LOSS-SHIFTING AND QUASI-NEGLECTIVENESS: A NEW INTERPRETATION OF THE PALSGRAF CASE

In 1928 the New York Court of Appeals denied recovery to Mrs. Palsgraf for injuries she sustained from the falling arm of a cracked scales which struck her while she was standing on the platform of the defendant's railroad. The scale beam had been loosened by the explosion of a package of fireworks which two railroad employees had negligently dislodged from a passenger's arm while pushing him on a moving train. From the evidence it was clear that the defendant's employees had no reason to know that the package in question contained explosives.

In declaring that there was no case for the jury, the court could have said that there was no "actionable negligence," that there was no violation of a "duty of care," or that the defendant's negligence was not a "proximate cause" of the plaintiff's injury. Mr. Justice Cardozo, speaking for the majority, preferred the first approach. He set forth a re-examination of the negligence concept with the hope of replacing the usual formulas and their "shifting meanings" with a more precise analysis and of bringing clarity to a field of law that had become a playground for conceptualism and patent arbitrariness. His opinion has since provoked both praise and skepticism.

In spite of frequently recurring opportunities, relatively few judges have adopted Chief Justice Cardozo's new approach. Only fourteen state courts and four federal circuit courts appear to have mentioned the Palsgraf case at all, and twelve of these do so but once. Even the New York courts, which continually...
use Cardozo's succinct phraseology, have preserved their old formulations and frequently do not attempt to apply his analysis. Perhaps the courts find his rationale too subtle for easy application, and indeed it is possible that they do not always understand it.\(^5\) This failure has increased the number of those who despair of the common law system of liability for negligence and has strengthened the argument of those who urge that its administration be taken from the courts.\(^6\) But it is submitted that the *Palsgraf* case itself might be utilized to clarify the common law system and thus to achieve without the assistance of legislation a practicable solution in terms of the underlying economic realities.

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Before the decision in the *Palsgraf* case, writers and judges had relied almost unanimously\(^7\) on the dicta of *Smith v. London & S. W. R. Co.*\(^5\) in defining liability for negligence. According to this approach, foreseeability of "*any*" harm characterized negligence. And where courts had differed in applying this approach, they substantially agreed in focusing attention upon the defendant's behavior, as such, without emphasizing its relation to the plaintiff's damage.\(^9\) Cardozo repeated that there is no such thing as "negligence in the air"\(^10\)—that negligence must always be related to a *person* or *class of persons*\(^11\) toward whom the de-
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defendant was under a duty of care. The existence of such a duty depends on whether the defendant can reasonably anticipate that his act will create a hazard to the plaintiff or to his class. Lest too narrow a restriction of liability result from thus making negligence a concept of relationship, Cardozo himself proposed an "absolute" application of his theory by suggesting "that negligence . . . in relation to the plaintiff would entail liability for any and all consequences, however novel or extraordinary."12

This notion, if literally, might occasionally result in a complete departure from the "foreseeability" test in favor of what may be called "transferred negligence"—that is to say, when admitted negligence exists toward some interest of the plaintiff, liability might ensue for simultaneous damage to some other interest of the plaintiff, though far removed from the scene of immediate hazard and not foreseeably endangered. To obviate the possibility of this result, Cardozo suggests a distinction within the plaintiff's sphere of protection "according to the diversity of interests invaded."14 Thus he introduces an additional element of relationship by implying that if the plaintiff's property alone is foreseeable endangered while only his person is actually harmed, the plaintiff should not recover. But even with this qualification, Cardozo's theory might produce singular results. For example, while Mrs. Palsgraf is left without a remedy, the prospective passenger toward whose personal property (the package he carried under his arm) the defendant's servants were negligent might recover for damage from the unforeseeable explosion to other property of his remotely situated. Perhaps Judge Learned Hand was justifiably ironical in the Glendola case15 when he observed: "A difference in ownership of . . . two pieces of property, successively injured, might exonerate a wrongdoer as to that injured last, though he would be liable had both been owned by a single person."

Professor Goodhart16 emphasized the same difficulty by suggesting an altered version of the Polemis case.17 In that case, it will be recalled, a servant of

