

Palsgraf Revisited (Again)¹

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I. INTRODUCTION

A funny thing happened at the 2005 meeting of the American Law Institute in Philadelphia. With hardly a thought as to the profundity—and probable futility—of its act, the assemblage bulldozed one of the enduring nuggets of common law wisdom to the pile of discarded relics of legal history.

Apart from those in personal injury work, most lawyers won't remember too many specifics about their first year law school torts courses. But if I had to bet on a single common law judicial opinion that is likely to stimulate a flicker of recognition in many memories—by specifying *common law*, I mean to muscle aside *Marbury v. Madison* by definition—my money would be on *Palsgraf v. Long Island R.R. Co.*²

Although how you remember *Palsgraf*³ is likely to be colored by how your torts teacher presented it to you, the truly catching points are those memorable aphorisms Justice Benjamin Nathan Cardozo penned to help us understand when any one has a legal obligation to be concerned with

1. The title is borrowed from Dean Prosser's famous article. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953) [hereinafter Prosser, *Palsgraf Revisited*].

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2. 162 N.E. 99 (N.Y. 1928). Corroborating this assessment, the majority opinion of the Michigan Supreme Court stated in *Anderson v. Pine Knob Ski Resort, Inc.*:

When one reflects on the roots of tort law in this country, it is clear that our legal forebears spurned such a "hindsight" test and, instead, adopted a foreseeability test for determining tort liability. See the venerable *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (1928), a case that every law student since 1928 has studied, and countless hornbooks and cases too numerous to require citation, where this is made clear. Said plainly, the common-law test for tort liability is not a "could-it-have-been-avoided" test, rather, it is a "was-this-foreseeable-to-a-reasonable-person-in-this-defendant's-position" standard. Before today, none would have contested that there were no assertions to the contrary in our case law. No longer can that be said.

664 N.W.2d 756, 761 (Mich. 2003). One of two dissenting justices whom the majority had criticized as engaging in "hindsight" analysis, explicitly denied abandoning *Palsgraf*'s foreseeability standard, as follows:

With regard to the majority's recitation of *Palsgraf* . . . , I assure my colleagues that I am familiar with *Palsgraf* and do not wish to engage in any type of hindsight analysis. Instead of debating the doctrines of tort law, I simply attempt to apply the statute at issue.

Id. at 763 n.1 (Cavanagh, J., dissenting).

3. The amount of writing on *Palsgraf* is enormous. William A. Manz has recently published a book detailing the case and its background. See WILLIAM A. MANZ, *THE PALSGRAF CASE: COURTS, LAW AND SOCIETY IN 1920S* (2005).

whether an act may have an adverse effect on another person. In short, when do we owe another person a duty of care?⁴

Mrs. Palsgraf was a patron of the Long Island Railroad Company.⁵ Tickets in hand, she had mounted a train platform with her daughters and stood awaiting a local train to Rockaway Beach.⁶ An explosion occurred at the other end of the platform—"many feet away."⁷ The explosion engulfed the platform in noise and smoke and threw a weighing scale onto Mrs. Palsgraf's side, injuring her.⁸

This was not a terrorist's act. Instead, two fun-seeking Italian boys had rushed onto the platform in an attempt to board a train that was pulling away from the opposite end of the platform.⁹ The slower of the boys had an innocuous looking package under his arm.¹⁰ He faltered while attempting to follow his compatriot onto the departing train and a railroad employee pushed him aboard.¹¹ The push dislodged the package, which dropped to the track under the train.¹² Unknown to anyone but the boys—and unknowable from any outward appearance—the contents were fireworks.¹³ In the contact with the iron rails and driving wheels, the fireworks ignited in a massive explosion that has reverberated through legal American legal history from 1928 through the May 2005 ALI meeting.¹⁴

From the point of view of any reasonable person in the place of the railroad worker, the only persons who were put at any risk in helping the

4. Hundreds of judges have given thumb nail descriptions of what *Palsgraf* requires to establish duty. In *Cunic v. Brennan*, 308 N.E.2d 617 (Ill. 1974), the Illinois Supreme Court stated thusly: "A complaint for negligence must set out the existence of a duty owed by the defendant to the plaintiff, a breach of that duty and an injury proximately resulting from the breach." *Id.* at 618 (citing *Mieher v. Brown*, 301 N.E.2d 307, 308 (Ill. 1973)). The character of the duty of the defendant which must be established was described in PROSSER, HANDBOOK OF THE LAW OF TORTS § 52 (4th ed. 1971) [hereinafter PROSSER, HANDBOOK]: "In other words, 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff . . ." This question, i.e., whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the plaintiff's benefit, is one of law for determination by the court. *Mieher*, 301 N.E.2d at 308; *Palsgraf*, 162 N.E. at 99; see also PROSSER, HANDBOOK, *supra*, § 53. *Cunic* remains as perhaps the negligence decision most frequently cited by Illinois courts.

5. *Palsgraf*, 162 N.E. at 99.

6. *Id.*

7. *Id.* See generally Prosser, *Palsgraf Revisited*, *supra* note 1, at 3 (reporting a more extended recitation of the facts with reference to the trial).

8. *Palsgraf*, 162 N.E. at 99.

9. Transcript of Record, *Palsgraf*, 162 N.E. 99, available at <http://www.iulaw.indy.indiana.edu/instructors/Wilkins/Torts/record.htm#Transcript> (last visited Aug. 10, 2007).

10. *Palsgraf*, 162 N.E. at 99.

11. *Id.*

12. *Id.*

13. *Id.* "Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station." *Id.* at 101 (emphasis added).

14. *Id.*

boy to board the train were the boy himself and anyone who might have been physically touched by the effort.¹⁵ Almost everyone on the platform carried a parcel or valise of some description.¹⁶ This was before the days of screening for explosives or dangerous instruments, even when getting on airplanes. Nothing about the boy's package itself hinted of danger to anyone at all.¹⁷ Indeed, the appearance of the parcel suggested only "newspaper." Nothing whatsoever gave any notice that poor Mrs. Palsgraf, standing far away, was in danger.¹⁸

Despite the railroad's opposition, the trial judge rejected the railroad's dispositive motions and submitted the matter to the jury under these instructions:

There was no duty upon the part of the defendant to examine each passenger as he entered the platform to see what was in any package he might be carrying. The plaintiff herself carried a package, and she might just as well complain if a uniformed man had come up to her and insisted upon her opening her package and showing him what she had in it. No such duty devolves upon the railroad company in this case, and no negligence can be predicated upon the failure of the defendant to stop a passenger while moving across its platform and examining what he might have with him. If every passenger was examined who was entering a railway or trolley car or subway train, and searched for what he might have upon him, none of us would be able to get anywhere. The purpose of railroad travel is that we can get some place. That is not what the plaintiff claims was the negligence of the defendant that caused her injury. *She claims that the guard upon the platform, the station platform, and the guard upon the train platform, were careless and*

15. This point is apparently not appreciated by some critics who have questioned whether Mrs. Palsgraf might have been closer to the point of explosion than Justice Cardozo's opinion suggests. *See* MANZ, *supra* note 3, at 101–06. *But see id.* at 110 (discussing how, given the proximity between Mrs. Palsgraf and the point at which the railroad workers assisted the passenger with the fireworks parcel onto the train, no reasonable person in the position of the helpers would have reasonably foreseen any risk to her).

16. Transcript of Record, *Palsgraf*, 162 N.E. 99, available at <http://www.iulaw.indy.indiana.edu/instructors/Wilkins/Torts/record.htm#Transcript> (last visited Aug. 10, 2007).

17. *Palsgraf*, 162 N.E. at 99. Even dissenting Justice Andrews agreed, stating: "Of its content [i.e., the contents of the package] the servant knew and *could know* nothing." *Id.* at 101 (Andrews, J., dissenting) (alteration in original) (emphasis added).

18. *Id.* at 99. As proved by the fact that he joined in an opinion denying a motion for rehearing that had been made on the ground that the evidence showed Mrs. Palsgraf to have been nearer to the point of the explosion than the initial opinion suggested, even dissenting Judge Andrews agreed to this. The operative portion of the opinion reads: "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." *Palsgraf v. Long Island R.R. Co.*, 164 N.E. 564, 564 (N.Y. 1928).

negligent in the way they handled this particular passenger after he came upon the platform and while he was boarding the train, and that is the question that is submitted to you for your consideration. Did those men omit to do something which ordinarily prudent and careful train men should not omit to do?

Or did they do something which an ordinarily and prudent and careful officer in charge of a railway train in the station platform should not have done? If they did, and the plaintiff met with her injuries through the careless act upon the part of the trainmen of the defendant, then she would be entitled to recover. If they were not at fault, if they did nothing which ordinarily prudent and careful train employees should do in regard to passengers moving upon their trains, then there can be no liability. *If they omitted to do the things which prudent and careful trainmen do for the safety of those who are boarding their trains, as well as the safety of those who are standing upon the platform waiting for other trains, and that the failure resulted in the plaintiff's injury, then the defendant would be liable.*¹⁹

This instruction plainly reveals that the judge invited the jury to find the railroad liable to Mrs. Palsgraf for some act of negligence its agent had committed in regard to the boy boarding the train.

The jury returned a verdict for the plaintiff and the appellate division affirmed.²⁰ In what is probably the most famous American torts decision, at least until May 2005, the court of appeals reversed.²¹ According to that formerly venerable decision, and the facts established by the evidence and Mrs. Palsgraf's theory of the case, the railroad owed Mrs. Palsgraf no duty of care. One might argue that Mrs. Palsgraf's lawyer should have presented the case under an entirely different theory, but that would have been another story.²²

19. Transcript of Record, *Palsgraf*, 162 N.E. 99, available at <http://www.iulaw.indy.indiana.edu/instructors/Wilkins/Torts/record.htm#Transcript> (last visited Aug. 10, 2007) (emphasis added).

20. *Palsgraf v. Long Island R.R. Co.*, 225 N.Y.S. 412, 414 (N.Y. App. Div. 1927). *But see id.* at 415 (Lazansky, J., dissenting) (stating he would have reversed on the grounds that "[d]efendant's negligence was a cause of plaintiffs injury, but too remote.").

21. *Palsgraf*, 162 N.E. at 101.

22. Dean Prosser made much of the fact that Mrs. Palsgraf was a business invitee on the railroad's premises and might well have been owed a duty of care in regard to the tumbling scales on premises liability principles. *See Prosser, Palsgraf Revisited, supra* note 1, at 7. This may have been a better theory upon which Mrs. Palsgraf's lawyer should have pursued the case, but in fact he did not do so. What Prosser never addresses is this: what would have been the propriety of the appellate court's having gone outside the pleadings, evidence, and instruction in the case to have decided that the plaintiff must win but for reasons never addressed to the trial court? Needless to say, had the court of appeals done that, *Palsgraf* would never have become famous as a torts case, although it might have obtained notoriety on other grounds.

