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## CARDOZO AS TORT LAWMAKER

Gary T. Schwartz\*

In his tort opinions, was Cardozo a lawmaking judge? Was he, as the title of Professor Kaufman's article claims, a "paradigmatic lawmaker?"<sup>1</sup> If Cardozo was a lawmaker, what was the quality and character of his lawmaking? Obviously, if a judge makes wise law, the judicial lawmaking process looks much more attractive than if the judge makes bad law, or even mediocre law.

From *The Nature of the Judicial Process*,<sup>2</sup> we learn Cardozo's deliberated views. Judges do make law, Cardozo reported—and his affirmation of this at the time evidently made his Storrs Lectures a sensational event. Yet, according to Cardozo, when judges make law, they generally do so only in the "gaps" or "interstices" brought about by precedent.<sup>3</sup> This suggests one point, and poses one related inquiry. The point is that judicial lawmaking, if limited to filling in the gaps, has less practical importance than it otherwise might; for the prior rulings which themselves provide the framework for those gaps are deemed to be generally immune from judicial reconsideration.

A related question concerns the frequency with which individual cases do indeed fall within gaps and interstices. After all, adherents to early versions of Critical Legal Studies advanced a theory of radical indeterminacy, pursuant to which no case, analyzed carefully enough, could authentically be seen as governed by precedent.<sup>4</sup> Under such a view, even if it is conceded that judges make law only within gaps, every case contains enough of a gap to give the judge the leeway to choose what result he wants to reach (though the reasons he gives for such a result—his holding—may well be significantly constrained by precedent). However, more recent writers—critiquing the radical indeterminacy thesis—have affirmed a theory of moderate indeterminacy, pursuant to which, for many cases, precedent does indeed yield

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1. Andrew L. Kaufman, *Benjamin Cardozo As Paradigmatic Tort Law Maker*, 49 DEPAUL L. REV. 281 (1999).

2. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

3. *Id.* at 113-14.

4. See, e.g., David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243 (1984).

clear results, though for many others gaps can be recognized.<sup>5</sup> The relevant passage in *The Nature of the Judicial Process* suggests that Cardozo would regard even the moderate indeterminacy thesis as coming on somewhat too strong; according to Cardozo, creativity is required of the judge in a percentage of cases that is “not large indeed, and yet not so small as to be negligible.”<sup>6</sup> In a later presentation, Cardozo indicated that in no more than 10% of all cases is there any uncertainty about the proper result.<sup>7</sup>

The body of Cardozo’s tort opinions are roughly in line with Cardozo’s extrajudicial statements about judicial lawmaking. As a New York judge, in no tort case that I know of did Cardozo overrule precedent.<sup>8</sup> Indeed, on occasion, he followed precedent even when he thought it reached an awful result. In *Schloendorff v. The Society of New York Hospital*<sup>9</sup> and *Hamburger v. Cornell University*,<sup>10</sup> for example, Cardozo affirmed and applied the doctrine of charitable immunity, even though he privately advised his fellow judges that he found the doctrine “foolish, antiquated, and unjust.”<sup>11</sup> It “ought to be abolished,”<sup>12</sup> he indicated—but abolition was not within the judicial function. Insofar as he followed precedent where it was clear even when he thought it was quite wrong, Cardozo comes across as a tepid lawmaker. Indeed, in worker injury cases, Cardozo applied the defenses of assumption of risk<sup>13</sup> and the fellow-servant rule<sup>14</sup> without even pausing to ask the question whether the defenses themselves

5. See, e.g., Lawrence B. Solum, *Indeterminacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 448 (Dennis Patterson ed., 1996); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

6. CARDOZO, *supra* note 2, at 165.

7. See BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 60 (1924).

8. As a Justice on the United States Supreme Court, Cardozo’s opinion in *Pokora v. Wabash Railway Co.*, 292 U.S. 98 (1934), is seen by some as overruling *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66 (1927), insofar as *Pokora* treated as a jury issue whether the plaintiff had been contributorily negligent in not getting out of his car as he approached a railroad crossing. Yet Cardozo was careful in *Pokora* to say he was not overruling *Goodman*. *Pokora, supra* at 102-06. And Cardozo was correct in this. The leave-the-car language in *Goodman* not only was seemingly dictum, but also was conditioned by “if” and “although” clauses that made it considerably less than a firm standard. *Goodman, supra* at 70.