13 Cowan, op. cit. supra note 3, at 49.
16 Goodhart, op. cit. supra note 9, at 456. See also Campbell, Duty, Fault, and Legal Cause, [1938] Wis. L. Rev. 402, 413.
17 In re Polemis v. Furness, Withy & Co., [1921] 3 K. B. 560. The Polemis case ought not, however, to be applied to situations similar to that in the Palsgraf case, since it involves contract liability determined by the intent of the parties. See Salmond and Winfield, Contracts 506 (1927).
the defendant-charterer of the plaintiff’s ship negligently dropped a plank into the hold of the vessel, foreseeably endangering the ship, but not foreseeably threatening the actually ensuing hazard of destructive fire which was caused by the ignition of fumes of benzine by a friction-spark. Professor Goodhart assumes that therefore under the *Palsgraf* doctrine the owner of the cargo could not have recovered and asks the question whether the result would be different had the cargo belonged to the owner of the ship. Professor Gregory avoids the difficulty by interpreting the *Palsgraf* case to mean (1) merely “that a defendant is not liable to a plaintiff towards whom he is not negligent, *not* that a defendant is liable to everyone towards whom he is negligent,” and (2) that liability must depend on the foreseeability of the general hazard or danger which brings about the harm complained of. Thus Professor Gregory believes that if Cardozo had been disposing of the *Polemis* case and was convinced that the evidence disclosed only foreseeability of harm to ship, cargo or crew from the impact of a falling plank but did not warrant the reasonable inference of fire, he would have denied recovery for the loss of the ship and cargo, whoever owned both or either of them. Professor Gregory’s interpretation, shared by most of the courts, extends the doctrine of the *Palsgraf* case beyond its actual facts (which might be called the “unforeseeable plaintiff” situation) and applies it to fact situations involving a “foreseeable” plaintiff and an unforeseeable hazard. The effect of this prevailing interpretation is to restrict liability to an extent not contemplated by Cardozo, although frequently this result has induced the courts to dilute the concept of foreseeability in order to correct the restrictive tendency.

Chief Justice Cardozo may have foreseen this difficulty, since he himself suggested that in his foreseeability test “perhaps other distinctions may be necessary.” How far, if at all, courts purporting to follow the *Palsgraf* case may have created such distinctions, and how far such distinctions may be desirable remains to be seen.

III

Although all attempts to formulate the *Palsgraf* doctrine have been unsatisfactory, the peculiar circumstances of those cases in which courts have employed language from Cardozo’s opinion suggest clues to its real significance and most feasible adaptation. Of sixty-odd such cases, at least three-fourths involve the vicarious liability of large enterprises, and most of the others involve injuries from “negligently” driven automobiles. The problem in these cases is

19 Prosser, op. cit. supra note 1, at 182.
20 Automobile liability is approaching a stage similar to vicarious liability in proportion to the spread of liability insurance. The insured motorist takes the place of the agent, the community of the insured through their insurer the place of the principal in instances of true vicarious liability.
to establish a standard of liability based on economic and social considerations. This standard, in spite of its "moral" origin, has come virtually to signify strict liability without fault, for the dangerous nature of the enterprise and the inevitable risks which may be absorbed as overhead costs have become the real bases of liability. Courts and writers are compelled to fix the limits of this strict liability in terms of the only available common law concepts, i.e., the "moral" concepts of negligence, foreseeability, fault and duty. Thus the servant-tortfeasor most frequently appears merely as an excuse for utilizing the law of negligence through the medium of the familiar doctrine of respondeat superior. Perhaps the reluctance of courts frankly to admit this accounts for the enigmatic character of the institution of vicarious liability. At any rate, implicit features in vicarious liability cases tend to suggest these conclusions. Thus courts frequently—particularly in manufacturers' liability cases—hold the employer liable in the absence of express assertions of the employee's negligence and sometimes even without revealing the identity of his person. Again, where such a description is made, the employer is often treated as the tortfeasor with regard to the question of foreseeability. A similar technique for placing the "blame" on the enterprise is the fiction of non-delegable duties in "independent contractor" cases. On the other hand, restrictive devices such as the "independent contractor" notion are used to limit liability of an enterprise in spite of its alleged employee's negligence, where the enterprise seems to be a less desirable medium for the spreading of the risk and loss than is the alleged "servant" in question. And a most significant indication of this whole trend is a line of decisions upholding verdicts which—probably in response to public opinion—absolve employees of liability for negligence, while their "enterprise-masters," paradoxically enough, have been held liable for the very negligence of which

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21 This result has been achieved by various devices such as the doctrine of res ipsa loquitur and the wholesale "objectivation" of the negligence concept. See infra p. 744.

22 "...the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct. And it is certainly arguable that even a fair chance to avoid bringing harm to pass is not sufficient to throw upon a person the peril of his conduct, unless, judged by average standards, he is also to blame for what he does." Holmes, The Common Law 163 (1881). Accordingly Holmes could say that "it would be possible to state all cases of negligence in terms of imputed or presumed foresight." Ibid., at 147. "The courts seem unable to rise above the distressingly inadequate and excessively used terminology of medieval morality." Green, Are There Dependable Rules of Causation?, 77 U. of Pa. L. Rev. 601, 620 (1929).


25 Even the "scope of employment" doctrine may sometimes serve this economic policy consideration.
their immediate human alter egos, their employees, have been adjudged free.\textsuperscript{26} This development is further illustrated by the fact that intermediate employees in control are not held liable for the negligence of their subservants—\textsuperscript{27} an additional indication that the doctrine of respondeat superior is largely based upon economic considerations.\textsuperscript{28}

