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From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980

WILLIAM E. NELSON†

INTRODUCTION

Beginning with Oliver Wendell Holmes' magisterial essay, *The Common Law,* no topic has captured the attention of private law theorists in America more than the law of tort. Innumerable scholars, many of whom, like Holmes, have written from the perspective of legal history, have striven to identify the principles and policies underlying judicial decisions concerning whether and to what extent victims of injury should receive compensation.

This Article focuses on developments in New York's tort law between 1920 and 1980. I have chosen to focus on the law of a single state because such a focus makes possible a distinct kind of study, in which one can examine not only leading cases known to all casebooks but also the often highly revealing secondary opinions of the state's highest court and the opinions of intermediate and trial court judges. This focus also makes statistical analysis of the work of trial courts possible and in other ways facilitates the placement of doctrinal change in a broader pattern of political, intellectual and cultural development. Hopefully, the study of a single state will produce a deeper kind of knowledge than would a rehash of the leading cases we

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1. OLIVER WENDELL HOLMES, THE COMMON LAW (1881).
already know.

The reason for choosing New York as the state for study is that, during most of the period under analysis, it was the most populous state and the cultural and economic leader of the nation. In its metropolitan center, in its upstate industrial cities, in its suburbs and in its rural farmlands and environmentally protected woodlands, New York contained locales similar to those in all the rest of the nation except the Deep South and the Pacific Southwest. New York was more representative of the nation as a whole than any other state, and hence the findings of this Article should serve as revised hypotheses about twentieth century development of American tort law in general until other scholars, through equally detailed studies of California, Texas, Georgia and elsewhere, prove them wrong.

The main claim of this Article is that in the first half of this century courts focused on issues of fairness in the adjudication of tort cases, but that during the second half of the century judges have made considerations of efficiency their primary concern. A further claim is that this shift from fairness to efficiency was the result, albeit indirectly, of policies adopted by the United States military establishment during the course of World War II. These claims, if accepted, have significant implications for the existing scholarly literature on the subject of tort law.

Three categories of literature require examination. The first is the prescriptive, doctrinal literature, in which judges and law professors have debated normative questions about the theory and underlying principles of tort. The second is the general historical literature, in which social historians, on the one hand, and law professors on the other, have engaged in a methodological controversy about how best to conduct research on the history of tort. The third is the specific historical literature discussing either particular developments in tort law or individual tort cases in twentieth century New York.

For the past quarter century, the doctrinal debate has been framed by George Fletcher's classic essay, *Fairness and Utility in Tort Theory*. Since Fletcher's article, two theories of tort liability, fairness and efficiency, have

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influenced tort law. It would be in vain to cite all the authors who have participated in the debate over the two theories or to capture all the nuances of their scholarship. All that can be done is to capture the main lines of the arguments.

On one hand, a number of scholars have argued that courts historically have focused and normatively ought to focus on issues of fairness in addressing matters of tort liability. Among the historians, Robert Rabin and Gary Schwartz have argued that concerns for fairness were the motivating force behind nineteenth century judicial decision making in tort cases, and several writers of normative scholarship, Fletcher himself and Jules Coleman, Richard Epstein, and Ernest Weinrib, have agreed that fairness should be important. Each, however, has a somewhat different conception of the concept of fairness as it applies to tort.

Fletcher's conception of fairness, for example, rests on notions of reciprocity: he would not require actors who impose reciprocal risks of harm on each other to provide compensation when harms come to fruition but would demand compensation only from a tortfeasor who imposes a nonreciprocal risk on her victim. Coleman, in contrast, argues for a principle of corrective justice, by which a tortfeasor has a duty to repair wrongful losses of her victims for which she is responsible. Epstein supports an analogous and overlapping principle, which holds one person liable for any harm she causes another, while Weinrib also turns to corrective justice as the fundamental principle of tort doctrine. Coleman differs from Epstein and Weinrib, in that

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6. See Fletcher, supra note 2, at 541-48.
9. See Ernest J. Weinrib, The Gains and Losses of Corrective Justice, 44 DUKE
he believes that existing tort doctrine has departed and justifiably may depart from the principle of corrective justice, whereas the others make no such concession. Coleman also differs from Weinrib in that his principle of corrective justice gains its content from a community's common sense morality and shared moral and legal practices, whereas Weinrib's principle is more abstractly and philosophically grounded.