From this decision, here is what Justice Cardozo has taught several generations of American law students about duty:

The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.²³

The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, *but original and primary*.²⁴

Even then, the orbit of the danger as disclosed to the *eye of reasonable vigilance* would be the orbit of the duty.²⁵

What the plaintiff must show is “a 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.²⁶

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others *within the range of apprehension*.²⁷

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.²⁸

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*.²⁹

He sues for breach of *duty owing to himself*.³⁰

The defect in Mrs. Palsgraf’s statement of claim and the evidence, (i.e., that the railroad’s employee did not use as much care as it should have to look out for the safety of the boy boarding the train or his property) was that any risk to herself was *unforeseen* and indeed *unforeseeable*.³¹ Many subsequent judges have referred to Mrs. Palsgraf as the prototypical *un-*

23. *Palsgraf*, 162 N.E. at 100.

24. *Id.* (emphasis added).

25. *Id.* (emphasis added).

26. *Id.* (emphasis added).

27. *Id.* (emphasis added).

28. *Id.* at 101.

29. *Palsgraf*, 162 N.E. at 101 (emphasis added).

30. *Id.* (emphasis added).

31. *Id.*

*foreseen*³² or *unforeseeable*³³ plaintiff. With the proved facts at its disposal, even the most suspicious and discerning eye would have detected no risk to Mrs. Palsgraf—standing many feet away—from even an abortive attempt to help the boy onto the train. Had the attempt failed and the boy fallen on the platform, someone standing close at hand might have been tumbled, but not a person standing at the opposite end of the platform. Much less could the railroad company have foreseen danger to Mrs. Palsgraf from the mere dropping of the seemingly innocuous bundle. As Justice Cardozo instructed us, the law of negligence does not burden us to possess the most suspicious and discerning eye; all that it requires is an “eye of reasonable vigilance.”³⁴ Under this standard,³⁵ we have readily accepted, as the case was presented to the court, that the railroad company owed Mrs. Palsgraf no duty of care.³⁶

II. THE ENSUING YEARS

Apart from Justice Cardozo’s memorable aphorisms about duty, which are the point of this paper, a most instructive value of *Palsgraf* for most

32. See, e.g., *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994, 998 (Colo. Ct. App. 1991); *Roberts v. Benoit*, 605 So. 2d 1032, 1053 (La. Ct. App. 1991); *Nelson ex rel. Tatum v. Commonwealth Edison Co.*, 465 N.E.2d 513, 517 (Ill. App. Ct. 1984).

33. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683, 690–91 (6th Cir. 2002); *Falk v. S. Md. Hosp., Inc.*, 742 A.2d 51, 53–54 (Md. Ct. Spec. App. 1999).

34. *Palsgraf*, 162 N.E. at 100.

35. The standard is not without its critics, at least as to its completeness. See, e.g., *James*, 300 F.3d at 691 (“Cardozo’s opinion in *Palsgraf*, while cited as the cornerstone of the American doctrine of a limited duty of care, has been criticized for its conclusory reasoning regarding whether Palsgraf’s harm really was sufficiently unforeseeable. Such conclusory reasoning has been endemic in the jurisprudence of determining duty by assessing foreseeability. Courts often end up merely listing factual reasons why a particular harm, although having materialized, would have appeared particularly unlikely in advance and then simply asserting that the harm was too unlikely to be foreseeable and to create a duty to exercise due care in protecting against it. What has not emerged is any clear standard regarding what makes a projected harm too improbable to be foreseeable.”). Despite this complaint, the court applied the principles and determined no duty of care was owed. In that regard, the court’s complaint is of a character that constantly recurred when courts find themselves confronted with difficult decisions. They wish for standards that will make the job easy. This, too, is a constant wish of law students. The difficulty is far broader than mere duty determinations. It is part and parcel of the common law method. Indeed, one is inclined to believe that civil law judges often wish they had more directive codes than they have been given.

36. Of course, dissenting Justice Andrews had a slightly different view as to duty:

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 result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs to 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.

Palsgraf, 162 N.E. at 103 (Andrews, J., dissenting).

law students was the Cardozo and Andrews (dissenting) debate³⁷ about the ingredients of *duty* in the law of negligence. As the foregoing quotations exemplify, Cardozo, supported by the remainder of the court except Andrews and two other dissenters, held that a person's entitlement to duty of care from another is a *primary* consideration based upon the relations between the two.³⁸ It cannot *derive* solely from the fact that the defendant did owe a duty of care to some other person, i.e., the boy getting on the train, or his property.³⁹ The latter was Andrews's view.⁴⁰

A still finer point is that for all we know from his *Palsgraf* dissent, Justice Andrews would have been happy to apply Cardozo's formula in testing whether a duty was owed to *someone*. For example, he would have willingly submitted to the proposition that a duty was owed to the Italian boy because a reasonable person in the position of the railroad worker who assisted the boy in boarding the train, if possessed of an eye of reasonable vigilance, would have immediately foreseen the risk to the boy or his parcel of acting negligently. In short, Justice Andrews did not deny that foreseeability had a foundational role in duty determinations.

Cardozo's conception of duty⁴¹ swept through the common law world and has yet to be supplanted by the courts.⁴² In fairness to Justice An-

37. See *Heatherly v. Alexander*, 421 F.3d 638 (8th Cir. 2005); *Knauerhaze v. Nelson*, 836 N.E.2d 640 (Ill. App. Ct. 2005).

38. *Palsgraf*, 162 N.E. at 99.

39. *Id.*

40. It should be observed that even Andrews did not maintain as an abstract principle that each of us always owes a duty to the whole world in everything we do. Andrews's view was more limited: once it is decided that the defendant owed a duty to one identifiable person, e.g., the Italian boy in *Palsgraf*, then a duty is owed to whoever might be hurt by the act that engendered the duty to the one. According to Andrews, if liability to the one hurt under those circumstances were to be negated, it would be on the basis of failure of proximate causation, not failure of duty. See *id.* at 103 (Andrews, J., dissenting).

Dean Prosser makes a point that seven of the thirteen judges that actually made a ruling on the *Palsgraf* case in fact sided with the plaintiff. Prosser, *Palsgraf Revisited*, *supra* note 1, at 1. Dean Prosser also informs the reader that he is an advocate for Andrews's view, although he later concedes that he finds Andrews's view to be as "barren" as Cardozo's. *Id.* at 24, 27.

41. Cardozo's insistence on foreseeability of potential harm to the particular plaintiff was certainly not novel at the time. Years before, the famous Oliver Wendell Holmes, Jr. had insisted that to hold a defendant liable in negligence it must be established that he had a chance to avoid the harm. O.W. HOLMES, JR., *THE COMMON LAW*, Lectures III & IV. In repudiation of the proposition that an actor always acts at his peril, Holmes rejoined:

But while the law is thus continually adding to its specific rules, it does not adopt the coarse and impolitic principle that a man acts always at his peril. On the contrary, its concrete rules, as well as the general questions addressed to the jury, show that the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct.

Id. at 163.

42. American decisions are voluminous. The rule in England was expressed by Diplock, J. in *Le-tang v. Cooper*, [1965] Q.B. 232 (U.K.), as follows:

I would observe in passing that a duty not to inflict direct injury to the person of anyone is by its very nature owed only to those who are within range—a narrower circle of Atkinsonian neighbours than in the tort of negligence. But in any event this distinction between a

drews's view, it must be reported that Wisconsin continually states that it has adopted his "duty-to-one, duty-to-all the world" view from the alternatives presented in the famous debate.⁴³

III. ENTER THE 2005 ALI

From a perusal of the entirety of Dean Prosser's *Palsgraf Revisited*, a reader should conclude that he wrote to express his discontent with what he deemed to be a lack of predictability in the articulated legal standards that courts then used to distinguish negligence cases in which a defendant *could* be liable from those in which a defendant *should never* be found liable.⁴⁴ As to the goal of the courts' duty decisions, Prosser concluded, "[t]he 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."⁴⁵ Prosser chose *Palsgraf* as the vehicle for

duty which is "particular" because it is owed to a particular plaintiff and a duty which is "general" because the duty owed to the plaintiff is similar to that owed to everyone else is fallacious in relation to civil actions. A has a cause of action against B for any infringement by B of a right of A which is recognised by law. *Ubi jus, ibi remedium*. B has a corresponding duty owed to A not to infringe any right of A which is recognised by law. A has no cause of action against B for an infringement by B of a right of C which is recognised by law. B has no duty owed to A not to infringe a right of C, although he has a duty owed to C not to do so. The number of other people to whom B owes a similar duty cannot affect the nature of the duty which he owes to A which is simply a duty not to infringe any of A's rights. In the context of civil actions a duty is merely the obverse of a right recognised by law. The fact that in the earlier cases the emphasis tended to be upon the right and in more modern cases the emphasis tends to be upon the duty merely reflects changing fashions in approach to juristic as to other social problems, and must not be allowed to disguise the fact that right and duty are but two sides of a single medal.

Id. at 247. Curiously, some commentators have stated that *Palsgraf* is "controversial." See, e.g., Mellon Mortgage Co. v. Holder, 5 S.W.3d 654, 663 (Tex. 1999) (Baker, J., concurring) (citing reporter's notes to RESTATEMENT (SECOND) OF TORTS § 281). The writer of the plurality opinion in the same case states: "[T]he gist of Chief Judge Cardozo's duty analysis has been widely embraced." *Id.* at 656. With a careful search inquiry and a few minutes in a general law data base, even an indifferent computer-ready researcher may readily confirm that the latter assessment is correct.

A possible explanation for the claim of "controversy" is that the unusual operative facts of *Palsgraf* seldom recur. Consequently, many cases have arisen in which defendants have asked courts to apply Cardozo's "unforeseen plaintiff" analysis *to deny* duty only to see the courts apply the Cardozoian analysis to hold that a duty *does exist*. It is wrong to refer to these as cases in which *Palsgraf* was rejected; they in fact are cases in which the *Palsgraf* analysis was adopted but the *Palsgraf* no-duty conclusion distinguished.

43. See Prosser, *Palsgraf Revisited*, *supra* note 1, at 9 n.36 (stating that Wisconsin had adopted *Palsgraf* in its decision in *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935)). While a critic might argue that Prosser glossed over the precise point of *Waube*, it remains true that many post-*Waube* Wisconsin decisions purported to adopt Andrews's view. This matter is developed in a later portion of this paper.

44. Prosser summed this up as follows: "Such is the state of the law. It is one of troubled waters, in which any one may fish." Prosser, *Palsgraf Revisited*, *supra* note 1, at 12.

45. *Id.* at 31. These "gatekeeping" functions have been more recently explained as follows: "By placing the foreseeability analysis in the hands of courts, the existence of duty element of the prima

focusing his complaint because the celebrated author of its famed majority opinion—Judge Cardozo—had been an observer of heated ALI debates about the problem of duty to an unforeseen plaintiff in which the ALI adopted the view that no duty is owed to the unforeseen plaintiff.⁴⁶ Apparently, the ALI debate on this proposition had taken place at the very time *Palsgraf* was making its way through the New York court system.⁴⁷

The view adopted by the ALI in the original Restatement (First) of Torts was expressed this way:

The actor is liable for the 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 . . . of the other* which is protected against unintentional invasion⁴⁸

Although Cardozo himself made no reference to any Restatement in *Palsgraf*, it was the thought expressed in the words “*with respect to such interest of the other*” that *Palsgraf* transformed into a legal icon.⁴⁹ The words justified limiting the scope of duty to the avoidance of foreseeable harm “to the other.”