Perhaps the main thought under discussion can be most clearly set forth by indulging briefly in some deliberately fictitious retrospection. Early in the nineteenth century the complexity of society was greatly increased by the advent of organized mechanical enterprises which transformed all branches of social and economic life. Speculative observers gifted with a social perspective (not altogether unknown in the history of man) may be imagined to have thought in the following vein. Organized mechanical enterprise is inevitable and useful—but dangerous. A certain amount of consequent harm to others in the operation of such enterprise is unavoidable, no matter how carefully its servants are selected or how carefully they may behave when chosen. Indeed, the application of the general principle of "fault" with its strict requirements of care in these two respects may prove unduly expensive and may discourage industrial developments generally believed of more ultimate importance to society than the avoidance of this inevitable harm to certain of its members. Society cannot then penalize enterprise for its negligence in operating with full realization of the harm it inevitably will cause, after having permitted and even encouraged such

\textsuperscript{26} Cf. Weil v. Hagan, 166 Ky. 759, 179 S.W. 835 (1915); Dunbaden v. Castles Ice Cream Co., 103 N.J. L. 427, 135 Atl. 886 (1927); Buskirk v. Caudill, 181 Ky. 45, 203 S.W. 864 (1918); Chesapeake & O. R. Co. v. Dawson's Adm'r, 159 Ky. 296, 167 S.W. 125 (1914); Illinois Central R. Co. v. Murphy's Adm'r, 123 Ky. 787, 97 S.W. 729 (1906); Van Gundy v. Packard Motor Car Co., 114 Kan. 636, 219 Pac. 503 (1923). See notes in 11 Minn. L. Rev. 568 (1927), 78 U. of Pa. L. Rev. 904 (1930), and 16 Col. L. Rev. 164 (1916). But see Rest., Torts § 883, Comment (1939). 36 Yale L. J. 1026 (1927) speaks of "desirable results based on unconvincing reasons and distinctions," and correctly states that "the effect of such results is to place the loss on those in the best position to distribute it among the community, the desirability of which would appear as great here as in the cases of workmen's compensation." See also Smith, Frolic and Detour, 23 Col. L. Rev. 444, 456 (1923): "The upsetting of these so-called inconsistent verdicts is an attempt to force juries to conform to the courts' own logical processes—a course which seems neither practical nor desirable."

\textsuperscript{27} Brown & Sons Lumber Co. v. Sessler, 128 Tenn. 665, 163 S.W. 812 (1914).

\textsuperscript{28} See Steffen, Independent Contractor and the Good Life, 2 Univ. Chi. L. Rev. 501, 507 (1935): "In all honesty it should be admitted that there are now large areas of employer responsibility which cannot be accounted for realistically upon a fault rationalization."

\textsuperscript{29} Although it was said as early as 1681 that "in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering" (Lambert and Olliot v. Bessey, T. Raym. *421, *422 (K.B. 1681)), the civil law of torts carried the criminal law notions of exclusive liability for fault into its independent existence. For a history of civil law liability see Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L. Rev. 315, 383, 441 (1894); Woodbine, The Origins of the Action of Trespass, 33 Yale L. J. 799 (1924), 34 Yale L. J. 343 (1925).
enterprise in spite of the certainty of harm.\textsuperscript{30} Therefore the basis of liability of organized mechanical enterprise for damage caused by its servants must differ from that of relatively individualistic undertakings such as the everyday functions of small craftsmen and shopkeepers as well as landowners and people in general, in which "back-yard" cases the traditional "fault" theory appears adequate. At the same time, society cannot casually leave the losses incident to relatively dangerous organized mechanical enterprise on the individuals suffering them. These inevitable risks should be shared so far as possible by those who benefit from such enterprise. The most obvious medium for effecting this distribution of loss is the enterprise itself.\textsuperscript{31} If the risks are everpresent, indemnification of those harmed may be absorbed as an overhead cost and may actually be shifted through increased prices.\textsuperscript{32} These considerations need not be restricted to mechanical enterprise but should determine as well the further development of the liability of all large enterprise.

The inherent conservatism of the law, as well as a reluctance to seem to regress toward supposedly primitive forms of so-called "absolute liability,"\textsuperscript{33} militate against frank legislative and judicial adoption in so many words of this standard of liability complete with its social reasons. While the same result is attained in terms of the conventional common law negligence categories, it is important that the true basis of this liability in economic necessity be kept constantly in mind. Thus, although the courts continue to speak of the liability of the employees of the enterprise, they impose liability for practically all harmful behavior of the employees in order to shift to the enterprise the losses occasioned by its operation. Language dealing with the servants' negligence serves then as a substitute basis for the "negligence" of the enterprise itself. No such

\textsuperscript{30} See Rest., Torts § 520 (1938) where "ultrahazardous" activity involving liability under § 519 is defined as an activity that "necessarily involves a risk of serious harm .... which cannot be eliminated by the exercise of the utmost care, \textit{and} .... is not a matter of common usage." (Italics added.)

\textsuperscript{31} Any overburdening of a socially desirable enterprise may be avoided by subsidies in the form either of a reduction of liability (e.g., charitable institutions) or conceivably of state financial support.

\textsuperscript{32} Efforts of the management to reduce risks by new safety devices and careful supervision may be considered an additional advantage arising from loss distribution through the enterprise.

