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A Teaching Note on Negligence: *Palsgraf* Revisited

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Abstract
The case of *Palsgraf v. Long Island Railroad* (1928) provides an opportunity to engage students in a study of the cause of action termed negligence. The article explores issues relating to proof of negligence, defenses to negligence, and more directly, to the views of two American jurists, Benjamin Cardozo and William Andrews, relating to the issues of duty and causation—critical elements of proof.

Keywords: Negligence, Respondent Superior, Duty of Due Care, Causation, Compensatory Damages, Punitive Damages, Superseding Cause, Contributory and Comparative Negligence

A view of the East New York station of the Long Island Railroad (LIRR), seen in 2008

1. Introduction

The classic (and fun!) case of *Palsgraf v. Long Island Railroad* (1928) provides an excellent opportunity to engage students in studying the cause of action termed *negligence*. In doing so, a professor will be able to explore with his or her students the following topics (and perhaps others):

1. The *prima facie* elements of proof of negligence: duty, breach, causation, and damages;
2. Issues relating to contributory and comparative negligence;
3. Issues relating to the application of the doctrines of *Respondeat Superior* and *negligence per se*;
4. Issues relating to the application of the doctrine of assumption of risk or other potential defenses;

5. Issues relating to the divergent views of Judges Cardozo and Andrews of the New York Court of Appeals concerning the elements of duty and causation;
6. Issues relating to issues of foreseeability, "direct connection," "zone of danger," and intervening and superseding causes.

As an introduction to the study of *Palsgraf*, Dratler (2009, p. 23) wrote:

> "As lawyers, judges and law professors reach retirement age, there is little that we remember of our first-year course in torts. The cases we studied, our professors' personalities—even the psychological trauma of the first pointed Socratic question directed at us—all are lost in the mists of time."
>
> "Yet some things remain. Among them are the name and facts of Palsgraf v. Long Island Railroad Co., one of the most memorable cases in all of American common law. A great judge, Benjamin Cardozo, penned the majority opinion."

2. The Basic Facts (New York Times, August 25, 1924)

On Sunday, August 24, 1924, Helen Palsgraf, a 40-year-old single mother and part time janitor and housekeeper, was taking her two daughters, Elizabeth and Lillian, aged 15 and 12, to Rockaway Beach for a late summer outing. Having already paid the necessary fare, they were standing on the platform at the East New York station of the Long Island Railroad or LIRR on Atlantic Avenue in Brooklyn, when a train, which was not their train, pulled into the station. As the train began to pull out of the station, and with the doors not fully closed, two men raced to get onto the train, and one apparently made it without incident. The second man, carrying a package, "leapt aboard" with the help of a platform guard pushing him from behind, and a member of the train's crew pulling him into the car.

In the process, the man lost control of the package, which dropped on to the platform, exploding. The package apparently contained fireworks. What seems unclear is whether the force of the explosion or the panic the other passenger's experienced on the platform caused a tall, coin-operated scale to topple onto Mrs. Palsgraf. No one suffered injuries severe enough to spend the night in the hospital, although several people, Mrs. Palsgraf among them, were listed as injured in the official reports.

Recorded contemporaneous accounts and the testimony of witnesses at trial described the man as "Italian" in appearance. Speculation at the time indicated that the package containing the fireworks was being transported for use at an "Italian-American" celebration of some kind. Interestingly, no effort was apparently made to identify the owner of the package containing the fireworks. Mrs. Palsgraf's injury was chronicled in a story which appeared in *The New York Times* (1924) as "shock." [The under headline to "BOMB BLAST INJURES 13 IN STATION CROWD" stated "Package of Fireworks Explodes in Beach-Bound Throng at East New York. A PANIC AS TRAIN IS SHAKEN, Windows are smashed on Jamaica Express and Part of Platform Is Ripped Up."]

Mrs. Palsgraf also suffered some minor bruising. The actual distance between Mrs. Palsgraf and the explosion was never made clear in the transcript of the trial or in the opinions of the judges who ruled on the case; however, the distance from the explosion to the scale was described in the *Times* as "more than ten feet away" or about 3 metres. Witnesses testified that Mrs. Palsgraf was about 6 feet away. Several days after the incident, Mrs. Palsgraf developed a "bad stammer," and her doctor testified at trial that the condition was caused by the trauma of the events Mrs. Palsgraf had experienced at East New York station. She had not yet recovered from the stammer when the case came to court. Healy (2021) wrote: "The accident left her with a nervous disorder and a speech impediment that eventually rendered her completely mute. Today she might be diagnosed with PTSD."