The Restatement (Second) of Torts slightly amended subsection (b) to reflect the quite common sense view that a plaintiff who is a member of a class of persons, the presence of one or more of whom is quite foreseeable, does not constitute an “unforeseen plaintiff” merely because the defendant could not identify the particular person by name, rank, and serial number.⁵⁰ The amended provision states:

The actor is liable for an invasion of an interest of another, if:

(a) the interest invaded is protected against unintentional invasion, and

facie case serves as a gatekeeper for the otherwise extremely broad concept of negligence.” *James v. Meow Media, Inc.*, 300 F.3d 683, 692 (6th Cir. 2002).

46. Prosser, *Palsgraf Revisited*, *supra* note 1, at 4.

47. *Id.* Prosser does note that Judge Cardozo “took no part in the discussion, and did not vote.” *Id.* Manz considers Cardozo’s ALI role in detail and concludes that he was guilty of no impropriety. *See MANZ, supra* note 3, at 94–95.

48. RESTATEMENT (FIRST) OF TORTS § 281 (1934) (emphasis added). The remaining two subsections of section 281, having to do with causation and defenses, were: “(c) the actor’s conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.” *Id.*

49. *Id.*

50. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

(b) the conduct of the actor is negligent with respect to the other, or class of persons within which he is included⁵¹

Had the facts in *Palsgraf* permitted the railroad worker who helped the boy onto the train to have reasonably foreseen risk to any person standing “many feet away,” Justice Cardozo would not have required Mrs. Palsgraf to prove that the defendant should have had her specific identity in its mind. This supposition is supported not the least by the earlier 1921 decision in which Cardozo’s famous maxim, “[d]anger invites rescue!,” required a negligent railroad operator to foresee that a quite unknown and unknowable (in specific identity) person would emerge to rescue another whom the railroad company had negligently placed in a position of peril.⁵²

IV. THE NEW RESTATEMENT (THIRD) OF TORTS

In the context of this historical background, the new Restatement has launched its “foreseeability-free” conception of duty⁵³ as follows:

51. *Id.* (emphasis added). The legal cause and defense subsections remained unchanged: “(c) the actor’s conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such an invasion.” *Id.*

52. *Wagner v. Int’l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921). In fact, the rescuer was a cousin to the endangered person, but that was of no consequence to Cardozo’s analysis. His larger statement was:

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

Id.

53. The RESTATEMENT (THIRD) OF TORTS does continue to acknowledge some role for foreseeability for factual decisions of breach of duty, as follows:

A person acts negligently if the person does not exercise reasonable care under the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

RESTATEMENT (THIRD) OF TORTS § 3 (Proposed Final Draft No. 1, 2005). By contrast, the revised statement of proximate causation, while not attempting to eliminate foreseeability as a criterion, does attempt to scale it back, as follows: “An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.” *Id.* § 29. Nevertheless, a comment to section 29 makes it clear that the foreseeability standard to be applied in regard to a proximate causation determination under its aegis should be limited as is the foreseeability standard in regard to the determination of negligence. *Id.* § 29 cmt. j. This sentence is particularly revealing: “Thus, when scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor’s conduct negligent.” *Id.* In a sense, this permits the factfinder to make a no-liability determination based upon proximate causation upon which a foreseeability duty analysis would have permitted a judge to do so, which is one of the aims of the drafters of the provisions.

(a) An actor ordinarily has a duty to exercise reasonable care *when the actor's conduct creates a risk of physical harm*.⁵⁴

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.⁵⁵

A torts lawyer, even a seasoned one, examining that statement might unconsciously and understandably read into the end of subsection (a) words that are not there, i.e., “to the particular plaintiff.” Such an insertion would be consistent with the first and second Restatements. It would also be consistent with Cardozo’s teaching that duty is a primary and not a derivative attribute in the legal relationship between persons. But such a reading of the new Restatement would be wrong. That section 7 is meant to *exclude* such an implicit adding of limiting words is made plain in the comments scattered throughout the revised provisions of the new Restatement. For example, comment f to the new Restatement provision on “Liability for Negligent Conduct” explains:

The rule stated in section 7 is that an actor ordinarily has a duty to exercise reasonable care. That is equivalent to saying that an actor is subject to liability for negligent conduct that causes physical harm. Thus, in cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty.⁵⁶

Thus, we are told we owe a duty of care not to cause physical harm, period!

What has happened to “foreseeability” in the duty determination? The new Restatement and its commentary never flatly acknowledge that they are about the profaning of an icon in the law but *in toto* they manifest that outcome. Initially, the comments acknowledge that “courts *sometimes* are influenced by the relationship between the actor *and the person harmed*” in making duty determinations.⁵⁷ The word “sometimes” has been italicized to highlight how the commentary has understated the importance courts have historically (and currently) given to foreseeability in assessing

54. This wording differentiates a risk of physical harm created in fact from the prior foreseeable perception of creating such a risk. It is this difference that cuts away the Cardozian conception of duty.

55. *Id.* § 7 (emphasis added).

56. *Id.* § 6 cmt. f. Section 6, “Liability for Negligent Conduct,” states: “An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty or reasonable care is inapplicable.” *Id.* § 6 (Proposed Final Draft No. 1, 2005).

57. *Id.* § 6 cmt. a.

whether defendants owed particular plaintiffs a duty of care. In fact, a careful review of the cases will prove that the sentence must be amended to conform to reality; the adverb “sometimes” should be replaced with “almost always.”⁵⁸ This further comment effectively concedes this fact:

Despite *frequent* use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulate policy or principle in or to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.⁵⁹

In sum, the plainly stated purpose of the new Restatement is to invite judges to repudiate venerable precedents and hereafter to exclude judge-made no-duty rulings on the peculiar facts of a non-categorical case such as *Palsgraf*. Of course, this assessment of the new Restatement could be wrong. It could give too little credit to its willingness to permit courts to identify principled or policy-based no-duty *categories*.⁶⁰ Hence, the new Restatement might accept *all* cases involving unforeseen plaintiffs as a principled no-duty category, but what would be the point of that?⁶¹

It thus becomes certain that the new Restatement does not intend for courts to concern themselves with the risk of harm *to the particular plaintiff* in deciding whether the defendant owed the person a duty of care in the peculiar circumstances of a particular case. Under this new Restatement standard, Justice Andrews’s insistence that the railroad did owe Mrs. Palsgraf a duty of care would have been on solid ground. On the agreed facts, the railroad undeniably owed a duty to use care to avoid hurting the boy boarding the train (and his property).⁶² Hence, the railroad also owed a duty to Mrs. Palsgraf despite its quite reasonable lack of knowledge of any risk to her. In the new Restatement, all of Justice Cardozo’s fine rhetoric and his equally fine understanding of what may be reasonably expected of an ordinary human being have been shelved.⁶³

58. Select any comprehensive electronic case data base you like and search with a combination of “foreseeability” and “duty” in close juxtaposition.

59. *Id.* § 7 cmt. j (emphasis added).

60. In a section entitled “Conflicts with Social Norms About Responsibility,” the comments acknowledge that no duty rules may exclude or limit liability in particular contexts, such as dram shop liability and premises liability. *Id.* § 7 cmt. c.

61. *Id.* § 7 cmt. j.

62. It cannot be doubted that Cardozo would have agreed with this.

63. This refers to Cardozo’s trenchant response to Justice Andrews’s assertion that the law would require a motor vehicle driver to have “prevision” that the car ahead had dynamite in the trunk, thus imposing an obligation of the following driver to take care not to rear-end the dynamite laden vehicle ahead to avoid injury to persons as an “immediate” result of an explosion, even if far away from the crash. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928). Cardozo retorted: “Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.” *Id.* at 100.

In fact, the new Restatement also attempts to excise *foreseeability* from determinations of what all tort lawyers know as *proximate causation*. New section 6, “Liability for Negligent Conduct,” quoted above, and new section 29, “Limitations on Liability for Tortious Conduct,” substitute phrases such as “scope of liability” and “limitations on liability” in the place of phrases using the word “causation.”⁶⁴ New section 29 states: “An actor’s liability is limited to those physical harms that result from the *risks that made the actor’s conduct tortious*.”⁶⁵

The reader will quite naturally inquire, “[w]hat are those risks that made the actor’s conduct tortious?” The new Restatement’s answer is to be found in a revised statement prescribing the meaning of “Negligence,” which provides:

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct *will result in harm*, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.⁶⁶

At last, we have found a place where “foreseeability” may have a say. A jury may use it to assess the “likelihood that the person’s conduct will result in harm” and also to assess the “severity of the harm that may ensue.”⁶⁷ However, note that the word harm is *not* followed by the words “to the plaintiff.” It would thus appear that once a jury has found that the defendant was negligent to one person, then it was negligent to all the world, *a la* Justice Andrews: *negligence to one is negligence to all*. Consequently, in any case similar to *Palsgraf*, where physical harm undeniably occurred, the new Restatement would require a court to hold that the defendant owed a duty of care to whoever happened to have suffered physical harm and to submit other liability issues to the jury. In *Palsgraf* itself, any reasonable person could have readily foreseen the likelihood that carelessness in boarding the boy onto the train could have thrown him to his death onto the rails under the moving train. Accordingly, based upon that alone, every reasonable jury should be expected to find that the defendant had been negligent under the new Restatement standard of negligence, not only to the boy, but to all the world. This, of course, would have included Mrs.

64. RESTATEMENT (THIRD) OF TORTS §§ 6, 29 (Proposed Final Draft 2006).

65. *Id.* § 29 (emphasis added).

66. *Id.* § 3 (emphasis added).

67. At another place, the commentary tells us that “courts should leave such determinations to juries unless no reasonable person could differ on the matter.” RESTATEMENT (THIRD) OF TORTS § 6 cmt. i (Proposed Final Draft No. 1, 2005).

Palsgraf.⁶⁸ Because it could not be denied that the act of the railroad's employee was a cause-in-fact of the harm suffered by the unforeseen Mrs. Palsgraf, the case would ultimately have risen or fallen on proximate causation, which was exactly Justice Andrews's opinion in *Palsgraf*.⁶⁹ From Justice Andrews's point of view, the difficulty in that outcome would have been that the new Restatement does not permit us to use foreseeability in the way he envisioned it.⁷⁰

V. MRS. PALSGRAF'S LIKELY FATE UNDER THE ALI DUTY REVISION

From the face of section 7 of the new Restatement, unadorned by any implicit addition of *the particular plaintiff* and glossed by various comments referred to above, a reader might readily conclude that the revision has deftly switched the outcome of the *Palsgraf* case. This is certainly true as far as whether a duty of care was owed—Mrs. Palsgraf now wins that point. In short, on this central duty point, the new Restatement has adroitly overturned *Palsgraf's* rejection of derivative liability in favor of Justice Andrews's dissenting view. The remaining question is whether Cardozo's "eye of reasonable vigilance" need concern itself at all with the specific whereabouts of Mrs. Palsgraf, once it has reasonably detected the potential risk of harm to the Italian boy.⁷¹ Answering it requires an application of the remaining elements of the tort of negligence as embodied in the new Restatement.

