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BY LESTER CLARK

At a depot of the Long Island Railroad a passenger with a small paper wrapped package under his arm ran to catch a train already moving out of the station. The passenger jumped for the step of the train, reached it, and then wavered there attempting to maintain his balance. Two of the train guards employed by the Railroad reached to grab the passenger and haul him to safety. As they did so they dislodged the package under his arm and it fell to the rails. Though the package to all appearances was innocuous, it in fact contained fireworks which exploded as a result of the fall. The shock wave from the explosion threw down some heavy scales many feet away. A Mrs. Palsgraf, standing under the scales, was struck by them and severely injured. She subsequently sued the Railroad for the injuries thus sustained. From the final decision in that suit, handed down by the New York Court of Appeals, arose the famous and controversial Palsgraf Theory. Mr. Justice Cardozo, who was at the time Chief Justice of the Court and wrote the Majority Opinion, took that occasion to propound a doctrine of negligence contra in many ways to what were until then considered the established doctrines. Justice Andrews, with the concurrance of Justices Crane and O'Brien, vendered a vigorous dissenting opinion supporting the accepted views. As its title indicates, this paper will not deal with the merits of the Palsgraf Theory or its reception in other courts but rather will attempt to define exactly what the theory is and the extent to which it was intended to alter theretofore accepted theories.

The Court was agreed as to the following conclusions of fact in the case: (1) It was foreseeable that the actions of the guards might result in injury to the passenger they assisted or to his package, and therefore there was negligence as to this passenger; (2) It was not foreseeable that the actions of the guards would result in injury to Mrs. Palsgraf; (3) Their actions were the proximate cause of the harm to Mrs. Palsgraf. (At least this contention of Andrews was not denied by Cordozo.) Thus it is seen that the split of the Court was caused entirely by differences in theory.

Justice Andrews contended that the theory applicable to the case was that developed from the dicta of the judges in Smith v. London & Southwestern Ry. Co., Exchequer Chamber, 1870. L.R. 6 C.P. 14. A brief statement of that doctrine might be: Once negligence is shown there is liability to all those whose injuries were proximately caused by the negligence regardless of the foreseeability of the injury to them.

Applying the admitted conclusions of fact to the doctrine, Andrews contended that the Railroad Company was liable to Mrs. Palsgraf since their acts (the acts of the guards, their employees) were negligent and were the proximate cause of the injury suffered. Chief Justice Cardozo, and the majority, held that the guards violated no basic duty of care to Mrs. Palsgraf despite the facts that they were negligent as to the passenger boarding the train and that this negligence caused the injury to Mrs. Palsgraf. If there was no violation of a duty of care to Mrs. Palsgraf then, Cardozo held, there was no liability for the injury. In the opinion of the majority, the factual conclusion that the injury to Mrs. Palsgraf was unforeseeable gave rise to the legal conclusion that there was no duty owed. The theory of duty on which the legal conclusion was based is the crux of the Palsgraf theory.

THE PALSGRAF THEORY OF THE DUTY OF CARE

Chief Justice Cardozo looks first for a duty of care *toward the plaintiff* laid upon the defendant's servants in their acts. He says that the duty of care - the duty to avoid negligence - is not thrust upon one unless there is foreseeable "To the eye of reasonable vigilance," or to the average prudent man, a possibility that the act complained of would injure the *complaining individual.* If the possibility of injury to any person or his interests could be foreseen, then a duty is laid upon the defendant to us due care in his actions to avoid injury to that person. A corresponding right to protection against resulting injury arises in those persons to whom the injury was foreseeable. The duty under which the defendant is put is a duty solely to those whose injury could be foreseen, and the right of protection against injury resulting from a breach of duty accrues solely to those persons.

Chief Justice Cardozo says the duty has an "orbit", or if you prefer, a range, which extends only so far as a prudent man might foresee harm spreading from the act. The duty extends only to those persons who are themselves within, or who claim interests within, the orbit of duty; i.e. the area within which injury is foreseeable. From this concept of the boundary of the duty comes the oft quoted statement that:

> "The risk reasonably to be perceived defines the duty to be obeyed."

ESTABLISHED DOCTRINES ALTERED BY THE THEORY

By tracing the limits of the intended applicability of the theory of Mr. Justice Cardozo in the Palsgraf case we may hope to arrive at a conclusion as to which niche in the Law he intended it to fill.

Justice Cardozo makes clear that in limiting the extent of duty to the extent of foreseeability of harm he does not mean to limit other factors of liability in negligence to the foreseeability-of--harm test.

The decision states that once the duty to a particular person is fixed, then it is not necessary that harm to that person or his interests occur in a foreseeable manner in order that there be liability for the breach of duty. Professor Cathcart's favorite illustration of this principle was the case of Reydon v. The Waterworks, 32 S.W. 828. A tank, on a negligently constructed water tower, fell from the tower onto a house below. This overturned an oil lamp in the house and the lamp's burning oil spread to the occupant of the house burning him to death. Possibility of harm to the occupant could be foreseen, hence there was a duty to him. However, the particular manner in which the harm occurred to him might be held unforeseeable - fire from water is certainly not a common occurrance and yet there was liability for the death. Liability here is not inconsistent with the Palsgraf theory, for Justice Cardozo says:

> "This (i.e.: that there is no duty to those not within the risk.) "does not mean, of course that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path."