9. 105 N.E. 92 (N.Y. 1914). In this case, which involved a hospital, Cardozo seemed enthusiastic about charitable immunity.

10. 148 N.E. 539 (N.Y. 1925). In this case involving a university, Cardozo seemed somewhat skeptical about the immunity rule.

11. Cardozo’s report is quoted in ANDREW L. KAUFMAN, *CARDOZO* 252 (1998).

12. *Id.*

13. See *Dougherty v. Pratt Inst.*, 155 N.E. 67 (N.Y. 1926) (perfunctory opinion holding that the worker assumed the risk as a matter of law).

14. See *Fitzgerald v. O’Rourke Eng’g Constr. Co.*, 105 N.E. 111 (N.Y. 1914) (perfunctory opinion).

were right or wrong. In another worker injury case, Cardozo applied the New York rule that placed the burden of proof on the issue of contributory negligence on the plaintiff, even though that rule was out of line with the more general practice nationwide.<sup>15</sup>

Cardozo was tepid, moreover, in somewhat related ways. When in tort cases he agreed with the majority's result but possibly disagreed with its reasoning, he withheld his own views. There are no important Cardozo concurring opinions; he was a solid team member. Nor, in fact, are there any Cardozo dissenting opinions in tort. When he regarded the majority's result as mistaken, he noted his dissent but did not write an opinion. This happened even when the majority evidently exalted form over substance,<sup>16</sup> and even in cases raising important and interesting issues such as tort liability for prenatal injuries.<sup>17</sup>

On several occasions, however, Cardozo did encounter issues that were free of precedent (at least in New York) and therefore provided him with lawmaking opportunities. *H.R. Moch Co. v. Rensselaer Water Co.*<sup>18</sup> and *Ultramares Corp. v. Touche*<sup>19</sup> are good examples of this—cases in which Cardozo did indeed make law. In dealing with *Moch* and *Ultramares*, I regard it as obvious that the judge's "lawmaking" includes holdings that withhold liability as well as holdings that impose liability. Too often, terms such as "lawmaking" and "creativity" are employed or defined in ways that give those terms a distinct pro-liability bias.

As a New York judge, only in *Hynes v. New York Central Railroad*<sup>20</sup> and *MacPherson v. Buick Motor Co.*<sup>21</sup> did Cardozo really lean on or manipulate precedent somewhat in order to achieve the results he desired. *Hynes* recognized a somewhat ad hoc limitation to an otherwise general rule of the landowner's nonliability to trespassers. *MacPherson* endorsed a new pro-liability standard, despite considerable contrary indications in the case law.

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15. *McCabe v. Rosoff Haulage Co.*, 166 N.E. 343 (N.Y. 1929).

16. *See, e.g., Kettel v. Erie R.R.*, 122 N.E. 885 (N.Y. 1919). This case is discussed in KAUFMAN, *supra* note 11, at 254-55.

17. *See Drobner v. Peters*, 133 N.E. 567 (N.Y. 1921). At this point, I should make clear that the cases discussed in the previous paragraphs were unknown to me until I learned of them from Professor Kaufman's thorough and admirable account. Given the selection criteria that coursebooks employ, they necessarily omit opinions like *Schloendorff* and *Hamburger*. Those coursebooks thereby convey to readers a serious misrepresentation of Cardozo's overall position.

18. 159 N.E. 896 (N.Y. 1928).

19. 174 N.E. 441 (N.Y. 1931) (rejecting accountants' liability in negligence to non-privy plaintiffs, though supporting liability for fraud, broadly defined).

20. 131 N.E. 898 (N.Y. 1921).

21. 111 N.E. 1050 (N.Y. 1916).

How should we size up opinions such as *Hynes* and *MacPherson*? I agree with Professor Kaufman<sup>22</sup> that Professor Richard Weisberg errs<sup>23</sup> insofar as he seemingly regards *Hynes* as representative of Cardozo's general approach; *Hynes* is, to the contrary, an unusual episode for Cardozo. I also agree with Professor Kaufman that the common law background for *MacPherson*, especially in New York, was much more confused and ambiguous than has been generally supposed—though I still find that *MacPherson* endorses a standard that is much more solidly in favor of liability than anything that had preceded it.<sup>24</sup> *Winterbottom v. Wright*,<sup>25</sup> as Cardozo correctly pointed out,<sup>26</sup> did not involve a manufacturer defendant, but rather a defendant operating under a service contract, who apparently had failed to repair. The defendant's negligence evidently taking the form of a failure to act, *Winterbottom* may well be an affirmative duty case, which means that the contract does have relevance by way of understanding the scope of the defendant's undertaking. Moreover, the prior record of the New York Court of Appeals did contain precedents imposing liability on the supplier of a scaffold<sup>27</sup> and a steam-driven coffee urn.<sup>28</sup>