Turning first to the element of breach-of-duty, i.e., "negligence," one must be mindful that the *Palsgraf* jury was instructed this way:

68. As Justice Andrews said, "[d]ue care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone." *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting).

69. *Id.* New section 26, "Factual Cause," supplants the well seasoned "cause-in-fact" terminology with "factual cause," and eschews the use of "but-for" terminology but does not abandon its content. It states: "Tortious conduct must be a factual cause of physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under section 27." RESTATEMENT (THIRD) OF TORTS § 26 (Proposed Final Draft No. 1, 2005).

Section 27, "Multiple Sufficient Causes," states: "If multiple acts exist, each of which alone would have been a factual cause under section 26 of the physical harm at the same time, each act is regarded as a factual cause of the harm." *Id.* § 27. Section 27 perpetuates the prevailing rule that two independently efficient causes of a harm do not cancel out each other's liability by application of the but-for test.

70. As a decision made on the interplay of "practical politics" within the deliberations of the jury. As Justice Andrews put it, "This is not logic. It is practical politics." *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

71. This, of course, repudiates *Palsgraf's* central teaching: "The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." *Id.* at 100 (majority opinion).

That [i.e., a claim that the railroad company had been negligent in not inspecting the parcel carried by the boy before permitting him to enter the station], is not what the plaintiff claims was the negligence of the defendant that caused her injury. *She claims that the guard upon the platform, the station platform, and the guard upon the train platform, were careless and negligent in the way they handled this particular passenger after he came upon the platform and while he was boarding the train, and that is the question that is submitted to you for your consideration.*⁷²

Under Cardozo's *Palsgraf* theory of duty, that instruction was erroneous because it did not require the jury to assess negligence in light of whether risk of harm to Mrs. Palsgraf herself was reasonably perceivable to the defendant. But as noted above, the new Restatement has changed that result. In being instructed how to assess whether the defendant was negligent, a jury would now be told it may consider the "foreseeable likelihood that the [defendant's] conduct *will result in harm*, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."⁷³ Hence, under the new standard, the jury would be asked to evaluate the abstract *character* of the defendant's act and not its character in specific relation to the particular plaintiff.⁷⁴ Once the jury had found that the act was wrongful to the boy boarding the train, that finding would have subsumed the larger finding that the act was wrongful to all the world, including, of course, Mrs. Palsgraf.

So far, Justice Andrews's theory would be sustained and Mrs. Palsgraf would seem to be on a winning track toward a belated Pyrrhic victory. The causation-in-fact element of the tort would be readily satisfied under the traditional but-for test, which the new Restatement refers to as "factual cause."⁷⁵ The only remaining factor, and the key to liability, would be application of the new Restatement's statement of "scope of liability" provision, through which it intends to supplant the use of the term "proximate

72. Transcript of Record, *Palsgraf*, 162 N.E. 99 (N.Y. 1928), available at <http://www.iulaw.indy.indiana.edu/instructors/Wilkins/Torts/record.htm#Transcript> (last visited Aug. 10, 2007) (alteration in original) (emphasis added).

73. RESTATEMENT (THIRD) OF TORTS § 3 (Proposed Final Draft No. 1, 2005) (alteration in original) (emphasis added).

74. This proposition Cardozo earnestly repudiated: "What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to anyone." *Palsgraf*, 162 N.E. at 100.

75. See RESTATEMENT (THIRD) OF TORTS § 26 (Proposed Final Draft No. 1, 2005) (stating "[t]ortious conduct must be a factual cause of physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under section 27.>").

causation.”⁷⁶ Under both the new and old regimes, the job of assessing scope of liability/proximate causation properly falls to the jury.⁷⁷ Under the “old regime,”⁷⁸ juries would generally be instructed that a defendant is liable for all consequences that “directly and naturally” flow as consequences of its wrongful acts.⁷⁹ More particularly, when defendants claim that some independent cause intervened between the occurrence of initial wrongful acts and the plaintiffs’ harm, juries are often instructed that the defendants may be relieved of liability if such an intervention was not foreseeable.⁸⁰ Thus, juries are permitted to find that an intervening act has severed the legal causative effect of the original wrongful act and thereby itself become the sole proximate cause of the injury.

For example, suppose a defendant should negligently injure a person who, being unable to bear the unremitting pain of the injury, later committed suicide? Would the intervening suicidal act of the decedent become the

76. Foreseeability has always been an important ingredient in the determination of proximate causation. Justice Andrews elaborates this in his *Palsgraf* dissent. See *Palsgraf*, 162 N.E. at 103–05 (Andrews, J., dissenting). The difference between duty and proximate causation is that the judge decides the former as a threshold determination of whether a reasonable jury *could find the defendant liable* whereas the jury decides the latter as the definite determination of whether the defendant *should be liable*.

77. How a jury would be instructed on proximate causation and even whether it would decide that question would vary from state to state. In Michigan, for example, apparently the judge decides proximate causation along with duty. In *Moning v. Alfonso*, 254 N.W.2d 759 (Mich. 1977), the Michigan Supreme Court provided this explanation of the relationship between the two elements:

Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences. In the *Palsgraf* case, the New York Court of Appeals, combining the questions of duty and proximate cause, concluded that no duty is owed to an unforeseeable plaintiff.

The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability whether it is foreseeable that the actor’s conduct may create a risk of harm to the victim, and whether the result of the conduct and intervening causes were foreseeable.

Id. at 765.

78. “Old regime” meaning the approach that almost all courts now follow.

79. Not every court agreed that testing proximate causation was for the jury. For example, in *Moning*, quoted in n.68, the Michigan Supreme Court stated in *dictum* that proximate causation was for the judge. *Id.*

80. The Florida Standard Jury Instruction on this point provides:

[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] some other cause occurring after the negligence occurs it [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].

FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES § 5.1(c) (2006).

sole proximate cause of the death, thus freeing the original defendant of the “but-for” consequence of the original wrongful act?⁸¹ Thousands of cases such as this have historically permitted juries to weigh “foreseeability” in the consideration of whether defendants should be relieved of liability on grounds of no proximate causation.⁸²

Still another standard variation must be dealt with. Suppose a negligent act were to produce a particular element of damage that could be said to be its “direct” consequence but not its “natural” consequence.⁸³ How then should the question of proximate causation be resolved? Two famous English court decisions have developed this point. Suppose a stevedore were to carelessly knock a wooden board into an open hatchway in the deck of a ship? One would readily foresee that the falling plank might injure a worker in the hold or damage the physical structure of the ship or its cargo as a “direct and natural” consequence of the wrong. However, one would not so readily foresee that the falling board, upon striking the bottom of the ship, would induce sparks, ignite inflammables that hap-

81. Many variations of this factual scenario can be found in reported decisions. Outcomes are fact sensitive. Perhaps the most useful exegesis of proximate causation is this context of Victoria Supreme Court Judge Cowans:

Confining attention to what is relevant to the present case the main principles, I consider, are these. In the first place a wrongful act or omission cannot ordinarily be held to have been a cause of subsequent harm unless that harm would have occurred without the act or omission having previously occurred with such of its incidents as rendered it wrongful. Exceptions to this first principle are narrowly confined. Secondly, where the requirements of this first principle are satisfied, the act or omission is to be regarded as a cause of the harm unless there intervenes between the act or omission and the harm an occurrence which is necessary for the production of the harm and is sufficient in law to sever the causal connexion. And, finally, the intervening occurrence, if it is to be sufficient to sever the connexion, must ordinarily be either—(a) human action that is properly to be regarded as voluntary, or (b) a casually independent event the conjunction of which with the wrongful act or omission is by ordinary standards so extremely unlikely as to be termed a coincidence.

Haber v. Walker (1962) 1963 V.R. 339, 1962 VIC LEXIS 372. The court concluded that because the deceased's reason had been overcome by pain, his suicidal act was involuntary and ineffective to sever the causal chain of the original wrongful act.

82. See *Knauerhaze v. Nelson*, 836 N.E.2d 640, 651–52 (Ill. App. Ct. 2005) (distinguishing cause-in-fact from *legal cause*, a term often used in place of proximate cause or to subsume both cause-in-fact and proximate cause, as follows: “‘Legal cause,’ on the other hand, examines the foreseeability of the injury, or whether the injury is ‘of a type which a reasonable man would see as a likely result of his conduct.’”).

83. In this scenario the introduction of an independent causative force is excluded.

pened to be in the hold, and destroy the ship in flames.⁸⁴ Despite that, *In re Polemis*⁸⁵ held a defendant liable for unforeseen harm in just such a case.⁸⁶

Although *Polemis* seems to support Andrews's view (after all, physical harm of some description as a result of knocking a heavy plank into the hole of a crowded ship was certainly foreseeable), it is not the end of the story. Some years later a ship negligently released fuel oil into the waters of a dock in Sydney harbor.⁸⁷ Under inferences permitted by the evidence, the defendant should have reasonably foreseen that such an act would damage nearby ships and piers by fouling them, but had no reason to foresee that the floating oil would be set alight by welding operations on the docks, and thus threaten the fire damage that occurred.⁸⁸ Holding that the defendant should not be liable for the unforeseen fire damage, the Privy Council repudiated *Polemis*.⁸⁹ According to *The Wagon Mound I*, justice does not permit holding a negligent defendant liable for an unforeseeable kind of harm even though a harmful consequence of an entirely different

84. See, e.g., *In re Polemis*, [1921] 3 K.B. 560, 571 (Banks, L.J.) (accepting, at least arguendo, that sparking and flames could not have reasonably been foreseen: "In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated.").

85. *Id.* at 560. Justice Andrews cited *Polemis* in support of this duty-to-one imposes a duty-to-all view. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

86. The reasoning of *Polemis* is well expressed by Warrington, L.J.:

The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Sufficient authority for the proposition is afforded by *Smith v. London and South Western Ry. Co.*, in the Exchequer Chamber, and particularly by the judgments of Channell, B. and Blackburn, J. Channell, B. says: "I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell B. in his judgment in *Blyth v. Birmingham Waterworks Co.* referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Blackburn J. says: "I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the appellants are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: see per Lord Sumner in *Weld-Blundell v. Stephens*.

In re Polemis, 3 K.B. at 574-75 (Warrington, L.J.).

87. *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g. Co., Ltd. (The Wagon Mound I)*, [1961] A.C. 388, 388 (P.C.) (appeal taken from N.S.W.) (U.K.).