\textsuperscript{33} See Winfield, The Myth of Absolute Liability, 42 L. Q. Rev. 37, 46 (1926). In the light of the discoveries of modern psychology it can hardly be doubted that liability for fault rather than liability for causation as such was the basis of primitive law. It is because the primitive mind—like the child's mind—contemplates mere causation as intentional infringement that retaliation for all harm caused was the first theory of punishment and compensation. The gradual replacement of the idea of punishment by retaliation and deterrence with measures of prevention and security in criminal law on the one hand, and with a system of compensation without regard to "fault" in civil law on the other, should be considered an entirely new development in the history of the law, and—with its renouncement of primitive instincts of vengeance—should not be hampered by the incorrect assumption that it is a regression. Rather such a regression would be involved in a reintroduction of the foreseeability test.
substitution took place in continental Europe, where at first the populace looked on organized mechanical enterprise as an "enemy" and where its negligence is frequently still irrebuttably presumed in damage suits.

But liability for the incidental losses of organized enterprise cannot remain unlimited. This does not mean that the limits of liability should be fixed by means of the same standards governing liability for the everyday behavior of "small people"—by a sort of "avoidability test" such as might be used in what we have termed, in a homely sense, the "back-yard" cases. Because society wishes to use enterprise merely as a convenient medium for spreading or socializing the losses caused by enterprise, liability on this basis can be justified only for such losses as enterprise is able to spread—that is, for losses which it can calculate and insure against. Here again the courts find it almost impossible or, perhaps, politically inexpedient to speak in frank terms and are compelled to resort to the language of common law negligence. Where the hazard is not typical of the enterprise in question, the courts deny the existence of "duty," "proximate causation," "foreseeability" or "negligence." Unfortunately in such cases the courts use the term "foreseeability" in a sense quite different from that which they have in mind in the "back-yard" cases, and this difference of usage has been largely responsible for much of the confusion in our common law of negligence.

If this speculation is sound, we have in effect two types of liability for negligence: (1) the older "moral" negligence liability for hazards which could have been foreseen and avoided by the "guilty" tortfeasor, and (2) the relatively modern "quasi-negligence" liability for hazards which could not be avoided but might have been anticipated ("foreseen") as typical of the particular activity, and therefore readily distributable by insurance or as an operating cost.

34 See Ehrenzweig, Die Schuldhaftung im Schadenersatzrecht 40 (1936). The Bavarian Oberappellationsgericht said in a much discussed opinion (Seufferts Archiv 74, 208) that "the operation of a railroad implies negligence necessarily and inseparably." Cf. Winfield, The History of Negligence in the Law of Torts, 42 L. Q. Rev. 184, 195 (1926): "Early railway trains . . . were notable neither for speed nor for safety. They killed any object from a minister of State to a wandering cow, and this naturally reacted on the law."

35 See, e.g., Unger, Handeln auf eigene Gefahr 85 (1904); Sauzet, Revue Critique 1886, at 608; 2 Planiol, Traité Elémentaire de Droit Civil § 931 (1926).

36 Where, however, the hazard is virtually unpredictable and incalculable, liability might endanger the stability of the enterprise in question; the victim must therefore either bear his own loss or receive assistance from public means.

37 For an attempt to classify and analyse the parallel results of the development of the European law of negligence in a "damage," "causality," "fault" and "duty" system see Ehrenzweig, op. cit. supra note 34.

38 Liability for "objective" negligence may be considered as the first expression of this idea and the "reasonable man" as the first fiction employed in its rationalization. See infra, p. 744. The much abused "quasi" terminology has been introduced into this note with some reluctance. Nonetheless, the historical development of a doctrine which has come to use an antiquated formula for a new theory of liability seems to justify the choice.
Recognition of this "dualism" in the negligence concept should be helpful in understanding and interpreting the Palsgraf case and in the treatment of questions of foreseeability and causality in negligence cases in general.

IV

The decisions dealing with the liability of enterprise occasionally seem inconsistent and arbitrary when considered only in light of the foreseeability test set forth in the Palsgraf case. But this result is to be expected of a theory which applies the same foreseeability or avoidability test to all situations alike, for the same abstract test cannot possibly effectuate the different policies underlying the two kinds of so-called negligence liability. In the "quasi-negligence" cases the Palsgraf test preserves the antiquated element of moral evaluation ("fault"), thus rendering liability too narrow in most cases if literally applied. On the other hand, courts desiring to counteract this tendency and to produce socially desirable results have diluted the negligence doctrines based on moral concepts. But this diluted doctrine, unless carefully administered, is likely to effect too broad an extension of liability in cases involving the negligent behavior of "small people" in the "back-yard" cases, which should be disposed of only under the "moral" version of the foreseeability test. Indeed, it might even effect too broad a liability in litigation against organized enterprise because of its failure to emphasize as the focal point for determining the liability of particular enterprises the "typical" nature of the hazard involved or of the harm ensuing.