Stepping back and looking at Cardozo's general approach to tort law, it can properly be said that Cardozo accepted the doctrine of negligence liability—in each of its two parts. Part one is this: when a defendant is negligent, he should bear liability. Part two is: when a defendant is not negligent, he should generally not be liable. For Cardozo, accepting the negligence liability doctrine was not at all a matter of being bound by precedent. As Professor Kaufman persuasively shows,<sup>29</sup> Cardozo was entirely comfortable within the framework of a

22. See KAUFMAN, *supra* note 11, at 281.

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

24. *Statler v. George A. Ray Manufacturing Co.*, 88 N.E. 1063 (N.Y. 1909), for example, found liability appropriate because a steam-driven coffee urn was an "inherently dangerous" product which becomes "imminently dangerous" if negligently constructed. *Id.* at 1064-65. But in his *MacPherson* opinion, Cardozo rejected the distinction between "inherently dangerous" and "intrinsically dangerous" as a "verbal nicet[y]." 111 N.E. at 1055.

It can be noted, however, that the rationale supplied by Cardozo in *MacPherson* had indeed been articulated in a prior intermediate-court New York opinion. See *Kahner v. Otis Elevator Co.*, 89 N.Y.S. 185, 188 (App. Div. 1904). "[A]lthough a machine may not be in its nature inherently dangerous, yet, if it is made so by the neglect of a manufacturer having notice and knowledge that it is to be used by others than the purchaser, . . . such manufacturer is liable . . . because of that negligence." *Id.* The Court of Appeals affirmed this ruling without opinion. *Kahner v. Otis Elevator Co.*, 76 N.E. 1097-98 (N.Y. 1905).

25. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. Ch. 1842).

26. *MacPherson*, 111 N.E. at 1054.

27. See *Devlin v. Smith*, 89 N.Y. 470 (1882).

28. See *Statler*, 88 N.E. at 1063.

29. KAUFMAN, *supra* note 11, at 310.

negligence-based liability system; he accepted as a given its basic correctness. Unlike Holmes, he was in no way intrigued by such strict liability examples as *Rylands v. Fletcher*,<sup>30</sup> and the New York blasting cases.<sup>31</sup> Nor did he display any interest in the enterprise liability writings which were then emanating from legal centers such as Yale, and which were implicated in emerging workers' compensation programs.

If Cardozo accepted the negligence liability rule as a given, did he contribute to an illumination of the negligence doctrine? The answer to this question is affirmative, and the key case is *Adams v. Bullock*.<sup>32</sup> Professor Kaufman treats this case as simply an instance of a no-liability holding in a case involving a trolley company as the defendant.<sup>33</sup> In fact, however, Cardozo's opinion in *Adams* merits substantial attention (and it is indeed highlighted in Robert Rabin's co-authored torts coursebook).<sup>34</sup> In *Adams*, Cardozo noted that trolley companies, and also power companies, rely on high-strung energized electric wires.<sup>35</sup> In each situation, the risk of someone coming into contact with such a line at any particular out-of-the-way location is quite small, but still was more than zero. A relevant distinction, however, is that power companies can provide safety through the acceptable precaution of insulating the power line. The precaution of insulation is not, however, available to a trolley company. All it can do is bury the electric line underground—and the burden of such a precaution Cardozo deemed to be excessive.<sup>36</sup> Hence the proper result in *Adams* was a directed verdict for the trolley company defendant.

*Adams* is an excellent opinion. What it implies—and very usefully illustrates—is a balancing approach to negligence, an approach that balances the magnitude of the foreseeable risk against the burden of risk prevention. Yet while I admire the opinion, my admiration is limited by two considerations. The first is that in *Adams* the balancing approach to negligence is only implicit. It would take a far more creative judge—namely Learned Hand<sup>37</sup>—to make that approach explicit in an important judicial opinion.<sup>38</sup> Secondly, and despite Professor

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30. 19 L.T. 220 (1868).