The trial court awarded Mrs. Palsgraf $6,000 in compensatory damages, which was reversed on appeal. In addition, Mrs. Palsgraf, whose annual salary was $416 per year. was ordered to reimburse the Railroad $559.60 for its costs and fees (Healy, 2021). The decision of the appellate court is one of the most parsed and debated decisions in the annals of tort law—more specifically negligence actions—in American legal history. In addition, the fact that two

very prominent American jurists squared off in their views on the nature of proof required in negligent actions relating to *duty* and *causation* have made the case a favorite for both professors and their students alike.

2.1. Points of Disagreement

A requirement under the law of torts is that the consequences of a party's negligence must be reasonably foreseeable to result in injury to a plaintiff. The website US Legal (2023) notes: "In such cases, the resultant injury was reasonably predictable by a person of ordinary intelligence and circumspection as in the case of throwing a heavy object at someone." Relying on a theory of *foreseeability*, Judge Cardozo (later United States Supreme Court Justice) found that neither the platform guard nor the conductor owed Mrs. Palsgraf a *legal duty of care* because the injury to Mrs. Palsgraf was not foreseeable (see MacDougall, 2019). Judge Cardozo wrote that "[t]he 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."

Later in his opinion, Judge Cardozo wrote "[o]ne 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." Cardozo suggested that because the contents of the package were unknown, it was not foreseeable that someone on the other end of the platform would be injured. "In other words, the railroad owed the plaintiff no duty unless its employee could reasonably foresee the danger to her and so was culpable in failing to avoid it" (Dratler, 2009; see also Kelly, 2020).

Interestingly, the dissent in *Palsgraf* penned by Judge William Andrews has also been instrumental in shaping the law of torts in the United States relating to the issue of causation—although Judge Andrews' view did not prevail in the *Palsgraf* case itself. Judge Andrews would have found for Mrs. Palsgraf on the basis of an explication of the doctrine of proximate cause leading from a negligent act to its "direct connection" to the injury of a plaintiff. Andrews first concluded that the platform guard and conductor were clearly negligent. On that point, few could disagree. On that basis and applying a "direct connection" test, Judge Andrews reasoned that the defendant owed a duty to plaintiffs "even if he be outside what would generally be thought the danger zone"—i.e., in Cardozo's terms, outside of the range of foreseeability.

In commenting on the views of Judge Andrews, Cunningham (2010, p. 696) wrote:

> "Judge William Andrews' dissent took a broader view of duty: "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." Negligence is not defined by duty, but as an unreasonable act affecting rights, not confined to those who might probably be hurt. If one person is justified to complain, anyone injured may assert liability, Andrews reasoned. For Andrews, the only limitation on liability for negligence is absence of proximate cause, based on "practical politics," not philosophy or logic. Though it must be "something without which the event would not happen," proximate cause means "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." Andrews posed a series of questions to decide whether an action is the proximate cause of injury and found all supported requisite causation in *Palsgraf*."

Would adoption of the Andrews's view potentially lead to unlimited liability for a defendant? Nelson (2018, pp. 287-288) suggests that:

> "The limit was the doctrine of proximate cause. By virtue of this doctrine, negligence did not invariably give rise to a cause of action for damages, unless the damages were "so connected with the negligence that the latter may be said to be the proximate cause of the former."
>
> "By "proximate" Andrews meant: "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," not as a matter of "logic" but of "practical politics." In determining proximate cause, it was necessary to ask questions such as "whether there was a natural and continuous sequence between cause and effect," whether "the one

> was a substantial factor in producing the other," and whether there was "a *direct connection* between them, without too many intervening causes" (emphasis added).

In another sense, Wright (2003) notes:

> "Judge Andrews' dissent took a much broader view of the relevant rights and duties. Rather than viewing negligent conduct as a morally wrongful "affront to personality" that exists only for those whose interests the defendant knew or should have known would be exposed to unreasonable risk by her conduct, he viewed it as a legally wrongful failure to comply with the standards of reasonable care established to protect the interests of each person in society, which results in a legal wrong to anyone whose interests are harmed by such legally wrongful conduct…."

In short, "This legal discussion in *Palsgraf* has been instrumental in shaping personal injury law" (website of Crews & Pasquera, P.A., 2017). In a sense, the development of tort law in the United States reflects not the absolute policy victory of either of these judges, but rather a subtle *blending* of their views: While essential to the analysis of liability lies in determining whether the defendant could have reasonably foreseen an injury to the plaintiff, defendants in tort actions are held liable for the direct consequences of their negligence as long as the harm is foreseeable. Although not raised as an issue in *Palsgraf*, under traditional tort analysis, liability may also be judged from the perspectives of a superseding cause, which may cut off the liability of the original tortfeasor.

2.2. Superseding Causes

Interestingly, the confluence of the doctrines of foreseeability, proximate cause, and the "direct connection" test with issues relating to a superseding cause has yielded some interesting conclusions. Sperino (2020, p. 321) writes: "Typically, when tort law expresses concerns about directness or superseding cause, it is discussing an action taken by one actor and then a second action taken by a legally separate actor."