It is submitted, therefore, that the cases may be reconciled and corrected (1) by distinguishing between the "moral negligence-avoidability" and the "quasi-negligence or calculable risk distribution" cases and (2) by shifting attention, in determining foreseeability in the latter group of cases, from the person (agent or servant) actually causing the harm, to the nature of the enterprise for which that person was acting. This shift of emphasis must be with respect not only to the actual circumstances causing the harm but especially to the calculable risks which are involved in and, in a general sense, foreseeably associated with the enterprise under consideration. The practical working of this suggestion may be illustrated by the analysis of a few cases purporting to follow the Palsgraf case. This limited choice of illustrations is, of course, arbitrary; but those chosen represent an adequate cross section of the situations in which the courts have felt most urgently the need for a new limitation of liability.

In a fairly recent decision of the New York Court of Appeals, in Missouri Pacific R. Co. v. Johnson, 198 Ark. 1134, 133 S.W. (2d) 33 (1939), a railroad company was held liable for the additional suffering of a tubercular woman from smoke which spread to her cottage from a railroad fire negligently caused. For an analysis of similar cases see Harper and Harper, Establishing Railroad Liability for Fires, 77 U. of Pa. L. Rev. 629 (1929).

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under a road crossing encased a gas main at right angles inside its much larger sewer pipe. The company was held responsible for damage caused months later by entrance of gas into far distant homes through drains connected with the sewer. The link connecting the liability and the enterprise was said to have been one of the defendant's workers who had hit the gas main with his pick during the encasement operation. Liability was expressly based on the company's "responsibility for the negligence of its servants and employees in the performance of that work." According to the foreseeability test as applied by Chief Justice Cardozo in the Palsgraf case, therefore, the question should have been whether the laborer-wrongdoer could have foreseen the hazard created by his act. But either because the court believed this test unrealistic and far-fetched under the circumstances or, perhaps, because it assumed a theory similar to that of "enterprise-quasi-negligence," Judge Lehman used the following language: "In this case it is plain that by the exercise of reasonable vigilance, the defendant might have anticipated that gas might leak from a break in the injured gas main at the point where it was encased in the pipe drain, and that the escaping gas might find its way into a public sewer or a farm drain in the street and from there into houses along the street, and endanger life or property in such houses."41 Here the emphasis is on the general foreknowledge of the company as an enterprise dealing with sewers and gas-mains rather than on the specific "negligence" of the workman in question. Whether or not it was intended, this shift of emphasis tends to justify application of the thesis of this note.42

While the servant's negligence was at least asserted in this case—the record reveals the most dubious evidence, if any, in support of it—in other cases liability can hardly be explained at all on the basis of the foreseeability or "range of apprehension" test as ordinarily applied. For instance, in another New York case43 purporting to follow the Palsgraf precedent, a plate glass window on the second floor of a big department store quite suddenly fell inward, causing a stampede of customers beyond the reach of the glass itself, and in the stampede the plaintiff was hurt. The ensuing liability seems justifiable only if the foreseeability test is applied to the enterprise as such rather than to unidentified employees considered (unrealistically) to have been under a "duty" to discover latent imperfections long concealed by paint. This case and others somewhat similar44 illustrate the growing tendency to extend "quasi-negligence"

41 Ibid., at 207 (Italics added).
44 Cf. Jackson v. Lowenstein & Bros., 136 S.W. (2d) 495 (Tenn. 1940). A rubber mat in the defendant's department store overlapped a riser on one of the stairways. The plaintiff was struck and injured by a falling man who had rushed to the aid of his daughter, who, in turn, had lost her balance when she stepped on the edge of the mat and had fallen down the stairs with her baby. But see Weiner v. May Department Stores Co., 35 F. Supp. 895 (Cal. 1940), where recovery was denied to a customer who hurt herself when stepping onto an escalator.
liability, originally developed in connection with dangerous mechanical enterprises, to large organized undertakings of all kinds. Aside from business enterprises such as department stores, sports events, theaters, transportation facilities, apartment houses and hotels, which have created special dangers in concentrating large crowds of people, modern methods of communication have introduced new potentialities of damage to the pecuniary as well as the purely personal interests of others. Thus the incorrect transmission of a telegram frequently causes great harm to the parties immediately concerned as well as to third persons. It is unrealistic and inexpedient to predicate the liability of the company upon the erring employee’s ability to foresee and avoid the consequences of his error, particularly since he is not expected or, perhaps, not even permitted, to interpret the significance of the message. Consistent judicial practice based upon consideration of the general foreseeability of and insurability against errors should rather dictate the extent of liability and thus, indirectly, the scope of justified reliance by addressees and third persons who may be involved.