88. *Id.*

89. *Id.*

kind was readily foreseeable.⁹⁰ In effect, *The Wagon Mound I* transported Justice Cardozo's no-derivative duty jurisprudence into the field of proximate causation. *In re Kinsman Transit Co.*,⁹¹ the first United States decision to acknowledge *The Wagon Mound I*'s repudiation of *Polemis* agreed, saying:

The effect of unforeseeability of damage upon liability for negligence has recently been considered by the Judicial Committee of the Privy Council, *Overseas Tankship v. Morts Dock & Engineering Co.*, (*The Wagon Mound*). The Committee there disapproved the proposition, thought to be supported by *In re Polemis*, "that unforeseeability is irrelevant if damage is 'direct.'" We have no difficulty with the result of *The Wagon Mound*, in view of the finding that the appellant had no reason to believe that the floating furnace oil would burn⁹²

Just as Cardozo's view—that no duty is owed to the unforeseeable plaintiff—swept through the common law world, so too did the view of *The Wagon Mound I* displace *Polemis* virtually everywhere. Thereafter, an act that is negligent because of a foreseeable harmful consequence is not the proximate cause of an unforeseeable consequence.

The "unforeseeable consequences" cases are but a subset of a larger class in which the harm that befell a quite foreseeable plaintiff was so bizarre that no reasonable person could have foreseen it. *Kinsman Transit*

90. *Id.* at 425 (discussing foreseeability: "It is not the act but the consequences on which tortious liability is founded."). Foreseeability was discussed further:

Their Lordships conclude this part of the case with some general observation. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct." In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general public sentiment of moral wrongdoing for which the offender must pay. It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural" consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done: *cf. Woods v. Duncan*. Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth v. Birmingham Waterworks Co.*

Id. at 426.

91. 338 F.2d 708 (2d Cir. 1964).

92. *Id.* at 723 (citations omitted). A fact that must have sent shivers up the spines of the plaintiffs' lawyers in *The Wagon Mound I* is that plaintiffs, in subsequent decisions arising out of the same facts, adduced evidence to prove that a reasonable defendant *should have foreseen* that the oil would be set afire on water. Those later plaintiffs recovered for fire damage. See, e.g., *Miller S.S. Co. v. Overseas Tankship (U.K.) Ltd. (The Wagon Mound II)*, (1963) 1 Lloyd's List L.R. 402, 402 (Sup. Ct. N.S.W.).

may itself be viewed as one of these cases.⁹³ A negligently moored ship broke free in a fast flowing ice clogged river, careened downstream, crashed into other ships on its way, and came to rest against a bridge.⁹⁴ The jam-up created a temporary dam, raised the water level, and made it impossible for marooned ships to get wheat cargos ashore to satisfy delivery contracts. As a result, some plaintiff wheat-sellers suffered pure economic damages arising out of extra expenses incurred in performing their contracts to deliver wheat to purchasers.⁹⁵ The direct, natural, and foreseeable physical damage caused by the negligent mooring was recoverable against the errant ship.⁹⁶ However, the pure economic losses suffered in making the wheat deliveries received different treatment.⁹⁷ Although an orthodox disposition of the case under New York law at the time would have been to dismiss the claims on the grounds that no duty was owed as to pure economic loss (i.e., not derived from either property damage or bodily injury),⁹⁸ *Kinsman Transit* eschewed a no-duty disposition and held instead, as a matter of law, that the defendant's negligent act was not the proximate cause of pure economic damages which could not have reasonably foreseen.⁹⁹ Hence, *Kinsman Transit* reached a Cardozo conclusion with Andrews's reasoning. In any event, lack of foreseeability was the core basis of the defendant's immunity to liability.

Having shown that the concept of "foreseeability" has long been a criterion in the assessment of both duty and proximate causation, we may now explore how the new Restatement proposes to treat proximate causation. Avoiding the use of the term "causation," much less "proximate causation," the new Restatement prescribes: "An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious."¹⁰⁰ In turn, the "risks that made the actor's conduct tortious" limitation requires us to hearken back to the new Restatement's definition of negligence: "Primary factors to consider in ascertaining whether the

93. The facts in *Kinsman Transit* were not only bizarre but also, similar to many plaintiff's cases, involved claims of pure economic loss (i.e., with no predicate physical injury or property damages). As such, most courts might have been led to hold that no duty was owed to many of the plaintiffs. *Kinsman Transit* declined to resolve the case on duty-grounds, but instead ruled as a matter of law that no reasonable defendant could have seen the particular consequences if its acts. Hence, the case was decided on proximate causation grounds, but in a manner that did not permit the jury to make the decision. 338 F.2d at 708.

94. *Id.* at 712-13.

95. Examples of extra expenses may have included supplying the wheat from the market at higher prices or incurring added costs of unloading the stranded ships away from the dock.

96. *Id.* at 726-27.

97. *Id.* at 725-26.

98. See generally H.R. Mock v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928); Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp., 269 N.Y.S.2d 926 (N.Y. App. Div. 1966).

99. *Kinsman Transit*, 338 F.2d at 724-25.

100. RESTATEMENT (THIRD) OF TORTS § 29 (Proposed Final Draft No. 1, 2005) (emphasis added).

person's conduct lacks reasonable care are the *foreseeable likelihood* that the person's conduct will *result in harm*, the foreseeable severity of any harm that may ensue"¹⁰¹ Thus, to be true to the new Restatement (and, in fact, to Justice Andrews's dissenting opinion in *Palsgraf*), the defendant in Mrs. Palsgraf's trial would have been entitled to have the jury given an instruction such as this: "You may not hold the defendant liable for Mrs. Palsgraf's injuries unless you decide that the defendant knew or should have known of the foreseeable likelihood that its negligent actions in helping the boy on the train would have caused them."

History records that no such instruction was given to the *Palsgraf* jury. Instead, the jury was instructed:

That [i.e., failure to examine the boy's package before letting him board the train] is not what the plaintiff claims was the negligence of the defendant that caused her injury. *She claims that the guard upon the platform, and the guard upon the train platform, were careless and negligent in the way they handled this particular passenger after he came upon the platform and while he was boarding the train, and that is the question that is submitted to you for your consideration.*¹⁰²

On causation the trial judge told the jury only this:

If [the defendant] omitted to do the things which prudent and careful train men do for the safety of those who are boarding their trains, as well as the safety of those who are standing upon the platform waiting for other trains, *and the failure resulted in the plaintiff's injury*, then the defendant would be liable.¹⁰³

In short, the jury was instructed that it should hold the defendant liable if it was negligent toward the boy and Mrs. Palsgraf suffered injury as a consequence. The Long Island Railroad asked for a binding proximate causation instruction,¹⁰⁴ which the court declined to give, but failed to ask for a non-binding instruction on the crucial point.¹⁰⁵

101. *Id.* § 3 (emphasis added).

102. *See infra* Appendix (emphasis added).

103. *See infra* Appendix (emphasis added).

104. This was the requested instruction: "I ask your Honor to charge the jury that if they find that the defendant's servants were assisting the passenger upon the train and in so doing knocked the bundle from his hand, that the act of the servants is not the proximate cause of the plaintiffs' injuries." *See infra* Appendix (emphasis added).

105. *Palsgraf*, 162 N.E. at 105 (Andrews, J., dissenting) (noting that the trial judge refused to instruct the jury that the injuries were not proximately caused by the defendant's negligence as a matter of law). Justice Andrews also noted, "[n]o request was made to submit the matter to the jury as a matter of fact, even would that have been proper on the record before us." *Id.*

How might history have been altered had the *Palsgraf* jury been provided a proximate cause or scope of liability instruction? Such an instruction would have permitted the jury to return a no-liability verdict. Even a directed verdict for the defendant (or more likely, judgment *non obstante verdicto*) would not have been out of the question. Would these outcomes have deprived the legal world of Cardozo's up-till-now timeless aphorisms and the famous Cardozo-Andrews debate? We will never know for sure, but probably so. Nevertheless, given Justice Cardozo's intense views and the facts and theory presented by the case as tried, we may reasonably speculate that if called upon to review the case in any posture, Cardozo would have opined that the trial judge would not have erred to take the case from the jury. He would have affirmed a trial judge's ruling that no reasonable jury could decide that Mrs. Palsgraf was within the scope of foreseeable harmful consequences arising from the defendant's actions toward the boy. Indeed, one can surmise that Cardozo would have upheld taking this action at the front end of the case (i.e., pre-trial) and not at the back-end (i.e., post-judgment).¹⁰⁶ In short, had the new Restatement's regime been in place at the time *Palsgraf* was decided, Justice Cardozo may well have taken the occasion to introduce a revision such as: "No matter what the Restatement says, no duty of care is owed to an unforeseeable plaintiff."

VI. WHAT'S WRONG WITH THE NEW APPROACH?

The critical (and herein criticized) core of the new approach is that it deprives judges of the use of foreseeability in deciding whether a particular defendant owed a particular plaintiff a duty of care in a particular case. In the great bulk of cases—say almost all automobile crash cases—duty is not disputed.¹⁰⁷ But the facts in a small percentage of these cases, which may comprise a large number in any given year, often raise vexing questions as to whether certain actions, that might be unreasonable in some particularity, should attract liability for harm that was entirely unforeseen to the actor. To the extent that the new Restatement permits defendants any immunity in these cases, it reposes the discretion in juries. (Except that courts

106. This notion raises another "what if" question. What if Mrs. Palsgraf's case, as pleaded, had been dismissed on a motion to dismiss or summary judgment? She might have been permitted to replead under a different theory of the case that she might have proved. If so, *Palsgraf* as we know it never would have emerged.

107. Manz refers to *Palsgraf* as possessing an "improbable fact pattern" and attributes its "legendary status" to that point and "the endlessly debatable nature of the legal issue it presents, the status of its author, and the natural human interest in the tale of a poor woman who lost her judgment by one vote." MANZ, *supra* note 3, at 123.

might still rule classes of cases out of bounds as no-duty cases.) Justice Cardozo taught us (we thought) that it is for judges to make these tough calls.

Shortly before this article was written, the Court of Appeals of New York decided *In re New York City Asbestos Litigation v. A.C. & S., Inc.*,¹⁰⁸ which used a variant of the term “scope of duty,” but in a very different way than does the new Restatement.¹⁰⁹ The *Asbestos Litigation* question was whether an asbestos worker’s employer had a duty of care to warn the worker’s spouse of the dangers of handling the worker’s allegedly asbestos-contaminated work clothes (she suffered an asbestos induced disease).¹¹⁰ Under the facts of the case (unlike *Palsgraf*), the employer should have reasonably known that the contaminants posed a risk of harm to spouses who washed their worker spouses’ clothing. Hence, unlike Mrs. Palsgraf, the *Asbestos Litigation* plaintiffs were not unforeseen much less unforeseeable. Nevertheless, the court held that the defendant did not owe these plaintiffs a duty of care, saying in part:

[F]oreseeability alone, does not define duty—it merely determines the scope of duty once it has been determined to exist. . . . Foreseeability should not be confused with duty. The principle expressed in *Palsgraf v. Long Island R.R. Co.* . . . is applicable to determine the scope of duty—only after it has been determined that there is a duty.¹¹¹

This *Asbestos Litigation* excerpt obviously states the meaning of *Palsgraf* incorrectly, but it does correctly hold that foreseeability is not the only criterion of duty. More specifically, *Asbestos Litigation* stands for the wider proposition that while foreseeability may be a *required* criterion of duty in most cases, it alone will not be sufficient to establish duty in all cases. This is poles apart from the new Restatement’s proposition.