Tikriti (2023) sites examples of superseding causes that are usually deemed unforeseeable, and thus would potentially *cut off* the liability of the original negligent tortfeasor:

- "acts of God (i.e., earthquakes, "floods, hurricanes, tornadoes, wildfires, and drought" (Binder, 1996, p. 2; see also Fasoyiro, 2009);
- criminal acts of third persons (i.e., burglary) (*James v. Meow Media*, Inc., 2000); and
- intentional torts of third persons (i.e., assault, battery, false imprisonment) (see Goldberg & Zipursky, 2010)."

Section 443 of the Restatement (Second) of Torts (quoted in McDougall, 2019, p. 17) states the following concerning the issue of a criminal act or an intentional tort acting as a superseding cause:

> "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

On the other hand, examples of superseding causes that are typically deemed foreseeable such that the defendant *does not escape liability* include:

- "harm caused by rescuers (i.e., firefighters or other people that come to the injured person's aid) (White, 2002; Hunter, Shannon & Amoroso, 2018, p. 113; Ray, 2020);
- ordinary negligence of health care providers (i.e., doctors and nurses) (Hodge, 2021); and
- disease or subsequent injury that is sustained as a result of the injured person being in a weakened condition (Hunter, Shannon & Amoroso, 2018, p. 113)."

3. Proving Negligence

Proof of negligence is the basis for holding a person legally responsible for an act or omission resulting in harm (see LawSuit Legal.com). The legal system of the United States provides a construct for what are generally known

as "The Five Elements of Negligence" which include: duty, breach of duty, causation (causation in fact and proximate cause), and damages (see Owen, 2007).

The website of LawSuit Legal (2023) notes: "In its most general sense, the law of negligence obligates people to behave in a manner within acceptable standards of safe conduct and a reasonable manner." The Shouse Law Group (2022) noted that "The reasonable person standard works by comparing an allegedly negligent party's conduct to what a **hypothetical reasonable person would have done in the same or similar circumstances.** If a defendant fails to act like an objectively reasonable person would have, it can amount to a **breach of his or her duty of care** towards … the victim and plaintiff."

However, the requirements for proving negligence may vary depending on factual circumstances and on statutes enacted by individual states which may define specific duties not necessarily recognized in other states (Hunter, 2005).

The general standard against which the conduct of an individual will be judged is that of a "reasonable man" or "reasonable person." Interestingly, as Ahmed (2021) writes:

> "The general standard of the reasonable person cannot be applied to children, the elderly, persons with physical disabilities, persons with mental impairments or experts. Therefore, depending on the subjective attributes of the person against whom the standard is being applied, the standard may have to be adjusted accordingly. The general standard of the reasonable person would be raised when dealing with experts, for instance, and lowered when dealing with persons with physical disabilities."

In many states, professionals may be held to a higher standard of care than "ordinary" persons because of their education, background, training, or experience (Boothe-Perry, 2012). Professionals, such as medical personnel, accountants, engineers, attorneys, etc., have a duty to maintain their professional credentials and keep abreast of significant scientific or other information as it become available. A failure to provide the care expected or required of the professional can lead to a claim of professional negligence. Negligent acts committed by professionals are sometimes referred to as "malpractice" (see Bal, 2009; Hunter & Shannon, 2022).

The website of American Board of Professional Liability Attorneys (ABPLA) (2023) notes that "Medical malpractice can take many forms. Here are some examples of medical negligence that might lead to a lawsuit:

- Failure to diagnose or misdiagnosis
- Misreading or ignoring laboratory results
- Unnecessary surgery
- Surgical errors or wrong site surgery
- Improper medication or dosage
- Poor follow-up or aftercare
- Premature discharge
- Disregarding or not taking appropriate patient history
- Failure to order proper testing
- Failure to recognize symptoms" (see Bal, 2009; Sage, Boothman, & Gallagher, 2020).

Mallen (1979, p. 205) writes:

> "… clearly within the definition of legal malpractice is the negligent rendition of professional services. The courts agree that "legal malpractice" encompasses liability for negligence.' That wrong is sometimes alternatively stated in terms of an implied contract to exercise ordinary skill and knowledge, corresponding to the standard of care used to evaluate competence." To that extent the attorney's liability is comparable to that of other professionals."

