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## RESPONSE TO ROBERT E. KEETON AND GARY T. SCHWARTZ

*Andrew L. Kaufman*

I want to begin by thanking Bob Clifford for his interest in tort scholarship and for his annual sponsorship of this conference on tort law. I am honored to have been invited into this den of torts scholars and I should begin my response to Bob Keeton and Gary Schwartz by expressing my gratitude to them for their thoughtful comments.

My major response to Bob Keeton is to apologize for my lack of clarity. What I meant to emphasize in my shorter version of some of the themes of my book is that by and large Cardozo's listeners and readers have not really understood the relation between the messages contained in *The Nature of the Judicial Process*. They have heard the messages as major and minor, and that may well be part of the reason why Cardozo has been pictured as a much more progressive judge than I think he really was. I have no quarrel with Bob's view that for Cardozo and, I might add, for Keeton, the law-making function and the restraints on that function are coordinate and complementary. But the coordination is complex. Judges lie along a spectrum in their tilt toward more involvement in lawmaking at one end and more deference to the restraints at the other. Cardozo is not easy to place on that spectrum, and I am sure that all of us here differ somewhat in where we would place him.

I think that Gary Schwartz and I are in general agreement about Cardozo's approach to tort law. The one thing I would emphasize more is that Cardozo's approach in particular cases was influenced greatly by the confidence his experience as a lawyer had given him in forming a vision of the facts of a case. My sense is that very often that vision determined the outcome of the case.

Gary sees *Adams v. Bullock*<sup>1</sup> as an illuminating case, and his comments make it so. I plead guilty to slighting that opinion. My only defense is the size of my book. One of the problems of writing a legal biography is that the author has to slight almost every case to some extent. But if I had read Gary's analysis before I turned in my manu-

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1. 125 N.E. 93 (N.Y. 1919).

script, *Adams v. Bullock* would have played a larger role in the torts chapter.

Gary does comment on the fact that Cardozo in his *Adams* opinion (and he might have added “and in other opinions as well”) does not comment on the nature and purpose of the objectives of negligence law—deterrence or corrective justice. I suspect that with his eclectic, accommodationist views, Cardozo would have answered: “both, depending on the particular circumstances.” But I would have been surprised if Cardozo had addressed that question in any given opinion. He was just one of seven judges on the court. His job was to decide large numbers of cases on a busy court by writing opinions that his colleagues would join. Writing ambitiously to discuss the large themes of tort law would have taken a good deal of time and could have lost votes. Cardozo wrote quickly and then moved on to the next case, rarely writing a concurring or dissenting opinion in which he might have explored his own views more freely. When he was convinced to write ambitiously, it was about the larger issues of being a judge. He never thought to be a doctrinal scholar in any field.

Gary spends most of his Comment on *MacPherson v. Buick Motor Co.*<sup>2</sup> and *Palsgraf v. Long Island Railroad*<sup>3</sup> giving the former a “thumbs up” and the latter a “thumbs down.” I agree with those conclusions, although in the case of *Palsgraf* for rather different reasons. As for *MacPherson*, I am uncertain about the warranty issue that Gary raises because of the doubt whether recovery could have been had in New York for personal injuries arising out of a breach of warranty at that time. The issue is dealt with, too briefly, at page 649 note 31 of my book.<sup>4</sup>

As to *Palsgraf*, I do not understand why Gary in his teaching does “not look forward to the day on which *Palsgraf* is the agenda.”<sup>5</sup> His discussion of that case makes it clear that his students must leave with a greater understanding of what the judicial function is all about, the different approaches that good judges might take, the controversial nature of those different approaches, and indeed how good judges may have gone wrong. I have talked about Cardozo’s doctrinal approach in that case enough in my book, but there is one point I want to pursue. Gary follows Bill Powers in criticizing Cardozo for failing to address the issue whether his theory for excluding liability for negligence to an unforeseeable plaintiff should also exclude liability for un-

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2. 111 N.E. 1050 (N.Y. 1916).

3. 162 N.E. 99 (N.Y. 1928).

4. ANDREW L. KAUFMAN, *CARDOZO* 649 n.31 (1998).

5. Gary T. Schwartz, *Cardozo As Tort Lawmaker*, 49 DEPAUL L. REV. 305, 313 (1999).

foreseeable injury to a foreseeable plaintiff.<sup>6</sup> It is true that Cardozo, following a prior New York case, *Ehrgott v. Mayor*,<sup>7</sup> was willing to assume, without deciding, that liability would follow in the latter case. While critical of many things Cardozo did in deciding *Palsgraf*, I am not critical of his decision not to revisit *Ehrgott* in this case. In private correspondence with Bill Powers, I have speculated that Cardozo himself might have written something like the following paragraph in response to the criticism:

On my view of the case, there is an issue in the law of liability for negligence that arises before the issue of causation. The question is whether the defendant and its employees who were helping a passenger on a train owed any duty of care to someone standing far away. The answer to that, in my view, and I might add, in the view of most of the wise people then working on the *Restatement of Torts*, is that they did not owe a duty unless their lack of care posed some foreseeable danger to people like Mrs. Palsgraf. It did not in this case. I found it helpful to segment the issues of negligence into discrete pieces, and so I did not have to face the large issue that so troubled my Brother Andrews. Whether *Ehrgott* was correctly decided or not, it was not necessarily inconsistent and we did not have to address that issue. We decided enough in *Palsgraf*. As for foreseeability, I think it important in deciding negligence liability issues, but I don't think it is the only consideration, and my opinions have so indicated. I don't think there is any formula for saying when it is conclusive and when it is not. My opinions in *Ultramares* and *Moch* make it clear that I believe that one limiting principle is that without some very good reason we should not extend negligence liability in indeterminate amounts to an indeterminate number of people. Other opinions show that legislative action can also be a limiting principle. And there are doubtless many more. I am flattered that so many distinguished people seem to be spending so much time on the opinions in this little case and have spun so many theories out of and about it. All I was trying to do was to decide one case that was before us and straighten out one little aspect in New York law in accordance with the direction in which my Torts masters seemed to be going.

My major criticism of *Palsgraf* is different from Gary's. Where I think Cardozo went off the track was in reversing the jury on the facts of foreseeability. He did that in other cases too, and that habit I think derived from his experience as a litigator. *Palsgraf* is a bit idiosyncratic on one point. If it had not been for the American Law Institute discussions, my guess is that he would simply have reversed in a more ordinary Cardozo opinion that confined itself more closely to the

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6. William Powers, Jr., *Thaumatrope*, 77 TEX. L. REV. 1320, 1329-31 (1999).

7. 96 N.Y. 264 (1884).

facts. I think he tried to “Make Some Law” or at least to provide a case to hang a Restatement section on. *Palsgraf* is the wrong case for judging Cardozo’s contributions to tort law, but Gary is right about its symbolic place in the first-year curriculum. His exposition helps to explain that place. *Palsgraf* gives creative torts teachers like Bob Keeton and Gary Schwartz so much to talk about.