The Michigan Supreme Court provided a more orthodox statement of the relationship between foreseeability and other duty criteria, as follows:

Courts take a variety of approaches in determining the existence of a duty, utilizing a wide array of variables in the process. Frequently, the first component examined by the court is the foreseeability of the risk. However, other considerations may be, and usually are, more important. For example, in *Samson v. Saginaw Professional Bldg., Inc.*, we stated:

108. 840 N.E.2d 115 (N.Y. 2005).

109. *Id.* at 119.

110. *Id.* at 116.

111. *Id.* at 119 (citations omitted).

[T]he mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. The event which he perceives might occur must pose some sort of risk of injury to another person or his property before the actor may be required to act. Also, to require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong to require more than mere observation of the events which unfold on the part of the defendant. It is the fact of existence of this relationship which the law usually refers to as a duty on the part of the actor.¹¹²

The crucial point in cases like this is that foreseeability is not merely a *criterion* of duty; but for most courts, it is a *sine qua non*.

Of all the states, Wisconsin, and perhaps only Wisconsin, openly purports to follow Andrews's dissenting view in the famous *Palsgraf* debate.¹¹³ Hence, examining Wisconsin law is relevant to evaluating the new Restatement. Limited strictly to Andrews's own statements and adhering to his expressed view would mean that once a court were to find a defendant should have foreseen a risk to any person at all (i.e., the boy boarding the train) then the court would hold that the defendant owed a duty to all the world (i.e., including unforeseen Mrs. Palsgraf). In short, a defendant in a *Palsgraf* type case would not be immunized from liability to an unforeseen plaintiff on no-duty grounds as occurred in *Palsgraf*. But a jury would still be permitted to return a verdict for the defendant either upon a determination that it was not negligent as to Mrs. Palsgraf or, more likely, the defendant's negligence was not the proximate cause of the harm.

The "different" Wisconsin approach goes further than accept the view that defendants may owe a derivative duty of care to unforeseen plaintiffs. Indeed, one Wisconsin jurist has said that Wisconsin follows neither the majority nor the dissenting *Palsgraf* approach, which is demonstrably true.¹¹⁴ As the starting point, Wisconsin courts continue to state that the negligence cause of action requires a plaintiff to prove the orthodox ele-

112. *Buszkowski v. McKay*, 490 N.W.2d 330, 333 (Mich. 1992) (citations omitted).

113. *See Schilling v. Stockel*, 133 N.W.2d 335 (Wis. 1965) (divorcing Wisconsin from the Cardozo view).

114. *Schuster v. Altenberg*, 424 N.W.2d 159, 177 (Wis. 1988) (Steimetz, J., concurring) (noting that "[a]lthough it is true that *A.E. Investment* characterized Wisconsin negligence law as following the minority position in *Palsgraf*, the law in Wisconsin is more properly characterized as following neither the Cardozo majority in *Palsgraf*, which predicated liability on a very narrowly drawn scope of duty, nor the Andrews dissent in *Palsgraf* which limited liability in negligence through causation based on policy factors. Rather, Wisconsin has actually followed its own distinct approach and limited liability through policy considerations after the elements of duty and causation have been established.").

ments: duty, breach, causation, and damages.¹¹⁵ Wisconsin courts—unlike the new Restatement—also continue to say that foreseeability is the key to duty.¹¹⁶ But as to how foreseeability is to be used, and by whom, Wisconsin courts now separate themselves from Cardozo’s view. Indeed, they repeatedly hold that an actor owes a duty of care to any person injured by an action if “risk of harm to someone”¹¹⁷ was foreseeable even if the person injured was not that foreseeable *someone*. As recently stated in *Hatleberg v. Norwest Bank Wisconsin*,¹¹⁸ “[i]ndeed, in Wisconsin, [e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”¹¹⁹ This is Andrews’s view, pure and simple. The rhetoric of Wisconsin courts often goes further than this, even to say that we all owe a duty of care to all the world.¹²⁰ That seems to imply that we are always duty laden in everything we do even though risk of harm is foreseeable to no one at all. Nevertheless, the actual holdings of the cases agree that the “duty to all the world” rides on the foreseeability of “harm to someone.” In fact, finding an example of serious harm to someone where no risk of harm was foreseeable to anyone at all would be extraordinary.

Following the Andrews approach, Wisconsin courts ordinarily have no occasion to dismiss cases on no-foreseeability, ergo no-duty, grounds.

115. *Doe v. Archdiocese of Milwaukee*, 700 N.W.2d 180, 192 (Wis. 2005) (noting that “[i]n the abstract, a plaintiff alleging ‘negligence’ must show four elements: ‘(1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.’” (citation omitted)). It is also true that the duty element has been minimized through broad language such as this:

Every person has a duty to use ordinary care in all of his or her activities, and a person is negligent when that person fails to exercise ordinary care. In Wisconsin a duty to use ordinary care is established whenever it is foreseeable that a person’s act or failure to act might cause harm to some other person.

Alvarado v. Sersch, 662 N.W.2d 350, 353 (Wis. 2003). Broad as the first sentence is, it still seems limited by the Andrews notion of the second.

116. *See Smaxwell v. Bayard*, 682 N.W.2d 923, 933 (Wis. 2004) (reiterating that: “As we have previously explained: In this state all persons have a duty of reasonable care to refrain from those acts that unreasonably threaten the safety of others. This duty arises ‘when it can be said that it was foreseeable that his act or omission to act may cause harm to someone.’ Thus, the existence of a duty hinges upon foreseeability.”).

117. *A.E. Inv. Corp. v. Link Builders, Inc.*, 214 N.W.2d 764, 766 (Wis. 1974) (stating that “[a] defendant’s duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable. Once negligence is established, the defendant is liable for unforeseeable consequences as well as foreseeable ones. In addition, he is liable to unforeseeable plaintiffs.”).

118. 700 N.W.2d 15 (Wis. 2005).

119. *Id.* at 22 (citing *Alvarado*, 662 N.W.2d at 353).

120. *See, e.g., Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co.*, 680 N.W.2d 345, 352 n.8 (Wis. 2004) (stating that “Wisconsin has long since followed the minority rationale in *Palsgraf v. Long Island Railroad Co.*, which posits that everyone owes a duty of care to the entire world.” (citation omitted)). The Wisconsin courts always credit Justice Andrews as the origin of the “world at large” language. *See, e.g., Longberg v. H.L. Green Co., Inc.*, 113 N.W.2d 129, 133 (Wis. 1962).

Indeed, pure *Palsgraf* facts are rare for any court. Yet, Wisconsin courts continue to recognize broad categories of no-duty rule situations. For example, Wisconsin courts apply the “firefighter’s rule” to stop certain actions by firefighters against landowners at the pleading stage.¹²¹ This is not out of line with the new Restatement which does not disapprove designation of no-duty *categories* even if foreseeability is part of the consideration.¹²²

Wisconsin juries also continue to function as the finders-of-fact on the breach, causation, and damage elements in any negligence cause of action. What seems to be different is that juries are apparently forbidden to use “foreseeability” in their deliberations. The Wisconsin standard jury instruction on negligence tells a jury: “Ordinary care is the care which a reasonable person would use in similar circumstances.”¹²³ This would seem to permit a defendant to argue to the jury that no reasonable person in similar circumstances could have foreseen the risk of harm to the person injured, thus rendering the defendant’s action blameless as to the plaintiff. However, the foregoing instruction is immediately followed with this: “A person is . . . negligent . . . if . . . [the person] does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a *person or property*.”¹²⁴ This portion would seem to require the jury to consider only whether the defendant was negligent as to *someone* without regard to the lack of perceivable risk to the plaintiff.¹²⁵ This reading brings the Wisconsin view of breach into harmony with its view of duty. In other words, in Wisconsin the following views compliment each other: “Duty to one equals duty to all” and “[n]egligence to one equals negligence to all the world.”¹²⁶ This reading also harmonizes the Wisconsin approach with the new Restatement.

Causation is different in Wisconsin. The courts have held that a jury’s function is limited to determining whether the defendant’s negligence

121. *Cole v. Hubanks*, 681 N.W.2d 147, 150 (Wis. 2004) (explaining the origins and reasons for the rule).

122. RESTATEMENT (THIRD) OF TORTS § 7(b) (Proposed Final Draft No. 1, 2005) (emphasis added).

123. *Alvarado*, 662 N.W.2d at 358 n.1.

124. *Id.* (emphasis added).

125. *Id.* at 355 (supporting the use of foreseeability in a jury’s assessment of negligence: “A jury’s determination of negligence includes an examination of whether the defendant’s exercise of care foreseeably created an unreasonable risk of harm to others. Public policy factors can also implicate the concept of foreseeability. In a sense, evidence regarding foreseeability can play a dual role. Besides having the aid of the jury’s opinion when assessing liability, a judge will also be aided by the facts that were brought to light during the jury trial. Having examined the law, we next apply those principles to the facts in this case.”).

126. This harmony does not mean that the court’s determination that a duty was owed necessarily requires a finding that the defendant was negligent. A judge might determine that the defendant owed someone a duty of care and the jury thereafter might find that the defendant in fact used all the care that was due.

played a “substantial factor in producing” the complainant’s injury.¹²⁷ Unlike juries in other states, Wisconsin juries have no role to play prudentially limiting liability by applying principles of proximate causation, remoteness, or even intervening or superseding causes.¹²⁸ In this, Wisconsin departs from orthodox proximate causation jurisprudence, from Justice Andrews’s “practical politics” approach, and from the “scope of liability” approach of the new Restatement. Wisconsin’s approach may be *sui generis*.

What has been examined so far appears to preclude the use of unforeseeability, remoteness, bizarreness, and other fortuitous factors to limit a defendant’s liability in Wisconsin. Certainly, juries appear to be dispossessed of authority to consider those factors. But this is not the whole story. Alluding explicitly to Justice Andrews’s characterization of proximate causation as a matter of practical politics,¹²⁹ the Wisconsin Supreme Court has decided that prudential limits on negligence liability in Wisconsin should not be set by applying no-duty analyses at the front end of litigation but by applying “public policy” analyses at the post-trial stage of the process.¹³⁰ In essence, the Wisconsin negligence cause of action includes five elements: duty, breach, causation, damages, and public policy.¹³¹

127. *Jones v. Dane County*, 537 N.W.2d 74, 102 n.10 (Wis. Ct. App. 1995) (quoting the Wisconsin jury instruction: “WISCONSIN JI-CIVIL 1500 (Cause) reads: The cause questions ask whether there was a causal connection between the negligence of any person and the (accident) (injury). These questions do not ask about ‘the cause’ but rather ‘a cause.’ The reason for this is that there may be more than one cause of an (accident) (injury). The negligence of one person may cause an (accident) (injury), or the combined negligence of two or more persons may cause it. Before you find that (any) (a) person’s negligence was a cause of the (accident) (injury), you must find that the negligence was a substantial factor in producing the (accident) (injury).”).