Likewise, the ABPLA notes that "attorney malpractice can take many forms. Here are some examples of legal negligence [malpractice] that might lead to a lawsuit:

- Conflicts of interest
- Errors or omissions resulting in dismissal of a client's case
- Missing Statute of Limitations
- Misappropriation of client funds
- Billing fraud
- Poorly written legal documents
- Breach of fiduciary duty
- Breach of attorney-client privilege
- Abandonment of a client's matter or lack of due diligence
- Exerting undue influence adverse to the client's interest
- Improper legal advice
- Malicious or frivolous litigation
- Excessive litigation at the client's expense
- Obstruction of justice
- Presenting false evidence
- Malfeasance or dishonesty" (see Munneke & Davis, 1998).

3.1. The Elements of Proof of Negligence

3.1.1. Duty

An important consideration in proving negligence is determining whether the defendant owed a legal duty to the injured party. Owen (2007, p. 1674) wrote: "Duty, obligation of one person to another, flows from millennia of social customs, philosophy, and religion. Serving as the glue of society, duty is the thread that binds humans to one another in community."

The dictates, customs, and usages of many relationships require individuals to act in a certain prescribed manner. In order to establish negligence, the first question which must be answered is whether the defendant was has a duty to exercise reasonable care under the circumstances involved. Owen (2007, p. 1677) asserts:

> "While the standard of care must be adjusted for certain special relationships, as classically was the norm, modern negligence law imposes a duty on most persons in most situations to act with reasonable care, often referred to as "due care," for the safety of others and themselves. A person who acts carelessly—unreasonably, without due care—breaches the duty of care, and such conduct is characterized as "negligent."

In general, the question, "does a party owe a duty of due care?", is a "judge question" to be decided as a matter of law for the court and not as a question of fact for a jury (Goldberg & Zipursky, 2010). If a duty of due or reasonable care is established, the first element of proof of negligence is established.

3.1.2. Breach of Duty

The element of duty involves a determination of "reasonable" or "ordinary" care." Failing to exercise reasonable or ordinary care in fulfilling a duty is a breach of duty. Owen (2007, p. 1677) writes:

> "To assess what type and amount of care is reasonable in particular circumstances, negligence law turns to the standard of "a reasonable prudent person" and asks how such a person would behave in a particular situation, in pursuing his or her own objectives, to avoid harming others in the process. By defining the standard of proper behavior in terms of a mythical prudent person, the law thus sets up an objective standard against which to measure a defendant's conduct."

The element of duty has two aspects. Either the defendant did something that was unreasonable under the circumstances, or the defendant failed to do something which would have been reasonable under the circumstances (generally Moughalian, 2021). This is normally a decision for the "trier of fact"—normally a jury—unless the

judge has assumed this role in what is sometimes called a “bench trial” in which there is no jury. Duty may often be determined according to an analysis of specific responsibilities required of a defendant (e.g., Hunter, 2008).

3.1.3. Causation (see Stanford Encyclopedia of Philosophy)

Causation may be viewed from two perspectives:: cause in fact and proximate cause. Proof of negligence require that the alleged negligent act or acts caused injury to the plaintiff. Courts typically employ a broad "*but for*" standard to establish causation, inquiring whether the harm suffered would have happened “but for” the actions of the defendant.

In addition, in order to determine the legal responsibility of the defendant, the plaintiff must establish the most direct cause of an injury. A plaintiff must prove that the actions of the defendant are the closest (“proximate”) cause of the injuries sustained by the plaintiff (see McDowell, 1985; Knobe & Shapiro, 2021).

Issues relating to causation have vexed American courts for decades. As Dean Prosser noted in 1950: “Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze … [It] covers a multitude of sins … [and] is a complex term of highly uncertain meaning under which other rules, doctrines and reasons lie buried” (cited in Meadow, 2000, pp. 5-6).

However, Professor Geistfeld (2021, p. 420) comments: “The element of proximate cause then provides a case-specific requirement that the plaintiff’s injury must be within a general category of foreseeable harms encompassed by both the tort duty and its breach—a necessary predicate for liability. The prima facie case accordingly requires the foreseeability test to establish proximate cause for the breach of a duty that is limited to the risks of foreseeable harm.”

3.1.4. Damages

Finally, a finding of negligence will require that a “legal harm” has occurred. As noted by Owen (2007, pp. 1685-1686):

> “The last element of a negligence claim is harm, the damage a plaintiff suffers as a proximate result of a defendant’s breach of duty. Requiring a defendant to compensate the plaintiff for harm improperly inflicted by the defendant is the underlying, restitutionary (and deterrent) objective of the negligence cause of action. That is, as much as money damages can do so, the law requires a negligent tortfeasor to restore what the plaintiff lost as a proximate result of the defendant’s wrong. The interest normally protected by the law of negligence is freedom from improperly inflicted physical harm, including physical injury, death, and property damage. This means that negligence law normally does not protect plaintiffs against the risk of “pure” economic loss (such as lost wages, a lost contract, or lost profits) where the plaintiff does not.”