In contrast to the advocates of fairness, law and economics scholars have argued that courts should focus on issues of efficiency in addressing matters of tort liability. Most prominent among them have been Guido Calabresi and Richard Posner. Apart from their agreement on the value of economic analysis in the field of tort, Calabresi, Posner, and other law and economics scholars disagree about virtually everything else. For example, Calabresi's early masterpiece, *The Costs of Accidents*, uses economic analysis to demonstrate that legal attribution of damage liability to potential defendants typically will induce them to take precautions against harm and thereby reduce accidents to their optimal level. In contrast, Posner in his early work praised the efficiency of the Hand calculus for its immunization of many defendants from liability, thereby reducing enterprise costs and promoting entrepreneurial activity. In addition to disputing whether efficiency analysis has a pro-plaintiff or a pro-defendant bias, law and economics scholars have disagreed over efficiency's very meaning, with some insisting on Pareto optimality, others demanding a Kaldor-Hicks standard and still others requiring only wealth maximization in order to declare an economic initiative efficient.

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10. See Coleman, Risks and Wrongs, supra note 7, at 386.

11. Compare Coleman, The Practice of Corrective Justice, supra note 7, at 26, 29, with Weinrib, Causation and Wrongdoing, supra note 9, at 444-50.


14. For the distinction between Pareto optimality and the Kaldor-Hicks test,
More relevant for present purposes is Posner's claim, fully articulated in a co-authored book, The Economic Structure of Tort Law,\(^\text{15}\) that "the rules of the Anglo-American common law of torts are best explained as if designed to promote efficiency in the sense of minimizing the sum of expected damages and costs of care; or, stated differently, that the structure of the common law of torts is economic in character" and that the "logic of the common law is an economic logic."\(^\text{16}\) Other law and economics scholars, however, have disagreed. Lewis Kornhauser, for one, has doubted whether traditional tort rules have, in fact, reflected efficiency concerns,\(^\text{17}\) while Izhak Englard has demonstrated that the law and economics movement has had little but a rhetorical effect upon contemporary processes of tort adjudication.\(^\text{18}\)

The present Article takes no position in the normative debate whether some concept of fairness or some concept of efficiency should govern the law of torts; a fortiori, it also offers no view as to what is the best definition of each of these concepts. Nor does the Article deny that concerns both of fairness and of efficiency have impacted on tort law throughout its long history. However, it does deny that any single conception of fairness or efficiency has had a dominant input on tort law throughout the entire course of this century. The assumption underlying the Article is that the concepts both of fairness and of efficiency are socially constructed. Its thesis is that, in response to the political and propaganda needs of the American military during the World War II era, a socially constructed conception of efficiency replaced a socially constructed conception of fair-ness as the dominant way of thinking about tort in the mid-twentieth century. Acceptance of this thesis precludes de-

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\(^{16}\) For the distinction between Pareto optimality and wealth maximization, see Lewis A. Kornhauser, A Guide to the Perplexed Claims of Efficiency in the Law, 8 HOFSTRA L. REV. 591, 592-97 (1980).