31. *E.g.*, *Booth v. Rome, W. & O.T. R.R.*, 35 N.E. 592 (N.Y. 1893).

32. 125 N.E. 93 (N.Y. 1919).

33. KAUFMAN, *supra* note 11, at 281.

34. MARC FRANKLIN & ROBERT RABIN, *TORT LAW AND ITS ALTERNATIVES* 31 (6th ed. 1996).

35. *See Adams*, 125 N.E. at 94.

36. *Id.*

37. Cardozo and Hand were reasonably good friends. *See KAUFMAN, supra* note 11, at 148, 153-54.

38. *See United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *see also Moisan v. Lotfus*, 178 F.2d 148, 149 (2d Cir. 1949); *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940).

Kaufman's suggestion that Cardozo was a "pragmatic" judge,<sup>39</sup> there is not a word in *Adams v. Bullock*—indeed, not a hint—about what the goals or purposes of a negligence liability regime might be. Whether the objective of negligence law is deterrence, or instead corrective justice,<sup>40</sup> is a question that *Adams* does not address, nor in any way cast light upon. In accepting a negligence rule as in essence innate—in finding himself entirely at home with such a rule—Cardozo simply declined to ask himself what the rule itself was all about.

Cardozo's two most famous tort opinions involve not so much the negligence rule as such, but rather the extent of liability within a negligence system. These two are of course *MacPherson* and *Palsgraf v. Long Island Railroad*.<sup>41</sup> Judge Posner ventures the view that *Palsgraf* is the only judicial opinion to be reproduced in every torts coursebook.<sup>42</sup> My own estimate is that Posner is wrong—and that *MacPherson* is presented as universally as *Palsgraf*. Let me then address these two dramatic opinions, beginning with *MacPherson*.

In that case, the manufacturer's "privity"-based argument stipulated that the manufacturer *did* owe a negligence obligation to the retailer, but owed *no* such obligation to any other party.<sup>43</sup> Keep in mind that in many of the earlier cases involving claims of privity, the defendant had individually fabricated the product in question. Keep in mind, as well, that in many of those cases the defendant had sold the product to a party who could be expected to be the product's ultimate owner. *MacPherson*, however, involved the privity argument in the context of mass production, pursuant to which manufacturers distributed products throughout the nation, by way of a network of retailer intermediaries.<sup>44</sup> I am unaware of any prior case in England or New York in which the privity doctrine had shielded a mass-producing manufacturer from liability for an injury suffered by the ultimate consumer. Indeed, in this mass production context, the manufacturer's argument in favor of tort-liability-based-only-on-privity was highly unattractive,<sup>45</sup> perhaps even a reduction to absurdity. Accordingly, Cardozo's decision to reject it—and reject it firmly—was quite justi-

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39. See KAUFMAN, *supra* note 11, at 218-19.

40. The choice between the two goals is discussed in Gary T. Schwartz, *Mixed Theories of Tort Law, Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

41. 162 N.E. 99 (N.Y. 1928).

42. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 42 (1990).

43. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

44. See *id.*

45. It is interesting to note how courts prior to Cardozo's *MacPherson* ruled on the issue of the negligence liability of auto manufacturers. Liability was affirmed in *Olds Motor Works v. Shaffer*, 140 S.W. 1047 (Ky. 1911). Liability was rejected—but by a divided court—in *Cadillac Motor Car Co. v. Johnson*, 221 F. 801 (2d Cir. 1915). In *MacPherson* itself, when the case first

fied. To use the idiom of Chicago movie criticism, on balance the *MacPherson* opinion justifies an evaluation of thumbs up.