A plaintiff is required to both “plead and prove” that harm was suffered in the form of personal injury or property damage. Underhill, Schwartz, and Appel (2022, p. 2) note:

> “Damages are the engine that drives tort law. Whereas tort liability rules determine whether an actor may be held legally responsible for a harm, the law of damages determines how much that harm may be worth in terms of economic and noneconomic compensation, or other types of damages such as punitive damages. The aggregation of different types of damages to arrive at some expected total dollar amount, or range, can and often does determine whether a tort action will be brought and its likelihood for resolution via a settlement or judgment.”

If a defendant failed to exercise reasonable care under the circumstances—but no “legal harm” or damages were suffered by a plaintiff—“legal” negligence has not been established. Actual damages to the person who was owed a duty of care must be established for a negligence claim to have merit in a court of law.

Ellis (2022) writes: “Tort damages are awarded at the end of a civil law suit if the judge or jury feels they are appropriate. There are three major types of tort damages in common legal usage: punitive, compensatory, and nominal. What type and extent of damages awarded will depend on the specifics of each case; some trials result in one type of damage award, while others may have both punitive and compensatory damages.”

Compensatory damages are the most identifiable form of damages awarded in cases of a finding of negligence (Hunter, Shannon, Amoroso, & Lozada, 2017). Unlike punitive damages, which are designed to punish the wrongdoer for intentional conduct, compensatory damages are meant to “help restore a victim to his or her status” prior to the negligent act. The amount of any compensatory damage award is dependent on the nature of damage done to the victim that can be ascertained and proven. Compensatory damages may include reimbursement for medical costs, loss of business, wages, and destruction or damage to property caused by the negligent act of a defendant.

In addition to *monetarily measurable costs*, compensatory damages may also include an amount awarded to the victim for pain, suffering, and emotional distress (Hunter and Amoroso, 2012). While these damages may be difficult to prove in exact monetary terms, such damages are compensable if they were suffered as a result of the defendant’s negligent behavior. The judge will closely monitor the award of these types of damages. Hall and Anderson (2019, pp. 1303-1305) write:

> “This general rule becomes more problematic when "awarding damages for amorphous, discretionary injuries[,] such as mental anguish [and] pain and suffering" - such damages are inherently difficult because the injury constitutes "a subjective, unliquidated, nonpecuniary loss." It "is necessarily an arbitrary process[,]" not subject to objective analysis or mathematical calculation. Because there are no objective guidelines to assess the money equivalent of such injuries, the jury is given a great deal of discretion in awarding an amount of damages it determines appropriate. While the jury has broad discretion, there must be evidence to justify the amount awarded, as the jury "cannot simply pick a number and put it in the blank." However, a jury's discretion to compensate for mental anguish is limited to that which "causes [a] "substantial disruption in [the plaintiff's] daily routine[,]' or "a high degree of mental pain and distress.” Furthermore, the court added that while the damages are clearly reviewable under a sufficiency of the evidence review, there are tremendous difficulties "inherent in an appellate court's review of discretionary damages.” Nevertheless, a challenge to a damages award for these types of unliquidated and intangible injuries is reviewed as any other challenge based upon the sufficiency of the evidence (legal and factual) or based upon the factual sufficiency of the evidence where the excessiveness of the damages is challenged.”

While the defendant has the burden of proof to establish damages, although unusual in negligence actions, a court may award what are termed as “nominal damages” under certain circumstances, where, for example, a plaintiff is attempting to vindicate some right. Nominal damages may be analogized to a “token fine” paid to the victim of a minor or petty crime “in recognition of the fact that unlawful conduct did occur, but resulted in no meaningful monetary damages.” The award of nominal damages may serve the interest of justice, rather than providing a pecuniary benefit to a plaintiff, although some courts will not entertain nominal damages awards in a negligence cause of action.

Adar and Perry (2022, pp. 228-229) note:

> “If the plaintiff can establish a cause of action but did not suffer (or cannot prove) any harm, courts may award a trivial sum of money as nominal damages. Such damages can serve two goals. First, they may provide a form of prospective declaratory relief, vindicating the plaintiff s rights before any harm is caused, thereby protecting them against continuing or future threats. For example, a nominal award can be used to avert the creation of an adverse property right due to uncontested (harmless) trespass over a period of time. Second, nominal damages can provide retrospective relief under the assumption that every violation of right, even if actionable per se, imports damage. In other words, they can be awarded by default [unless] the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages. As a retrospective relief, nominal damages also offer the symbolic and empowering

> benefit of institutional acknowledgement of the commission of a wrong by the defendant against the plaintiff."