128. *Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co.*, 680 N.W.2d 345, 352 n.8 (Wis. 2004) (noting that “[i]n addition to Wisconsin’s broad formulation of duty, it is important to note that Wisconsin’s substantial factor test for cause-in-fact is equally as broad, as it eliminates the doctrines of superseding and intervening cause. As noted *infra*, these doctrines are now subsumed in the public policy analysis.”).

129. *Id.* at 351 (acknowledging this as follows: “Early in Wisconsin jurisprudence, the term ‘proximate cause’ referred to two distinct concepts. The first use of the term was to describe ‘limitations on liability and on the extent of liability based on [] lack of causal connection in fact.’ The second use of the term was to describe ‘limitations on liability and on the extent of liability based on . . . policy factors making it unfair to hold the party [liable].’ The second use of the term probably had its origins from the venerable Judge Andrews: ‘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.’” (citations omitted)).

130. *Smaxwell v. Bayard*, 682 N.W.2d 923, 933 (Wis. 2004) (stating that, in Wisconsin, the determination to deny liability is one of public policy rather than of duty and that “negligence is a distinct concept from liability.”).

131. *Fandrey*, 680 N.W.2d at 353–54 (stating that “[w]hether public policy is conceptualized as the second step in the legal cause analysis, or a fifth step following the duty, breach, cause, damage inquiry, *the fact remains* that ‘public policy’ is inexorably tied to legal cause in Wisconsin.” (emphasis added)).

Although making these public policy determinations is reserved solely to judges as a matter of law,¹³² Wisconsin decisions have been mixed as to when judges should undertake the public policy review. The view that trial courts should withhold these decisions until after the facts have been fully developed in jury trials seems to be favored.¹³³ Nevertheless, unbending adherence to this approach would build in the worst feature of what actually happened in *Palsgraf* as a potential outcome in every case—i.e., the plaintiff loses as a matter of law after a jury has returned a favorable verdict. This would effectively repudiate one of the most important of Justice Cardozo's *Palsgraf* lessons: whenever possible, make policy judgments of no-liability at the front-end of the litigation (preferably on motions to dismiss) and not at the back-end (post-trial). It would also invite the most scorching hostility court proceedings can engender: the ire of those who won jury verdicts only to lose on appeal and then be told that they never had a chance to win. Bowing to this practicality, the Wisconsin decisions authorize trial judges to make the no-liability public policy determinations on summary judgment motions when the facts are clear enough.¹³⁴

Originating in a 1957 decision, the Wisconsin Supreme Court has specified six discrete factors that courts are to weigh in determining whether a defendant—who owed a duty of care to someone and thus to all the world and whose actions were negligent as to someone and thus to all the world and whose negligent actions were a substantial factor in causing the harm of which the particular plaintiff complains—should be shielded from liability as a matter of public policy. As initially expressed in *Colla v. Mandella*:¹³⁵

It is recognized by this and other courts that even where the chain of causation is complete and direct, recovery against the negligent tort-feasor may sometimes be denied on grounds of public policy because the injury is too remote from the negligence or too

132. *Smaxwell*, 682 N.W.2d at 936 (stating that “[a] public policy analysis is separate and distinct from determining whether a duty exists in a particular case. Whether public policy precludes liability is a matter of law that is decided by this court de novo. Public policy may bar recovery against the negligent tortfeasor if this court determines any of the following: (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the tortfeasor’s culpability; (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) allowing recovery would place too unreasonable a burden upon the tortfeasor; (5) allowing recovery would be too likely to open the way to fraudulent claims; or (6) allowing recovery would have no sensible or just stopping point.” (citations omitted)).

133. *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523, 565 n.54 (Wis. 2005) (noting that “as with the constitutional arguments, [this court] express[es] no opinion on the dissent’s analysis, except to acknowledge that this court retains the ability to limit liability based on public policy factors but rarely invokes this power before a finding of negligence has occurred.”).

134. *Smaxwell*, 682 N.W.2d at 936–37.

135. 85 N.W.2d 345 (Wis. 1957).

“wholly out of proportion to the culpability of the negligent tortfeasor,” or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way to fraudulent claims, or would “enter a field that has no sensible or just stopping point.”¹³⁶

While this “public policy” determination may be conceived of as a “fifth” element in the negligent cause of action, the Wisconsin court has described it as part of the legal cause determination.

A thoughtful reader might wonder how the public policy analyses Wisconsin judges conduct in *post-trial* causation determinations differ from the public policy scrutiny judges apply everywhere else in orthodox *pre-trial* duty analyses. In most courts, both foreseeability and public policy are central to the duty questions. The Indiana Supreme Court’s view is illustrative:

The question of whether a duty exists on the part of a particular defendant to conform his conduct to a certain standard for the benefit of the plaintiff is generally a question of law. A court considers and weighs three factors in making this determination: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) *public policy concerns*. In general, though, courts will find that a duty of care exists if reasonable persons would recognize it and agree that it exists.¹³⁷

Similar statements can be found in decisions from other states.¹³⁸

136. *Id.* at 348 (format altered).

137. *Harris v. Raymond*, 715 N.E.2d 388, 393 (Ind. 1999) (citations omitted) (emphasis added).

138. English courts, too, employ *public policy* as a criterion as to whether to acknowledge the existence of a duty of care in cases with no precedents to bind the court. As stated by Lord Reid, in *Home Office v. Dorset Yacht Co., Ltd.*, [1970] A.C. 1004 (H.L.) (U.K.):

It cannot be, therefore, that in all circumstances where certain consequences can reasonably be foreseen a duty of care arises. A failure to take some preventive action or rescue operation does not of and by itself necessarily betoken any breach of a legal duty of care. It has in consequence been suggested that, in situations where reasonable foresight can be in operation, the decision of a court as to whether a duty of care exists is in reality a policy decision. So it was strongly urged that, in the circumstances of a case such as the present, there are reasons of public policy which should induce a court to hold that no duty of care arises which is separate from the duty owed by the officers to those by whom they were employed.

Id. at 1034. In the same case, Lord Diplock said:

But since *ex hypothesi* the kind of case which we are now considering [i.e., one with no precedent] offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C or D, etc. and the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which

Is there something peculiar about the Wisconsin factors that would preclude a holding for the *Palsgraf* defendant on public policy grounds? This question must be addressed in light of Wisconsin holdings that liability may be excluded by any one of the six factors.¹³⁹ With this in mind, a reasonable judge might have denied Mrs. Palsgraf's claim on any one of or a combination of at least three of the public policy factors: remoteness (Mrs. Palsgraf was standing "many feet away"); liability disproportionate to culpability (after all, was it so blameworthy to attempt to help the stumbling boy onto the train?); and highly extraordinary occurrence (who would have thought it?). In fact, *Pfeifer v. Standard Gateway Theater*,¹⁴⁰ one of the earliest cases in this line, explicitly characterized *Palsgraf* as a public policy decision:

The New York Court of Appeals in an opinion written by the noted jurist, Mr. Chief Judge Cardozo, held that as a matter of law the plaintiff could not recover, and stated his conclusion as follows: "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."

In a dissenting opinion Mr. Judge Andrews argued the question of proximate cause and came to the conclusion that the proximate cause of plaintiff's injury was the negligence of defendant's employees because their wrongful act had set in motion the sequence of events which produced the harm without any intervening cause. Logic seems to be on the side of the dissenting opinion, 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.¹⁴¹

Thus *Pfeifer* took two steps that have lead Wisconsin to the course it presently follows: it acknowledged that public policy is a proper element to limit liability in negligence actions, and it stated a preference for the Andrews view in *Palsgraf*. In fact, it took a third step that may be of even

is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis.

Id. at 1060.

139. *Smaxwell*, 682 N.W.2d at 936.

140. 55 N.W.2d 29 (Wis. 1952).

141. *Id.* at 34.

more importance: it renounced “foreseeability” as a factor to be considered by juries in making causation determinations.¹⁴²

Although Wisconsin courts are enraptured by that state’s novel negligence jurisprudence, it is a hard sell to an outsider. First, its evolution from a dictum that Justice Andrews’s approach was “more logical” up through the development of its novel post-trial public policy oversight was hardly a model of coherent decision-making. The preference for Andrews’s view over that of Cardozo is not a matter of logic; it is a policy preference. No Wisconsin decision truly grapples with the competing implications of the two positions, certainly not in the depth that Cardozo did. Second, its removal of the authority of juries to bring public policy factors, i.e., “practical politics,” into play in making liability decisions seems to be an undesirable infringement of the right of trial by jury. Third, Wisconsin courts delude themselves if they believe application of “public policy” factors at the back-end of the litigation as a fifth element in the cause of action is different in kind or quality from the standard duty analysis orthodox courts apply at the front-end. Fourth, pushing the potential no-liability ruling to the end of the process instead of making it at the first feasible opportunity seems wasteful of judicial resources and those of the litigants. Finally, to the extent the Wisconsin public policy approach systematically takes away jury verdicts at the back end of litigation, it seems designed to engender disrespect for the law.

The Wisconsin “duty-to-one, duty-to-all” rhetoric also suggests that Wisconsin negligence law regularly provides relief for deserving plaintiffs that orthodox duty analyses would abandon. While this result would be welcomed, its reality is doubtful. The decision in *Smaxwell* is illustrative.¹⁴³ There, the defendant owned two adjoining parcels of land, P¹ and P². P¹ was the site of several residential habitations, which were occupied by the defendant’s tenants, T¹ and T². P² was a vacant parcel upon which the defendant permitted T¹ to build a dog kennel to house dog-wolf hybrids. Numerous people objected to this use of P², including one complaint that a wolf-hybrid had bitten a deputy sheriff. The defendant knew of this incident. One of the dog-wolves escaped P², came upon P¹, and bit T². T² sued the defendant. The trial court granted the defendant’s motion for summary judgment on public policy grounds. Both the court of appeals and the supreme court affirmed. The supreme court explained:

142. *Id.* at 32 (stating that “[i]t was also error to charge the jury in the instant case that proximate cause is one which ‘produces the injury as a natural and probable result’ of defendant’s negligence. The use of the term ‘probable result’ carries with it a connotation of foreseeability and was distinctly disapproved in the decision in *Osborne v. Montgomery*.” (citation omitted)).

143. *Smaxwell*, 682 N.W.2d at 923.