Yet despite that evaluation, in important ways, the *MacPherson* opinion can be seen as superficial. First of all, the opinion fully accepts the manufacturer's position that there was no contract relationship between the manufacturer and the ultimate consumer. Interestingly enough, this is a position that is rejected by a modern economic analysis, which treats products liability as a situation in which there is a meaningful, even if somewhat indirect, bargaining relationship between the manufacturer and the ultimate consumer.<sup>46</sup> The manufacturer, after all, designs a product so that it includes a set of attributes that will appeal to consumers; the manufacturer, by establishing the product's wholesale price, essentially determines the product's retail price range; and the manufacturer calls the product to the attention of consumers through extensive advertising. The consumer then responds to the overall package prepared for him by the manufacturer by buying the product. When I purchase a loaf of packaged bread, I know what I like;<sup>47</sup> I then shop at whatever nearby market carries that product. When I need a car (the product involved in *MacPherson*), I figure out first what model I want, and only then begin considering the dealer with whom I might do business. Broadly defined, then, there may well be an important though implicit kind of "privity" between the manufacturer and the consumer in a case such as *MacPherson*. Yet this is a possibility that Cardozo does not bring up. Most of the time, he limits himself to stating that the manufacturer had knowledge that the product would be transferred from the retailer to some other party.<sup>48</sup> The most he is willing to say is that the manufacturer sold to the retailer knowing that the *retailer* intended to sell to another party, the consumer.<sup>49</sup> The more important point—that the *manufacturer* was itself seeking to reach that consumer—is a point that Cardozo does not really make.

But having affirmed that there is in a meaningful way a contract relation between the manufacturer and the consumer, I can go on to the next point, which is that the presence of this relationship may weaken the argument for tort liability rather than strengthen it. After

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reached the Appellate Division, that court had ruled in favor of liability. *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224 (App. Div. 1912).

46. See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 97-106 (2d ed. 1989).

47. Currently, Roman Meal Honey Wheat Berry; this is for the ritual of my breakfast toast.

48. *MacPherson*, 111 N.E. at 1053.

49. *Id.* Here Cardozo's analogy is to the seller of a scaffold who knows that the buyer of the scaffold expects to turn it over to his employee for use.

all, the manufacturer is in a position to offer the consumer an express warranty as to product quality. Moreover, by the time of *MacPherson*, the law had developed an implied warranty claim which the consumer could assert at least against the retailer, if not against the manufacturer.<sup>50</sup> Moreover, if the consumer collects against the retailer on this implied warranty claim, the retailer will no doubt seek indemnification from the manufacturer. The consumer's recovery, then, is essentially financed by the manufacturer. Why, then, is this implied warranty remedy not adequate for purposes of compensating the consumer and imposing the burden of liability on the manufacturer? This has to be regarded as an important issue to take into account in evaluating the *MacPherson* holding. Yet this is an issue that the Cardozo opinion does not discuss.<sup>51</sup> The brief for the plaintiff in *MacPherson* had argued that it would not be satisfactory for the law to rely on the consumer's remedy against the retailer, because that would "surely" lead to a "circuitry of action" as the retailer sought "recourse over the" manufacturer.<sup>52</sup> This brief went on to argue that by imposing liability directly on the manufacturer, the law can properly elevate "substance" over "form."<sup>53</sup> The plaintiff may have been right in all of this. But even if so, the Cardozo opinion's neglect of this range of issues renders the opinion significantly incomplete, and makes the liability issue considered in *MacPherson* appear excessively stark or dramatic.

As for *Palsgraf*, even though its universality in coursebooks is matched by *MacPherson*, it is *Palsgraf* that has come to symbolize the entire experience of being a law student—at least a first-year law student.<sup>54</sup> When the torts course is offered in the fall semester, I typically reach *Palsgraf* in October. I tell my students that when they return to

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50. A few years after *MacPherson*, Cardozo dealt with the implied warranty doctrine in *Chysky v. Drake Bros. Co.* 139 N.E. 576 (N.Y. 1923). In *MacPherson* itself, the defendant's brief to the New York Court of Appeals stated that "[a] vender owes a duty to his vendee, and for a failure of that duty, an action may be brought upon the contract or upon the warranty, expressed or implied." Brief on Behalf of Appellant at 10, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). In his own brief, the plaintiff's counsel expressed his "belief" that the plaintiff could have successfully sued the retailer. Respondent's Brief at 22, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

51. It is true that the implied warranty doctrine would not confer rights on parties unrelated to the product purchaser, such as the innocent bystander. But in *MacPherson*, Cardozo himself declined to consider whether the bystander can bring a negligence claim. 111 N.E. at 1053.

52. Respondent's Brief, *supra* note 50, at 22-23; *but see id.* at 48-49 (suggesting that implied warranty liability might not extend beyond the cost of replacement and repair).

53. *Id.* at 22-23.

54. *See, e.g.*, Marly Swick, *Moscow Nights*, ATLANTIC MONTHLY, Aug. 1990, at 59. This recent short story involves a young couple that break up, with the woman then enrolling in law school (at UCLA).

their families for Thanksgiving vacation, it is likely that several of them will encounter a friend or relative who, having learned they are in law school, will ask them: "What do you think of that *Palsgraf* case?" Every year, at the end of Thanksgiving vacation, several students come knocking on my door to tell me that my prediction has indeed been borne out.