\(^{17}\) See Kornhauser, supra note 14, at 591.

scriptive claims, such as those of Posner, that the common law over time has possessed any consistent logic or structure. It also counsels those who make normative claims to adopt the approach of scholars like Calabresi and Coleman, both of whom recognize that tort doctrine should be formulated in response to societal choices and desires.\(^{19}\)

Although this Article does not propose any full-scale resolution to the fairness-efficiency debate, it does reflect my considered views about how to write legal history, a subject of vexing debate among legal historians. Ever since J. Willard Hurst first appreciated the need to study legal history from the perspective not simply of judicial doctrine but of law in action,\(^{20}\) historians have debated whether in their study of the law's past they should focus on judicial doctrine or on economic, cultural and societal development. Today, no one questions the insight of Hurst and his successors in broadening the scope of scholarly inquiry beyond mere doctrine. It is obviously useful not only to know the analysis of the appellate judges who declare the formal legal rules, but also to examine the interplay between formal doctrine and the lives of ordinary citizens. Thus, it has become routine for legal historians to inquire into how public attitudes affect judicial lawmaking and into how common law rules impact on who commences and who wins litigation.

Some historians, however, appear to go beyond Hurst. Two senior scholars, Lawrence Friedman and Morton Horwitz, for instance, have denied the autonomy of doctrine and have treated nineteenth century tort law as a product of judicial policy choice among various claims presented by competing interest groups.\(^{21}\) A group of younger, "hybrid

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sociolegal" scholars go even further. These scholars appear to believe that judge-made doctrine has little, if any, impact on the substance of the law or on the law's effect on ordinary people, and, as a result, they strive to write legal history mainly from nondoctrinal sources. Their approach must be contrasted with that of doctrinal scholars like Gary Schwartz, who has written that "[c]ommon law history . . . provides a fascinating combination of political history and intellectual history . . . [and] is well worth pursuing."

In part, this debate about how to write legal history reflects differing views about the questions that historians should ask of the past, with common law historians asking why doctrine developed as it did and sociolegal historians asking how ordinary people live under a legal order. For reasons I have elaborated elsewhere, I believe that historians should be free to frame as they wish the questions they ask of the past and that they ought not be criticized for the choices they make. But the debate also concerns the evidence that historians should use in determining how law affects ordinary people.

Without doubt, in making such determinations historians should rely on statistical analysis and on statements about law by lay people. Often, however, historical sources are too imprecise to permit sophisticated statistical analysis, and statements by the laity are rare, if they exist at all. Sociolegal scholars, in my view, sometimes err both when they fail to recognize the unavailability of such direct evidence to answer the admittedly important questions they want to ask and when they refuse, even when direct evidence is missing, to turn to another source of insight—judicial opinions.

The opinions of judges, in fact, contain a wealth of historical evidentiary data. Those who work with judges know that their opinions are not prepared lightly. Although judges are acutely aware of the limitations on their writ and power, they also know that their judgments may affect how people live. Even more significant is their understanding that persuasion is their best, perhaps their only, tool for making their judgments effective, both in the short and long run. Although judges are not perfectly informed about how those who read their opinions will receive them, they typically are well informed. Insofar as their information about those whom their opinions must persuade is accurate, their holdings and the reasoning advanced to support them provide a window of insight into the thoughts of a much larger number of citizens who never commit those thoughts to paper. Accordingly, judicial opinions merit historical analysis, not only to learn the history of doctrine for its own sake but also for the window it provides into contemporary social and cultural development.

This study, mainly of doctrinal developments in New York’s law of tort between 1920 and 1980, attempts both to understand legal doctrine for its own sake and to use doctrine in an effort to portray the larger economic, cultural and societal context in which the doctrine emerged. It also turns to nondoctrinal historical sources in its effort to portray law in context. As it does so, it depicts the development of twentieth century tort law quite differently than does the received wisdom.