Framing the issue in modern parlance, we concluded that allowing recovery against landowners or landlords who are neither owners nor keepers of dogs—that is, landowners or landlords who do not have control or custody of dogs—causing injury to someone on or around their property would simply have no sensible or just stopping point.¹⁴⁴

Giving the Wisconsin Supreme Court's opinion the respect that it is due, one may readily predict that many—probably most—courts would have held that the *Smaxwell* defendants owed foreseeable plaintiffs a duty of care to restrain the animals.¹⁴⁵ Indeed, many courts might even apply the strict liability standard in *Rylands v. Fletcher*¹⁴⁶ to hold the landowner liable for permitting the harmful non-natural agency to escape from land and harm the plaintiff. One “bad” case does not prove or disprove the comparative worth of the Wisconsin approach of course, but it does prove its lack of perfection.

Although the Wisconsin regime is not identical to the approach of the new Restatement, it is close enough to suggest that courts pause before beginning a trek down a similar path. The key points are these:

1. Justice Cardozo's teachings that duty is primary and that foreseeability of harm to the particular plaintiff is a necessary element are robust almost everywhere. Neither the new Restatement nor Wisconsin has made a credible case to renounce them.

144. *Id.* at 939.

145. *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 511–12 (Cal. Ct. App. 1975) (dealing with a similar case the court stated: “While we have been unable to find a California case dealing with the precise question of whether a landlord owes a duty to his tenant's invitees to prevent injury from a vicious animal kept on the premises with the landlord's consent, we believe public policy requires that a landlord who has knowledge of a dangerous animal should be held to owe a duty of care only when he has the right to prevent the presence of the animal on the premises. Simply put, a landlord should not be held liable for injuries from conditions over which he has no control.”). *Uccello* is mainly cited for this proposition: “Under California law, a landlord owes a duty of care to his tenant's invitees to prevent injury from the tenant's vicious dog when the landlord has ‘actual knowledge’ of the dog's vicious nature in time to protect against the dangerous condition on his property.” *Yuzon v. Collins*, 116 Cal. App. 4th 149, 152 (Cal. Ct. App. 2004). Even more telling is *Batra v. Clark*, wherein the court held:

We agree with the majority of cases that liability should be imposed on an out-of-possession landlord only when he has actual knowledge, rather than imputed knowledge, of the presence of a vicious animal on the leased premises. We hold that, if a landlord has actual knowledge of an animal's dangerous propensities and presence on the leased property, and has the ability to control the premises, he owes a duty of ordinary care to third parties who are injured by this animal.

110 S.W.3d 126, 130 (Tex. App. 2003). More generally, see cases collected in Danny R. Veilleux, Annotation, *Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant*, 87 A.L.R.4th 1004 (1991).

146. (1868) 3 L.R. 330 (H.L.).

2. Making no-liability policy judgments is best done at the front-end of the litigation process and not the back-end.¹⁴⁷ Neither the new Restatement nor Wisconsin has made a credible showing that conventional duty analysis should be supplanted.

3. Most courts permit juries to apply “practical politics” considerations to limit liability under appropriate proximate causation¹⁴⁸ instructions. Neither the new Restatement nor Wisconsin has made a convincing case to diminish the right of trial by jury by withdrawing this authority.

In short, this reviewer concludes that the new Restatement’s position on the use of foreseeability in the law of torts is not supported by the law most American courts apply and does not provide a more desirable alternative. The experience of the one court—Wisconsin—that takes pride in following (in part) Justice Andrews’s view provides no persuasive reason to change. While all courts should be encouraged to find better ways to do things, none should be beguiled to adopt the principles of the new Restatement on the simple say-so of the Restatement itself.

VII. CONCLUSION

Dean Prosser wrote *Palsgraf Revisited* because he believed that courts had inadequate standards to make predictable and consistent duty decisions. He expressed his discontent by providing a thumbnail description of decisions that appeared to him to be rationally irreconcilable. Acknowledging that Cardozo’s powerful *Palsgraf* imagery had been persuasive to most courts, Prosser fastened upon it as the focus of his dissatisfaction. Hence, Prosser provided us *Palsgraf Revisited*.

I fault Prosser for looking for a nirvana that has no existence in law. Rarely will a court make a difficult, fact based, policy driven decision that all thoughtful legal commentators will endorse. I myself have expressed dissatisfaction with *Smaxwell*.¹⁴⁹ Furthermore, few commentators would ever be possessed of the full knowledge about the cases that was available to the judges who made the decisions. Hence, summarizing a list of apparently irreconcilable cases is hardly proof that either the standards or the processes under which the cases were decided were faulty. In the course of time, any system that employs the judgment of human decision makers—

147. It must be acknowledged that the Wisconsin approach does not preclude making a dispositive “public policy” no-liability decision at the front end. *Hoida, Inc. v. M. & I. Midstate Bank*, 717 N.W.2d 17, 32 (Wis. 2006).

148. This is not a suggestion that the term “proximate causation” be used in instructions. Many courts present the concepts in understandable language without using the term.

149. Some readers may, of course, contest that I am a thoughtful legal commentator.

call it discretion¹⁵⁰—as to whether an actor should be held liable for harm caused by non-intentional acts will produce an array of apparently inconsistent outcomes.¹⁵¹ Judge Cardozo knew as much. “Life will have to be made over and human nature transformed”¹⁵² before perfect consistency in the exercise of judgment would occur. It will also produce a predominance of predictable outcomes that is silently accepted without comment.

APPENDIX

[Transcript of jury charge in *Palsgraf*]¹⁵³

The Court thereupon charged the jury as follows:

COURT’S CHARGE.

(HUMPHREY, J.)

Gentlemen, in this case there is no dispute of fact. Everybody says that on the day in question the plaintiff was on the platform of this railroad company, the defendant, and while she was thus upon the platform some fireworks fell from the hand of a passenger who was entering a car, which was then in motion, to the platform or the track, an explosion occurred, and that subsequently the plaintiff developed a nervousness which still persists and which, according to her claim, will persist for some time in the future.

There was no duty upon the part of the defendant to examine each passenger as he entered the platform to see what was in any package he might be carrying. The plaintiff herself carried a package, and she might just as well complain if a uniformed man had come up to her and insisted upon her opening her package and showing him what she had in it. No such duty devolves upon the railroad company in this case, and no negligence can be predicated upon the failure of the defendant to stop a passenger while moving across its platform and examining what he might have with him. If every passenger was examined who was entering a railway or trol-

150. Some of the best descriptions of discretion have been provided by Lord Denning, as these examples prove: “[D]iscretion, when applied to a court of justice means *sound discretion guided by law*. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular.” *Ward v. James*, [1966] Q.B. 273, 294 (Denning, J.) (quoting *Rex v. John Wilkes*, [1770] 4 Burrow 2527 (Mansfield, L.)).

151. *Id.* at 295 (explaining how “[t]he cases all show that, when a statute gives discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion, and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised, and thus ensure some measure of uniformity of decision. From time to time the considerations may change as public policy changes, and so the pattern of decision may change: this is all part of the evolutionary process.”).

152. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

153. <http://www.iulaw.indy.indiana.edu/instructors/Wilkins/Torts/record.htm#Charge> (last visited Aug. 10, 2007).

ley car or subway train, and searched for what he might have upon him, none of us would be able to get anywhere. The purpose of railroad travel is that we can get some place. That is not what the plaintiff claims was the negligence of the defendant that caused her injury. She claims that the guard upon the platform, the station platform, and the guard upon the train platform, were careless and negligent in the way they handled this particular passenger after he came upon the platform and while he was boarding the train, and that is the question that is submitted to you for your consideration. Did those men omit to do something which ordinarily prudent and careful train men should not omit to do?

Or did they do something which an ordinarily prudent and careful officer in charge of a railway train in the station platform should not have done? If they did, and the plaintiff met with her injuries through the careless act upon the part of the trainmen of the defendant, then she would be entitled to recover. If they were not at fault, if they did nothing which ordinarily prudent and careful train employees should do in regard to passengers moving upon their trains, then there can be no liability. If they omitted to do the things which prudent and careful trainmen do for the safety of those who are boarding their trains, as well as the safety of those who are standing upon the platform waiting for other trains, and that the failure resulted in the plaintiff's injury, then the defendant would be liable.

You should first discuss the question of the liability of the defendant, under the rules that I have given you, and if you should find the defendant guilty of no negligence, then your verdict would be for the defendant and you would not be concerned with the question of the amount of the plaintiff's injury.

If you should find, under the rules that I have given you, that the defendant is liable, then you would pass to the question of the amount that the plaintiff is entitled to recover.

If you reach that point in your discussion, you will give her a sum which will fully and fairly compensate her for the pain and suffering which came to her as a result of any physical injuries—bodily injuries—she may have sustained, and which she has endured from that time down to the present time; and if you find from the evidence that she will suffer in the future, then such sum as you shall say will compensate her for that future suffering, and in addition to that such sum as she lost in earnings during the time that she was incapacitated, and such reasonable sum as she was required to pay for medicines and medical attendance. Those are the elements or items which go to make up her claim for damages, but first settle the question of liability before you discuss the question of damages at all.

The burden of proof is upon the plaintiff. She must satisfy you by a fair preponderance or greater weight of the testimony that the accident hap-

pened solely through the fault of the defendant, through its trainmen or platform-men in the control of passengers going upon its trains.

The plaintiff and defendant are both interested. The plaintiff is seeking money and the defendant is seeking to avoid paying money, and each has that interest, which is apparent.

Have you any requests?

Mr. Wood: No requests, your Honor.

Mr. McNamara: I ask your Honor to charge the jury, that under the testimony in this case no negligence can be found on the part of the defendant unless it knew, or should have known, that the bundle carried by the passenger contained fireworks or explosives.

The Court: I decline to so charge.

Mr. McNamara: Exception. I ask your Honor to charge the jury that they may draw no inference from the defendant's failure to put witnesses on the stand.

The Court: I so charge.

Mr. McNamara: I ask your Honor to charge the jury that if they find that the defendant's servants were assisting the passenger upon the train and in so doing knocked the bundle from his hand, that the act of the servants is not the proximate cause of the plaintiff's injuries.

The Court: I decline.

Mr. McNamara: Exception.

Juror No. 1: Your Honor, may I ask a question? There was no evidence to show whether the door was shut at the time the train left, or the door was closed before the train went in motion. There has been nothing shown in the case. Am I permitted to ask that question?

The Court: Well, what have you to say about it?

Mr. Wood: I don't see that it makes any difference.

Mr. McNamara: In view of the question of the juror, I ask your Honor to charge the jury that the fact that the door of the train—

The Court: There is no evidence that the door of the train was closed, or the gate of the door was closed—the gate of the platform was closed. There is no evidence that it was closed. You may retire, gentlemen.

(The jury retired at 11:55 A.M. and returned at 2:30 P.M., finding a verdict in favor of the plaintiff in the sum of \$6,000.)

Mr. McNamara: If your Honor please, I move to set the verdict aside upon all the grounds specified in Section 549 of the Civil Practice Act.

The Court: Well, I think not. Of course, it is a close question in my mind, but, at the same time, I will let the verdict stand.

Mr. McNamara: Exception. May I have thirty and sixty days?

The Court: Yes.