*Palsgraf*, then, undeniably exerts a fascination. What can be said about the case? I myself regard as quite correct Cardozo's result, denying liability. I also regard as correct his opinion's emphasis, in reaching that result, on the scope of the foreseeable risk. Despite these elements of agreement, I still regard Cardozo's opinion as a misfortune.<sup>55</sup> While I generally thrive in teaching the torts course, I do not look forward to the day on which *Palsgraf* is the agenda.<sup>56</sup>

My complaints about *Palsgraf* are several. One concerns the finding of negligence. In the case, two employees had helped a passenger who was attempting to board a moving train. The passenger dropped a package—which turned out to contain explosives.<sup>57</sup> The resulting explosion knocked over a scale some distance away, injuring the plaintiff who was standing near the scale. The jury found the railroad negligent, and the Appellate Division affirmed this finding.<sup>58</sup> In doing so, the Appellate Division assumed that the railroad's negligence consisted of unreasonably endangering the passenger's own safety by shoving him towards the train when the railroad should instead have been discouraging him from boarding a moving train.<sup>59</sup> For whatever reason, the Cardozo opinion rejects the Appellate Division's understanding. According to Cardozo, there was no risk at all to the passenger; the railroad's negligence consisted merely of unreasonably endangering the contents of the passenger's package.<sup>60</sup> Yet so characterized, the negligence of the railroad is so peculiar, so artificial, and

When [she] answered on the second ring, he was surprised. "It's Saturday night," he said. "I didn't think you'd be home."

"In law school there's no such thing as a Saturday night." She sounded impatient.

"I'm in the middle of *Palsgraf v. Long Island Railroad*. This better be good."

*Id.* at 60.

55. Another scholar who finds Cardozo's *Palsgraf* unsatisfying is Bill Powers. See William Powers, Jr., *Thaumatrope*, 77 TEX. L. REV. 1319, 1334 (1999).

56. One point is that the *Palsgraf* opinions are generally set forth in coursebooks at considerable length. It is therefore necessary to spend a full class hour teaching the case. If, as I believe, the yield of the case is slight and the confusions in the case numerous, this turns out to be an unproductive hour.

57. *Palsgraf v. Long Island R.R.*, 225 N.Y.S. 412, 413 (App. Div. 1927).

58. *Id.*

59. *Id.*

60. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928). "The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his

so unreal as to render *Palsgraf* a terrible vehicle for discussing the limitations on the liability of any genuinely negligent defendant.

Secondly, the Cardozo opinion, having hinted at a theory that would exclude liability for unforeseeable outcomes, then limits that theory to the particular problem of the unforeseeable plaintiff. Indeed, the Cardozo opinion explicitly assumes, if only for the sake of argument, that if a foreseeable plaintiff suffers an altogether unforeseeable injury, the plaintiff can secure a recovery.<sup>61</sup> This arguendo assumption would apply to plaintiffs' claims in many important proximate cause cases.<sup>62</sup>

Assume, for example, a slightly modified version of Judge Keeton's well-known hypothetical.<sup>63</sup> The defendant leaves a package of poison on a kitchen shelf; this is negligent, because a person such as the plaintiff could mistake the poison for food, and in consuming it, suffer injury. In fact, the can of poison is located near a pipe on the shelf. Even though the defendant had no reason to appreciate this, the proximity of can and pipe creates a risk of the can's explosion; in fact, the can does explode, and in doing so, injures the plaintiff. While in such a case the defendant's overall conduct is in some sense the cause of the plaintiff's injury, the plaintiff has not been injured because of the negligent aspect of that conduct. The injury is not part of that foreseeable risk which renders the defendant's conduct negligent in the first place. Under Judge Keeton's theory of proximate cause, the plaintiff would hence be denied recovery.<sup>64</sup> Yet under Cardozo's arguendo assumption, the plaintiff would evidently have a winning claim.

