the old words "proximate" and "remote," with the idea they convey of some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done. In other words, if there is a conclusion, it is that the courts may very possibly have been right all the time after all.149

147 "[The Palsgraf Case], by virtue of the sharp difference of opinion of the judges, should be a warning to appellate courts not lightly to assume the primary duty of determining liability or nonliability, in actions of tort, but to leave that duty where the Constitution has placed it, with the jury, as triers of facts, and if they act capriciously and arbitrarily to supervise their action." Jackson v. B. Lowenstein & Bros., 175 Tenn. 535 at 538, 136 S.W. (2d) 495 (1940). See also Pfeifer v. Standard Gateway Theater, 262 Wis. 229, 55 N.W. (2d) 29 (1952).
148 GREEN, RATIONALE OF PROXIMATE CAUSE (1927); GREEN, JUDGE AND JURY (1930).
149 Contra: PROSSER, TORTS 313 (1941).