Familiarity with personal and property injury cases arising from the use of automobiles, where damage is not caused by the “moral” negligence of the driver, such as voluntary drunkenness or reckless driving, suggests that the predication of liability only upon the operator’s ability to foresee and avoid harm is arbitrary. For in hundreds of these cases, particularly in those involving technically incorrect reactions, no foresight would have led to prevention of the driver’s “mistake.” Thus one motorist was held liable for the death of a woman who, after a minor collision between her car and that of the defendant, stepped out of her car, collapsed and broke her skull. Two other colliding automobilists were held liable for the death of a pedestrian who was hit by a stone falling from an archway struck twenty minutes before by one of the cars as a consequence of the collision. The statement that the operators could reasonably have foreseen such consequences of their driving becomes meaningful only if understood in the sense that everyone knows that automobiling involves inevitable damage as the result of collisions. Consideration of auto-

47 See notes 55 and 56 infra.
49 Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931).
51 See Report by the Committee to Study Compensation for Automobile Accidents (Columbia University Council for Research in the Social Sciences, 1932). We find a significant remark as to the probable development in Young B. Smith, Compensation for Automobile Accidents: A Symposium, 32 Col. L. Rev. 785, 786 (1932): "In many respects the report reminds one of the report of the Wainwright Commission in 1910 which led to the adoption in New York of
mobile injury cases from the approach advocated in this note would prevent the frequent denial of recovery for damage arising from typical highway hazards such as the projection of a brick or stone at a pedestrian by a passing truck or the harm through vicissitudes of traffic to the occupants of a car being driven in a line behind the colliding vehicle. Certainly some progress might be achieved in settling the question whether automobile drivers are liable for damage occasioned through shock suffered by onlookers, not themselves in the path of danger, who nevertheless see the gruesome consequences of collisions and running-down accidents. Opposite conclusions in such a situation were reached by two courts, both of which cited the 

Palsgraf case. There is some reason to believe that our courts may reshape the common law in order to provide compensation for damage arising from another typical source of recurring hazards—large apartment houses and tenements owned by corporate landlords. For some decades the spread of “absentee ownership” and the concentration of great numbers of inhabitants under one roof has threatened to deprive society of the protection formerly accompanying the personal supervision and interest of the individual landlord in his relatively small buildings. Though still hesitating to take a definite stand on this issue, the New York courts seem to have held the owners of large dwelling houses and hotels liable for instances of typical damage caused by their “enterprise.” In line with the

a workmen’s compensation act. The striking similarities with respect to the natures of the problems, the inadequacies of existing laws, the social results thereby produced, and the solutions proposed, cause one to wonder whether this report, as did that of the Wainwright Commission, foreshadows an impending development in the law looking towards a more scientific distribution of inevitable risks which are incident to an important and necessary activity in modern society.” Compulsory insurance or a state-created compensation fund supplied by taxation on those who take part in any particular risk-creating activity may be the devices of the future. See Radin, The Law and Mr. Smith 251 (1938); Radin, Law as Logic and Experience 72 (1940).


Wabue v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Frazee v. Western Dairy Products, 182 Wash. 578, 47 P. (2d) 1037 (1935). Cf. Owens v. Liverpool Corp., [1939] 1 K.B. 394, where recovery was granted to a plaintiff who had suffered a mental shock from watching his cousin’s coffin overturned in a collision between the hearse and a tramcar negligently operated by the defendant’s servant. For more cases on this subject see Seitz, Duty and Foreseeability Factors in Fright Cases, 23 Marq. L. Rev. 103 (1939).


increasing awareness of governments of their responsibilities to individual citizens, the time may not be far distant when courts will openly regard organized corporate enterprise of all kinds as a sufficiently distinctive factor upon which to erect a virtual presumption of liability for harm arising from typical and calculable hazards.\(^57\) Even now in certain groups of situations they imply the inadequacy of the negligence terminology for achieving a satisfactory distribution of loss. Do judges and jurors any longer seriously ask themselves whether or not particular hazards could have been foreseen and avoided by railroad engineers, by automobile operators, by factory hands or construction workers, or by janitors of great housing enterprises, before holding their principals liable for damage done to innocent third persons?

Yet we still frequently find decisions which relieve corporate enterprises from liability for obviously typical harm by using these inadequate and antiquated formulations of the underlying principles of liability. Such an undesirable result is illustrated by a decision\(^58\) which has been described\(^59\) as the forerunner of the *Palsgraf* case. The plaintiff's deceased, riding on a pass in the engine cab of one of defendant's trains, was killed in a head-on collision caused by the negligence of the engineer on the other train; the court denied recovery, saying that the negligent engineer could not have anticipated the presence of the deceased. But if anticipation were conceded, it obviously could not have affected the engineer's standard of conduct and thus have prevented the accident. Hence the rationalization based on negligence as a concept of relationship seems most unrealistic indeed. In another line of decisions reliance on the *Palsgraf* case seems to have prolonged an obsolete anti-social policy of defeating personal injury claims by employees against their employers.\(^60\)