The received wisdom is derived from Charles Gregory’s time-honored article, *Trespass to Negligence to Absolute Liability.* Gregory’s account begins in the nineteenth century, when courts, it is said, eliminated unintended trespass as a substantive tort and established a consistent theory of liability based on fault. Their goal, in his view, was to subsidize industrial enterprise by conferring immunity from liability for accidental harm. Then, in the twentieth century, “[c]hanging times and the amazing growth of our industries, together with a gradual shift in the basis of political power,” convinced the public “that industry not only ha[d] no further need of subsidization but also should be made to assume the burden of paying for all damage ensuing from its normal operations.” This new attitude

made "the climate . . . right for judges" to adopt a theory of absolute liability without fault.\textsuperscript{27}

The most elaborate version of the received wisdom occurs in Ted White's 1980 book, \textit{Tort Law in America}.\textsuperscript{28} White makes explicit an assumption that also underlies Gregory's work, "that the ideas of certain elite groups within the legal profession have had an influence disproportionate to the numbers of persons advancing these ideas,"\textsuperscript{29} and then proceeds, like Gregory, to examine as primary sources only materials authored by those professional elites. Using the same sources, he predictably agrees with Gregory that the "attitudes of educated Americans toward injuries have changed dramatically over the past hundred years," and that a "widespread attitude which associated injury with bad luck or deficiencies in character has been gradually replaced by one which presumes that most injured persons are entitled to compensation."\textsuperscript{30} Although some revisionist work questions the received wisdom in regard to the nineteenth century's shift from trespass to negligence,\textsuperscript{31} existing scholarship overwhelmingly supports the conclusions of Gregory and White.\textsuperscript{32}

This Article disagrees and presents a new interpretation of the development of twentieth century tort law. It rejects Gregory's claim that twentieth century courts imposed increasing liability on industrial enterprises as the economic need for subsidization declined and White's claim of a change in elite attitudes toward compensatory justice. Instead, the Article maintains that the military establishment's assertions during World War II that the exercise of care could significantly reduce battle casualties permeated the minds of millions of Americans and led them in the postwar years to focus on how to deter civilian accidents. This focus on deterrence rather than fair compensation

\begin{itemize}
\item \textsuperscript{27} Id. at 383.
\item \textsuperscript{28} See G. \textit{Edward White}, \textit{Tort Law in America: An Intellectual History} 37-50, 102-13, 163-76, 189-207 (1980).
\item \textsuperscript{29} Id. at xii.
\item \textsuperscript{30} Id. at xv.
\item \textsuperscript{31} See Rabin, \textit{supra} note 5, at 925.
\end{itemize}
pointed the way, in turn, toward the ultimate question of efficiency—identifying the socially optimal level of accidents.

This Article also disagrees with the received wisdom on some specific issues. Most notably, it rejects the traditional interpretation of *Palsgraf v. Long Island Railroad*, which ironically sees Andrews’ dissenting opinion as a legal realist tract and Cardozo’s majority opinion as a fact-specific exercise written, without regard to considerations of competing social interests, by a judge of such “purity” that he was uninfluenced by “frustrated ambitions with their envies, and... hopes of preferment with their corruptions.” Instead, this Article interprets Cardozo’s opinion as a brilliant compromise of a decades-long political conflict over the proper standard of compensatory justice in personal injury cases and Andrews’ dissent as a conservative effort to leave the judiciary free to set aside plaintiffs’ verdicts in the absence of tight connections between moral fault and injury.

Part I of the Article, which follows, will begin by examining the pre-1920s conflict in New York over the proper standard of compensatory justice. First, it will delineate the two paradigms of tort liability that competed against each other throughout the first few decades of the century—the traditional tort doctrine of causation designed to protect the existing distribution of wealth and resources by limiting tort recoveries to cases involving moral fault which had caused harm and a newer, more liberal view that entrepreneurs who created conditions that ultimately caused others to be injured should pay for those injuries. Part I will then turn to Cardozo’s attempt in *Palsgraf* and other cases to synthesize the two views. Finally, the Part will conclude with a detailed examination of important