Nor does the defendant necessarily escape liability

under the Palsgraf theory merely because he injured a *particular interest* of the plaintiff to which harm was unforeseeable if his act did foreseeably threaten harm to another interest of the plaintiff. Once the duty to the *particular plaintiff* has arisen through foreseeability of harm to the plaintiff's property interest, then the orbit-of-duty theory of the Palsgraf case is satisfied; and without inconsistency it would be held that there was liability for unforeseeable injury to the person of the plaintiff. Justice Cardozo only states as to this that:

> "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded."

What requires special emphasis is that the decision does not concern itself with proximate cause. The fact that the act of a defendant "proximately" or "directly" caused injury to a plaintiff would avail the plaintiff nothing unless he could show that the defendant owed him a duty. Unless duty could be shown the primary factor of the plaintiff's cause of action would be missing. The existence of a duty owing to the plaintiff from the defendant and a breach of that duty are, of course, the most essential parts of any cause of action. Justice Cardozo, not finding a duty owed to the plaintiff, had no occasion to touch upon the doctrine of proximate cause or its sub theories of intervening and responsible cause. True, the theory of the Palsgraf Case in application would limit the instances where an inquiry into proximate cause would be necessary, but it does not attempt to change the legal theory of causation itself.

In order to establish the defendants' liability under either the majority or minority view, the plaintiff must first establish that there was a duty of care owed, a breach of that duty by the defendant, and that this breach of duty proximately caused the plaintiff's injury. It is the doctrine of extent of duty, and not the doctrine of proximate cause, which was changed by the Palsgraf theory.

A better understanding of what is meant by the above statement may be facilitated by a more detailed exposition of older theories on which Justice Andrews based his dissent. The Andrews view of duty is that while the duty of care arises originally through foreseeability, still, once the duty does arise, then it

is owed to society in general, rather than only to those whose injury could be foreseen as Chief Justice Cardozo would have it. But, though he finds the duty general, Justice Andrews would not have liability extend to all those to whom the duty was owing. Liability extends only to those whose injury is "proximately" caused by the breach of the duty. Thus though the duty is unlimited the liability is restricted. But the restriction here is not the same as that used by Chief Justice Cardozo. Cardozo would apply a primary limitation of the duty while Andrews would supply only a secondary limitation of liability for the breach of the duty. It might be suggested that, whether the limitation is primary or secondary, it would be the same under an interpretation of proximate cause as foreseeable cause. But Justice Andrews rejects any such idea both by his statement that, "This is not a mere dispute as to words," and his correct interpretation of proximate cause as not consisting exclusively of, though including, the factor of foreseeability. Further, Justice Andrews does not view foreseeability from the same position as Chief Justice Cardozo. Foreseeability of effect in proximate cause is only necessary to continue the liability of the original where there is an intervening cause. The foreseeability, to Justice Andrews, is not necessary from the time of the original act but only from the time of the occurrence of the intervening cause. He says:

> "Given such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff."

Proximate cause, then, is used to limit liability once a duty is found. It draws an area of liability within the area of the duty. The Andrews view would leave the area of duty without boundary while the Cardozo view would limit this area of duty to the orbit of foreseeability. But still, within the area of duty the Cardozo theory would leave room for the doctrine of proximate cause to draw a smaller area of liability. Under this reasoning it may be concluded that the Palsgraf theory does not throw out the doctrine of proximate cause. However, the area drawn by proximate cause could not be larger - could include no more plaintiffs within its scope - than the area of duty. In this sense the Palsgraf theory servenly curtails the application of the doctrine of proximate cause for those

whose injuries are proximately caused by the act of the defendant might, in many cases, be without the area of duty as limited by foreseeability. Proximate cause, under the generally accepted rules of negligence, is used to determine the extent of liability, for an act otherwise determined to have been negligent.

It should be mentioned that the Palsgraf theory does not apply, once a duty to a particular person has arisen, to restrict the liability to that person to the degree of harm that was foreseeable. Thus, though a trifling scratch which a defendant negligently causes X could foreseeably entail only minor injury, but X, unknown to the plaintiff, has hemophilia and dies, the defendant would still be liable for the full consequence of his negligence. The defendant must still take the plaintiff as he finds him. Justice Cardozo says:

> "We may assume that negligence in relation to the plaintiff would entail liability for any and all consequences, however novel or extraordinary." (This on the theory that they are proximate when they are the direct consequences of the act.)

In conclusion it may be said that the Palsgraf theory as enunciated in the opinion did not intend to alter any theory of negligence other than that of duty. And it altered this theory only to the extent of the duty, not as to how the duty itself arose. It could be said that the Palsgraf theory gave a logical consistency to the theory of duty in negligence, for it carried on the idea as to how the duty arose to determine the extent of the duty. Brett, M.R., in Heaven v. Pender, Court of Appeal, 1883. 11 Q.B.D. 503, said:

> "Whenever one person is placed by circumstances in such a position with regard to another then everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such dangers."

(1) FOOTNOTE - Many writers, it must be warned, contend that the Cardozo view does change, and radically, the accepted doctrine of proximate cause.
Seavey, "Mr. Justice Cardozo and the Law of Torts," 52 Harvard Law Review. Goodhart, 39 Yale Law Journal.