Although not assessed in cases of ordinary negligence, punitive damages may be awarded in cases where a party has acted in an intentional, harmful, reckless, outrageous, or grossly negligent manner (Hunter, Shannon, Amoroso, & Lozada, 2017; see also Underhill, Schwartz, & Appel, 2022, p. 43; Section 908, Restatement (Second) of Torts). Punitive damages are designed to deter a party from acting in such a manner in the future. Punitive damages typically "go above and beyond the amount required for the victim's real or measurable costs." Punitive damages are also designed to serve as a *community deterrent* or warning to the public not to undertake the same actions as did the wrongdoer (see, e.g., Sharkey, 2003).

3.2. Negligence Per Se: Statutory Violations

A violation of a statute or an administrative regulation which defines the requisite conduct of a party may result in an act being considered as "*negligence per se*" (Caldwell & Baik, 2020; see *Coyoy v. Corecivic*, 2022), establishing a presumption of negligence, unless proven otherwise (see Paterick, 2022). An injured plaintiff must demonstrate to the court that the defendant violated a statute or an administrative rule which was enacted to protect the public from some harm, that the plaintiff was among the group the statute or administrative rule was meant to protect, and the injuries sustained were what the regulation was designed to protect against (Caldwell & Baik, 2020, p. 20).

Goldberg (2022, p. 5) writes:

> "… Section 286 in the Second Restatement, drafted by William Prosser, appropriately adopts a more stringent position than Bohlen's in stating that a statutory violation can serve as the basis for a negligence per se jury instruction only if the court finds that the purpose of the statute is: (a) to protect a class of persons which included the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results."

4. Why was the Long Island Railroad a Potential Defendant?

The Latin term *respondeat superior*, which translates as "let the master answer," refers to the legal doctrine by which an employer [Master] or organization (Reid, 2004) may be held responsible for the negligence of an employee, when the actions are performed "in the course of employment" and "within the scope of employment" (website of Schmidt & Clark).

Dalley (2016, p. 642) states: "The important underlying societal policies are satisfied most of the time: the master cannot be permitted to evade liability by employing another, and the master cannot be permitted to shift the costs of her business to relatively innocent bystanders." In order for the doctrine of *respondeat superior* to apply, an employee-employer relationship or master-servant relationship must be established (Maya, 2020; see also Loo, 2020).

In a seminal article the *Marquette Law Review*, Leiser (1956-1957, p. 37) writes:

> "A master may be subject to liability for the acts of his servant in both or either of these respects. A master may subject himself to liability based upon his own acts or omissions in several ways:
> 1. The master may be liable to third persons due to his negligence in the *selection* of his servant. This case arises when the particular servant is unfit or incompetent to perform the duties for which he was employed, especially if such duties require special skill or training.
> 2. The master may be liable to third persons for his negligence in *failing to instruct* his servants as to the proper method for performing the work.
> 3. The master is subject to liability for the torts of his servants where the act is done under his *express instruction* or under circumstances indicating an acquiescence by the master.

4. The master may be liable due to his *acquiescence* in previous similar tortious acts of his servant, although outside the scope of the servant's employment.
5. The master is subject to liability when he *ratifies* the tortious act of his servant" (emphasis added).

The principle of *respondeat superior*, however, does not apply to actions undertaken by an independent contractor (see generally Barron, 1989; *FedEx Home Delivery v. NLRB*, 2009; *Echeverry v. Jazz Casino*, 2021).

An independent contractor may be distinguished from an employee on the basis of the *control* exerted by the employer. In general, an independent contractor is a person or an entity hired to accomplish a specific task, but where the employer does not have the right to *control* the details or "methods or means" of those entities or persons (see Ravenelle, 2019). Independent contractors may have specialized skills or knowledge and may work for many employers at the same time.

An employer who hires an independent contractor do not incur *vicarious liability* for the tortious acts of the independent contractor (see Harris, 2021). However, where the duties of an independent contractor are found to be non-delegable (Santayana, 2019; *Farrar v. Dillard's Props.*, 2021), an employer will continue to remain vicariously liable for such acts (see Deakin, 2018). Non-delegable duties may include: (a) inherently dangerous activities (Sandgrund, 2018); (b) duties arising out of a relationship with a specific plaintiff or the public; (c) duties to keep premises opened to the public in a reasonably safe condition relating to the duties of storekeepers or landowners to invitees; and (d) duties to comply with state safety statutes under certain conditions. Concerning the issue of employer liability in cases of inherently dangerous or ultrahazardous activities, Sandgrun (2018, p. 52) writes:

"1. the activity in question presented a special or peculiar danger to others inherent in the nature of the activity or the particular circumstances under which the activity was to be performed;
2. the danger was different in kind from the ordinary risks that commonly confront persons in the community;
3. the employer knew or should have known that the special danger was inherent in the nature of the activity or in the particular circumstances under which the activity was to be performed; and
4. the injury to the plaintiff was not the result of the collateral negligence of the defendant's independent contractor. The rule does not apply "'where the negligence of the contractor creates a new risk, not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably to be contemplated by the employer.'"