All of this prompts criticism. If one accepts (as I do) Judge Keeton's proximate cause analysis, then the right result is to deny liability

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person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to property interest only, the safety of his package." *Id.*

61. *Id.* at 101. "We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary." *Id.*

To make things even more complicated, Cardozo then introduced an arguendo assumption into his arguendo premise. The foreseeable plaintiff who suffers an unforeseeable injury might not be able to recover if the injury involves a different "interest" than the interest foreseeably threatened by the defendant's negligent conduct. *Id.*

62. Under this arguendo assumption, the plaintiff (quite without regard for the factor of directness) would be able to recover in *In re Polemis*, 90 L.J.K.B. 560 (1921), because the defendant's negligence in that case foreseeably threatened harm to the plaintiff's vessel. A recovery could also be granted to the plaintiff in *The Wagon Mound (No.1) (Overseas Tankship (U.K.)) Ltd. v. Morts Dock & Engineering Co.*, [1961], 1 App. Cas. 388 (P.C. 1960) (appeal taken from Australia). In this case, the defendant's negligence foreseeably threatened harm to the plaintiff's dock.

63. See ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 3 (1963).

64. *Id.* at 9.

for unforeseeable injuries. While the Cardozo opinion moves somewhat in this direction, it nevertheless imposes a major limitation on that idea that confounds analysis—and that makes *Palsgraf* an inadequate vehicle for discussing the scope-of-the-foreseeable-risk proximate cause rule that Keeton recommends. At least in my course, that discussion must await later English opinions such as *The Wagon Mound (No. 1)*<sup>65</sup> and *Doughty v. Turner Manufacturing Co.*<sup>66</sup>

Also, the Cardozo opinion, having narrowed the issue to that of the unforeseeable plaintiff, then indicates that the doctrine of proximate cause has nothing to do with the case. That doctrine is indeed “foreign” to the case<sup>67</sup>—which instead turns exclusively on the issue of duty. All of this invites further criticism. By introducing a duty concept that is supposedly quite separate from a proximate cause concept, the Cardozo opinion prompts a long dissent by Andrews that discusses duty before it turns to proximate cause. Andrews’ broad definition of duty makes it seem as though he is very strongly pro-liability. But when (and if) attention is finally focused on Andrews’ treatment of proximate cause, his version of proximate cause turns out to be much less pro-liability than one might have assumed. While that version of proximate cause would indeed support liability in *Palsgraf* itself, it is also generally consistent with the denial of liability in *Ryan v. New York Central Railroad*<sup>68</sup>—and it would as well be unstructured and arbitrary in a way that makes that version highly unattractive. If, as Andrews states, proximate cause depends not on “logic” but rather on “expediency,” “practical politics,” “convenience,” and “a rough sense of justice,”<sup>69</sup> then how in the world does a trial judge instruct the jury? Likewise, how does an appellate court determine whether a trial judge has ruled correctly? In any event, the analytic deficiencies and the anti-liability implications in Andrews’ account of proximate cause are obscured by his more dramatic and unambiguous pro-liability pronouncements on the duty issue.<sup>70</sup> These are pronouncements that could have been avoided altogether had Cardozo defined the issue properly as one of proximate cause rather than of duty—and had

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65. *The Wagon Mound (No. 1)*, 1 App. Cas.

66. 1 All E.R. 98 (1964). *Doughty* is indeed a difficult case because the injury that happened is reasonably close to the injury that could have been foreseen.

67. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928).

68. 35 N.Y. 210 (1866). In discussing the *Ryan* problem, Andrews indicated that “[w]e may regret that the line was drawn just where it was, but drawn somewhere it had to be.” *Palsgraf*, 162 N.E. at 104.

69. *Palsgraf*, 162 N.E. at 103.

70. Judge Posner notes the deficiencies in Andrews’ treatment of proximate cause. POSNER, *supra* note 42, at 45-46. But he does not appreciate how those deficiencies receive reduced attention because of Andrews’ dramatic discussion of duty.

the case been fully debated in proximate cause terms. In fact, the two opinions join issue on the duty issue, a question which I regard as an irrelevancy. Worse yet, given Cardozo's emphasis on duty, there is simply no joinder on the issue of proximate cause.<sup>71</sup>

To make a bad situation worse, the Cardozo opinion is replete with grandiloquent quasi-philosophical rhetoric that captures but also confounds the reader.<sup>72</sup> There is not a word in the opinion that counts as genuine legal philosophy—that deals with the purpose or functions of the tort system.<sup>73</sup> In his review of the Kaufman biography, Professor Goldberg calls Cardozo “conceptual,” and applies this evaluation to the *Palsgraf* opinion.<sup>74</sup> I think he is right in this. But Goldberg is wrong in referring to a “pragmatic conceptualism.”<sup>75</sup> Rather, the Cardozo conceptualism is pretentious and essentially arid.<sup>76</sup>