Perhaps because of the tendency of the courts to continue to think in terms of concepts and doctrines instead of openly in terms of distribution of losses, it is at present impossible to determine what they consider calculable "enterprise" hazards in many situations. For instance, how should courts administer losses occasioned by publications in newspapers,\(^61\) or what should a court do concerning the claim of one who has depended upon the bond of a surety company which had been executed in blank by the proper company officials and had then been left where casual strangers, who "sold" it to the plaintiff, could and did easily steal it?\(^62\) What of the inevitably recurrent losses arising from the main-


tenance of ball parks and golf courses? Should not ordinary hazards of these enterprises justify the imposition of "quasi-negligence" liability? Constantly repetitive types of litigated fact situations arising out of such organized enterprises as municipal, county and state government undertakings to maintain sidewalks, roads and highways as well as other public services clearly call for the administration of losses through this "quasi-negligence" approach. And certainly the loose language now employed by the courts and writers should be avoided in legislation dealing with the liability of enterprise as such. For instance, it is hard to believe that the inclusion of foreseeability terminology in the section of the Draft for a Uniform Sales Act, 1940, dealing with the regulation of manufacturer's liability will contribute in any way to a clarification of the economic and social issues there involved. On the other hand, an important step in the right direction seems to have been taken by Section 14 of the Uniform Trusts Act which distinguishes enterprise liability from liability for "personal fault" and treats the former like liability "without fault." It is high time for our courts and our legislatures to adopt a realistic point of view toward the liability of enterprise for the organized undertakings upon which our populace is almost completely dependent, and so far as possible in keeping with the growth of the common law to introduce standards of risk and loss shifting more

Note 45 supra.

May a city be held liable for injuries caused by defects in the maintenance of its streets? The courts, referring to the Palsgraf case, have denied liability where a guest in an automobile was injured when the car collided in a fog with stones negligently placed in a public driveway (Birckhead v. Mayor and City Council of Baltimore, 174 Md. 32, 197 Atl. 615 (1938)), and where, because a street was not sufficiently well marked, an automobile driver lost his way and ran into a body of water (Thompson v. Houma, 76 F. (2d) 793 (C.C.A. 5th 1935)). But cf. O'Neill v. Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930), allowing recovery where a child, while being conducted around an obstruction on the sidewalk, was struck by an automobile.

The Comment on § 28(1) provides: "Where it can reasonably be foreseen that goods, if defective .... will in the ordinary use thereof cause danger to person or property, the manufacturer thereof .... assumes responsibility to any legitimate user thereof ...."

The Comment on § 28(1) attempts to reconcile the two theories upon which the present manufacturers' liability is based, i.e., the warranty theory (1 U.L.A. §§ 15–16; Llewellyn, On Warranty of Quality and Society, 36 Col. L. Rev. 699, 701, 723, 732 (1936)) and the negligence theory (MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Manufacturers' Liability—MacPherson v. Buick Comes of Age, 4 Univ. Chi. L. Rev. 461 (1937); Rest., Torts § 395 (1934)). It is difficult to see how the draft expects to achieve its aim of meeting economic necessities by introducing the novel concept of "assumption of responsibility" while maintaining the requirement of foreseeability, the very substance of the law of negligence. As to related problems in the law of the "repairman's" liability see 8 Univ. Chi. L. Rev. 162 (1940).

This act was drafted by Professor Bogert, approved by the National Conference of Commissioners on Uniform State Laws, and adopted in Louisiana, North Carolina, and Nevada. See 3 Bogert, Trusts and Trustees § 734 (1935).

Such liability is assumed in sections 13 and 14 of the act where "the tort was a common incident of the kind of business activity in which the trustee .... was properly engaged."
closely related to the demands of a well-ordered society than are those developed at early common law.69

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Casum sentit dominus, let the loss remain where it falls, is a maxim, the significance of which lies chiefly in its exceptions. But to conclude that these exceptions are apparent in the common law principles of negligence is to leave them shrouded in doubt. They might, therefore, with profit be realistically restated, if only to indicate the direction of developing policies of loss distribution for inadvertently caused harm.

1. Cases of harm arising from activities which inevitably create risks to other members of the community, no matter how carefully they are conducted, clearly require exceptional treatment. Any such activity which is socially undesirable should be prevented by punitive sanctions and, being "morally negligent," by the imposition of liability for all damage it occasions. But if such activities are socially valuable and therefore encouraged and subsidized or at least tolerated in spite of their risky character, society will exonerate them from the imputation of "moral" negligence. Liability will be imposed upon them merely to effect a just distribution of loss among those who benefit from the activity. If the courts propose to rationalize this liability under established negligence concepts, they will have to abandon the traditional emphasis placed on the negligence vel non of the servant as the only available source of liability and look to the "quasi-negligence" of the activity or enterprise as such in terms of its foreseeable risks and generally calculable potentialities of harm. Where both the injuring and the injured parties are enterprises and even though the hazard is a typical one, it is arguable that liability should be imposed only on the basis of "moral" negligence inasmuch as distribution of the loss will be effected, whichever enterprise bears it.70

2. In other situations, liability must be referred to the personal negligence or carelessness of individuals in the traditional sense: where harm ensues from

69 But future legislation based on a consistent system of liability might have to consider the realization of some "principle of the smallest harm" which would distribute the loss in cases of innocent causation also with regard to the respective wealth of the parties.

An application of this principle to the liability of insane persons and children is contained in the Austrian Civil Code § 1310. See also German Civil Code § 829: "A person who is . . . not responsible for any damage caused by him, shall, nevertheless, where compensation cannot be obtained from a third party charged with the duty of supervision, make compensation for damage in so far as according to the circumstances; e.g., according to the relative positions of the parties, equity requires compensation, and he is not deprived of the means which he needs for his own maintenance suitable to his station in life . . . . and for the fulfilment of his statutory duties to furnish maintenance to others." Translated, Rheinstein, The Law of Torts, Cases and Materials from Common Law and Civil Law Countries 9 (1940). For a survey of pre-war European legislative experiments see Ehrenzweig, Zur Erneuerung des Schadenersatzrechtes (1937).