Sandgrund (2018, p. 52) continues:

"Courts deciding whether an activity is ultrahazardous must consider whether.
1. the activity poses a high degree of risk of harm to a person, land, or chattels;
2. it is likely that the resulting harm will be great;
3. the risk cannot be eliminated by exercising reasonable care;
4. the activity is not a matter of common usage;
5. the activity is inappropriate where it occurred; and
6. the activity's value to the community is outweighed by the danger."

In addition, an employer may be held liable for its *own negligence* in selecting an independent contractor if an employer was negligent in hiring the independent contractor (McElhattan, 2022). An employer may also liable for any physical harm caused by an independent contractor pursuant to orders or directions negligently given by an employer.

Because both the actions of the conductor and the platform guard were performed "within the scope of their employment" in the service of the Long Island Railroad, the application of the doctrine of *respondeat superior* would be appropriate under these circumstances.

5. Contributory and Comparative Negligence (FindLaw.com)

In many cases, although a defendant may have been found to have been negligent, the plaintiff may bear some or all of the liability (often in terms of costs) for their own negligence either under the application of the theory of contributory or the theory of comparative negligence (see Levmore, 2019).
As Raffii (2022) notes:

> "Accidents take place everyday -- people are injured and property is damaged. When personal injury cases like car accidents happen, one of the first questions people typically ask is: "Who was at fault for the tort?" The concepts of contributory and comparative negligence address this question and provide a way to allocate fault between parties when the answer to this question is not entirely clear. As the terms imply, a party may contribute to an act of negligence or be comparatively held liable."

The term *contributory negligence* describes conduct that creates an unreasonable risk of harm to oneself. After an injured party files a negligence claim, the defendant may assert a defense of contributory negligence against the plaintiff, arguing that the injury occurred at least partially as a result of the plaintiff's own actions (van Dongen, 2014).

Traditionally, courts viewed contributory negligence as an absolute or "complete bar" to the recovery of any damages by a plaintiff (Davis, 1994, p. 284). Under the traditional view, if a plaintiff had contributed to the accident *in any way*, the plaintiff was not entitled to receive any compensation for his or her injuries (see *Crane v. Weber*, 1933).

In an attempt to reduce the harsh outcome from the application of an "absolute bar" rule, courts began to adopt a *comparative negligence* approach. Owen (2000, p. 3) stated: "While contributory negligence has remained the basic defense to products liability claims grounded in negligence, most jurisdictions in the latter part of the twentieth century renamed the doctrine 'comparative negligence,' or 'comparative fault,' and changed its effect from barring a plaintiff's claim altogether to reducing the plaintiff's damages proportionate to his or her fault."

There are two approaches to the comparative negligence doctrine (Schwartz & Rowe, 2010, Sections 2.01, 201(a)):

1. *Pure Comparative Negligence:* Plaintiff's damages are totaled or aggregated by the trier of fact and then the award is reduced to reflect their contribution to the injury. For example, if a plaintiff was awarded $ 50,000 and the trier of fact (either the judge or jury) determined that the plaintiff was 25% responsible for their own injury, the plaintiff would be awarded $ 37,500 as damages.
2. *Modified Comparative Negligence:* A plaintiff will not recover *at all* if they are found to be either *equally* responsible or *more* responsible than the defendant for the resulting injury. In other words, in order to collect damages, the plaintiff must not be more than 50% at fault for the resulting injury (*Nugent v. Quam*, 1967; *M.M. v. Fargo Public Sch. Dist. No 1*, 2012; *Alan L. Frank Law Assocs. v. P.C. Ooo Rm Invest*., 2021).

Just one state—South Dakota—follows a comparative negligence modifier called the *slight vs. gross* rule. In South Dakota, a party to a lawsuit can be found to be at "slight" fault, or "gross" fault. The court will decide which party was at slight or gross fault, thus impacting the amount of compensation for damages that can be awarded. In general, if a party is judged to have been at "gross" fault, that party would be barred from any compensation (Fouse, 2022).