In defense of Cardozo, about all one can say is that roughly sixty years later, Professor Weinrib was able to find a certain corrective justice quality in Cardozo's relational reasoning in *Palsgraf*.<sup>77</sup> However,

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71. In *Palsgraf* itself, the proximate cause argument against liability is that the defendant, in causing the package to drop, could not have foreseen that a scale some distance away would fall in a dangerous manner. Given this basic argument, the point that the plaintiff was an unforeseeable victim is derivative and redundant.

Consider the following hypothetical. At 4:00 p.m., the defendant negligently creates a hazard on a street in Beverly Hills that endangers those who encounter it. At that moment, the plaintiff is more than an hour away in Long Beach, where she lives and works. Indeed, it has been more than a year since the plaintiff has come to Beverly Hills. At 4:30, however, the plaintiff receives a phone call from an acquaintance visiting in Beverly Hills, suggesting they get together for dinner. At 6:00, the plaintiff, while driving in Beverly Hills, encounters the danger, and suffers injury.

If Cardozo's *Palsgraf* opinion requires that the plaintiff be specifically foreseeable at the time of the defendant's negligent act, that requirement has obviously not been satisfied. Accordingly, *Palsgraf* would deny the plaintiff a recovery—which would be a very unattractive result. Perhaps, in such a factual situation, *Palsgraf*'s “foreseeable plaintiff” requirement can be interpreted as referring to “anybody who encounters the hazard.” But so interpreted, a “foreseeable plaintiff” test adds nothing to a “foreseeable injury” standard; it is—again—derivative and redundant.

72. For Posner's discussion of the “bluff” involved in Cardozo's inflated rhetoric, see POSNER, *supra* note 42, at 45.

73. As the Kaufman book usefully shows, in *Palsgraf* Cardozo drew on a prior discussion among Restatement Reporters. KAUFMAN, *supra* note 11, at 290-93. I find this discussion similarly discouraging, because of a lack of any concern about what the ultimate goals are of tort doctrine, and, more generally, the tort system. But at least that discussion proceeds by way of an interesting give-and-take, and in straightforward language. There is nothing in it that resembles the pretentious overconfidence of Cardozo's *Palsgraf* opinion.

74. John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1456-57 (1999).

75. *Id.* at 1461-62.

76. Even Goldberg concedes that *Palsgraf* is on the “technical” side. *Id.* at 1469.

77. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 159-64 (1995). For similar reasoning in a recent article that speaks approvingly of Cardozo's duty analysis, see Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

corrective justice reasoning can also be found in the proximate cause rule that Judge Keeton has persuasively recommended. By requiring a meaningful causal connection between the negligent aspect of the defendant's conduct and the harmful consequences suffered by the plaintiff, that rule strengthens the relationship between the defendant and the plaintiff's injury in a way that supports a relational<sup>78</sup> or corrective justice understanding of tort law.

Overall, then, I confer on *Palsgraf* an evaluation of "thumbs down." Undeniably, no coursebook can afford to leave *Palsgraf* out. The case is too imposing, and has been too widely discussed to justify any such omission. Still, my view is that Cardozo in this instance has disserved the tort community.

I can conclude my Comment with this observation. In his own Comment, Judge Keeton has offered the view that, while he never met Cardozo personally, he feels that he knows Cardozo well through his judicial opinions.<sup>79</sup> I find Cardozo more elusive than this. The Kaufman biography answers certain questions about Cardozo, but leaves unanswered other questions, and suggests new questions of its own. Indeed, the more I learn of Cardozo, the more uncertain I am as to who he is and what he stands for. Why the judge who was so creative in *Hynes* should have accepted and applied a charitable immunity rule that he found atrocious, I do not know; nor do I know why Cardozo was a law reformer on manufacturer liability yet a complacent conservative on employer liability. But just as some mystery is the spice of life, it likewise is a spice of legal history. In this regard I do not find that Cardozo's elusiveness is in any important sense unsatisfactory.

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78. See KEETON, *supra* note 63, at 82-83.

79. Robert E. Keeton, *Andrew Kaufman's Benjamin Cardozo as Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 301, 301 (1999).