70 See, e.g., Austrian Act Regulating the Liability for Damages Caused by Motor Vehicles (1908) § 3, according to which the ordinary rules of absolute liability do not apply to mutual claims of parties under the act.
some hazard not generally foreseeable as a risk of the activity or enterprise in question; or where it is caused by individuals pursuing some everyday “back-yard” activity or by some small enterprise with which no particularly foreseeable risk or generally calculable inevitable potentialities of harm to others are associated.

When individuals or even small enterprises cause harm through intentionally wrongful conduct or through “moral” negligence, such as drunken driving or the deliberate disregard of the accepted methods of doing certain things, they will be expected to compensate for the resulting damage. In such cases no economic consideration can outweigh the legitimate desire of society to retaliate and deter. But in the absence of such “fault,” education and reform of potential “wrongdoers” might better be left to the criminal side of our law and precedence be given to considerations of social expediency. A policy allowing recovery by one party against another in such cases is apparently based on the false assumption that it is more just to place the loss on the innocent “harmdoer” rather than on the innocent injured person, a paradoxical choice which somehow implies that as between innocent parties it is more innocent to receive than to give harm. Liability for subjectively unforeseeable and unavoidable harm can be rationalized in terms of negligence only by that fiction of foreseeability and avoidability which we call the “objective” standard of negligence, according to which the defendant is judged in light of the conduct of the reasonable and prudent man. This “objective” negligence was designed to become the first “enterprise” liability independent from purely moral reprehensibility. Alone, such liability can cover the whole ever-increasing field of enterprise liability only by diluting its conceptual elements to the extent of destroying its very meaning. But if, as is here suggested, such liability is supplemented by a kind of enterprise or “quasi-negligence” liability, then answerability in damages for so-called “objective” negligence in “back-yard” cases is susceptible of the necessary restriction, in fact as well as in theory, to those consequences which a reasonable and prudent man could have foreseen and avoided. Confining liability in these cases to foreseeable consequences or to the consequences of foreseeable hazards amounts, it is true, to the denial of full recovery; but such splitting of the loss seems more than justified in view of the subjective innocence of the “harm-doer.”

It is, perhaps, implicit throughout this note that two essentially different

71 Cf. Gierke, Der Entwurf und das deutsche Recht 167, who called this principle “paradox but correct.” The medieval concept of guilty animals as well as the “faits des choses inanimées” of the French law involves the same primitive psychological attitude.

72 See Seavey, Negligence—Subjective or Objective?, 41 Harv. L. Rev. 1 (1927); Harper, Torts 160 (1933).

73 The imposition of such a restriction would lend support to Professor Gregory’s proposed legislative reform as to contribution among joint tortfeasors against the attack that it is helping to preserve an antiquated system of liability for fault. Gregory, Contribution among Joint Tortfeasors: A Defense, 54 Harv. L. Rev. 1170 (1941); James, Contribution among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941).
fundamental notions determine present day civil liability in tort: (1) the retaliatory and educational sanction retained in the private law as a hang-over from its criminal law origin, and (2) compensation according to principles of economic distribution of loss. Since these two principles are realized within the one system of common law liability for negligence, the equivocal use of its concepts was inevitable. Thus the unconsciously interchangeable use of the term "foreseeability" in two entirely different senses, i.e., foreseeability by the wrong-doer of avoidable harm and foreseeability by an enterprise of unavoidable harm, has led in the administration of so-called negligence litigation to a confusion between two competing policies of liability for inadvertently caused damage. Recognition of this fact by our courts and legislatures should do much toward clarifying our so-called law of negligence and should obviate most of the confusion of thought revealed in learned disquisitions on "proximate cause" or on the extension and restriction of liability for inadvertently caused harm.

The administration of our common law negligence has become so arbitrary in spots that it repeatedly provokes the suggestion that a good deal of so-called negligence litigation be removed from the common law courts and be handled under appropriately drafted legislation by commissions acting without juries. Although this may be the best ultimate solution, the courts seem capable of achieving almost equally desirable results by openly recognizing the social needs and tendencies, as well as by consciously adopting the means of achieving and furthering them, set forth in this note.

With alterations along the lines suggested, the foreseeability test of the Palsgraf case may remain generally useful and Chief Justice Cardozo's opinion may attain the position of creative importance which it has never yet firmly achieved. Thus, perhaps, the "riddle of the Palsgraf case" can be solved without acceding to Professor Cowan's "motion to bury it."74

COLLECTIVE BARGAINING BY RETAILERS UNDER THE FAIR TRADE ACTS

The Miller-Tydings amendment4 to the Sherman Act5 provides that nothing in the act "shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions . . . . in any state . . . . in which the commodity is to

74 Cowan, op. cit. supra note 3, at 67.