6. Assumption of Risk

The website Justia (2023) notes that under the *Federal Rules of Civil Procedure* (Rule 12f), assumption of risk is an affirmative defense that a defendant can raise in a negligence action (*Colon v. Fource Hotel Props.*, 2011). "Assumption of risk refers to a legal doctrine under which an individual is barred from recovering damages for an injury sustained when he or she voluntarily exposed him or herself to a known danger."
Guelli (1992, p. 243, Note 6) explained:

> "Assumption of risk is a term which has been surrounded by much confusion, because it has been used by the courts in at least four different senses, and the distinctions seldom have been made clear. These meanings are as follows:
> 1. In its simplest form, assumption of risk means that the plaintiff has given his *express consent* to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff.
> 2. A second, and closely related, meaning is that the plaintiff has *entered voluntarily* into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances. Thus a spectator entering a baseball park may be regarded as consenting that the players may proceed with the game without taking precautions to protect him from being hit by the ball. Again the legal result is that the defendant is relieved of his duty to the plaintiff.
> 3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, *proceeds or continues voluntarily* to encounter it. For example, an independent contractor who finds that he has been furnished by his employer with a machine which is in dangerous condition, and that the employer, after notice, has failed to repair it or substitute another, may continue to work with the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct; and he may even act with unusual caution because he is aware of the danger. The same policy of the common law which denies recovery to one who expressly consents to accept a risk will, however, prevent his recovery in such a case.
> 4. To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in *voluntarily encountering a known risk* is itself unreasonable, and amounts to contributory negligence. There is thus negligence on the part of both plaintiff and defendant; and the plaintiff is barred from recovery, not only by his implied consent to accept the risk, but also by the policy of the law which refuses to allow him to impose upon the defendant a loss for which his own negligence was in part responsible" emphasis added).

In short, in order to raise the assumption of risk defense successfully, the defendant must demonstrate the following:

- The plaintiff had actual knowledge of the risk involved; and
- The plaintiff voluntarily accepted the risk, either expressly through agreement or implied by their words or conduct.

If a plaintiff has assumed the risk, the defendant does not owe any legal duty to the plaintiff. The application of the doctrine of assumption of risk vitiates the duty element of a negligence claim, and the plaintiff cannot recover for injuries caused either by a risk inherent in the situation or a danger created by the defendant's negligence (see Wade, 1961; Sergienko, 2006). An inherent risk is one that is integral to the activity or a risk that cannot be reduced or minimized without changing the basic nature of the activity (*McCaw v. Ariz. Snowbowl Resort*, 2022; *Annitto v. Smithtown Cent. Sch. Dist.*, 2022). However, even if a plaintiff has assumed some risk, they may not have assumed the risk related to their specific injury.

Procedurally, the defendant bears the burden of proof when it comes to asserting an assumption of risk defense. The defendant must show by a preponderance of the evidence that the danger was obvious or apparent. *Express assumption of risk* involves showing that the plaintiff explicitly accepted the risk (*Goss v. USA Cycling, Inc.*, 2022). "It follows that in order for a conscious acceptance to be made, an agreement purporting to constitute an express assumption of risk must state a clear and unambiguous intent to release the party from liability for its negligence" (*Holmes v. Health & Tennis Corp. of Am.*, 1995). The burden placed upon a defendant can be met through presenting a written agreement between the parties, which often takes the form of a *wavier* signed by the plaintiff when undertaking a dangerous activity.

Hylton (2022, p. 1) states: "Waivers are likely to increase the welfare of the parties when litigation is likely to reduce their welfare. Litigation is wealth reducing when the social value of the deterrence created through litigation is low relative to the costs of litigation." Liability waivers are governed by the law of contracts. As such, waivers may be subject to certain restrictions including:

- The contract cannot violate public policy;
- The contract cannot include any intentional or grossly negligent acts; and
- The plaintiff must have the capacity to understand the terms in the contract or waiver, and cannot be a minor.

Because assumption of risk has been deemed to relate to the issue of duty, the existence of an express assumption of risk is typically decided by the court as a *matter of law.*

Implied assumption of risk can be inferred through words and conduct. Implied assumption of risk exists when a plaintiff undertakes conduct with a full understanding of the possible harm to him or herself and consents to the risk under those circumstances and is "ordinarily" submitted to a jury as a 'failure to keep a careful lookout'" (*Coomer v. Kan. City Royals Baseball Corp.*, 2014).

7. Teaching Summary

At this point, it is important to note that Mrs. Palsgraf neither expressly or impliedly assumed the risk that a scale would fall causing her bodily injury and alleged psychological trauma and shock. Neither could the defenses of contributory negligence or assumption of risk be raised against her because of any actions she may have taken on the platform of the Long Island Railroad.

What kept Mrs. Palsgraf from recovering for her injuries lies in the divergence of opinions of Judges Cardozo and Andrews in analyzing and then applying the principles of proof of negligence—more specifically, duty and causation.

What might be interesting would be to somehow "reconnect" with these two esteemed jurists to see if their views may have changed, been modified, or perhaps may have "morphed" into one unified theory that might have permitted Mrs. Palsgraf, who by all accounts was simply an innocent bystander, to be compensated (nearly a hundred years later) for her injury. And would everyone who teaches torts love to be present at such a meeting!

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