33. 162 N.E. 99 (N.Y. 1928).
35. See John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* 121 (1976). Noonan’s essay on *Palsgraf* is the best piece of writing on the case to date and effectively summarizes the earlier scholarship. See id. at 111-51. The language quoted in the text was reprinted and was originally from a eulogy of Cardozo by Learned Hand published in the Columbia, Harvard and Yale law reviews. See id. at 121. Learned Hand, *Mr. Justice Cardozo*, 39 Colum. L. Rev. 9, 10-11 (1939); Learned Hand, *Mr. Justice Cardozo*, 52 Harv. L. Rev. 361, 362-63 (1939); Learned Hand, *Mr. Justice Cardozo*, 48 Yale L.J. 379, 380-81 (1939).
areas of personal injury law, such as the rules of product liability, the general principles of negligence, and a series of classic doctrines dealing with assumption of risk, contributory negligence, the liability of landowners, and vicarious and joint liability. This examination will attempt to show how the two competing paradigms of tort liability and Cardozo's effort at synthesis affected day-to-day doctrine in the pre-World War II period.

Part II will trace the shift to judicial concerns for social utility and efficiency during the years from 1940 to 1980. After an introduction suggesting how World War II made millions of Americans conscious of their ability to reduce accidents, Part II will turn to the law of product liability, the liability of landowners to people entering on their land, assumption of risk, contributory negligence, joint liability and res ipsa loquitur, all of which changed in fashions designed to deter accidents. Part II will conclude with a general discussion of the law of negligence that seeks to establish how the goals of reducing accidents and providing compensation were related to and part of a larger strategy of delineating and achieving the optimally efficient level of accident deterrence.

Of course, the goals of the tort system both now and a hundred years ago were far more variegated than this oversimplified summary would suggest, and it is hoped that the variety and complexity of tort law in all periods will emerge in the extended analysis below. This introduction's emphasis on World War II is also an overstatement, since no one could write about mid-twentieth century American history without taking into account the Great Depression and the New Deal, against the background of which the War had its enormous impact, and the events after the War which cemented its effects into place. Accordingly, the contribution of these events to change in the law of tort must also be kept in mind throughout the pages that follow.

I. FAIRNESS AS THE BASIS OF TORT LAW, 1920-1940

A. Introduction: The Search for an Underlying Principle of Tort

Many historians have observed that the aftermath of World War I was a time of widespread conflict in America
between the capitalist and laboring classes. As President Woodrow Wilson declared to Congress in a cable from Versailles, the "question . . . standing at the front of all others amidst the present great awakening is the question of labor," the question of how those "who do the daily labor of the world [are] to obtain progressive improvement in the conditions of their labor . . . and to be served better by . . . the industries which their labor sustains." On the eve of the War, Louis Brandeis had similarly urged that "[t]he labor question is and for a long time must be the paramount economic question in this country." A few years after the War another reformer, Frederick Howe, wrote in an autobiographical sketch that, although the upper classes opposed a world of equality, "[l]abor would not [any longer] serve privilege."

New York, of course, was hardly immune from the class conflict affecting the rest of the nation, if not the whole industrialized world. Indeed, conflict between established elites and a restless working class was the central issue in New York politics and constitutional adjudication into the decade of the 1930s.

This class conflict also impacted on the development of tort law during the same period. In the early decades of the twentieth century the core principle underlying common law tort doctrine in New York, like much other common law of the period, was the protection of a particular distribu- tional norm, that wealth or property not change hands without consent unless the person from whom it was being transferred had committed some moral wrong that had resulted in damage to another. Thus, the law enforced the

"familiar principle[s]" first, that a "violation of a legal right knowingly committed gives to the injured party a cause of action against the wrongdoer" and second, "that one who acts must exercise due care not to do damage to another's person or property." "If property [was] destroyed or other loss occasioned by a wrongful act, it [was] just that the loss should fall upon the estate of the wrongdoer rather than on that of a guiltless person." People had a "right to be protected against loss attributable to another's wrong," and "elementary policy" dictated "that a wrongdoer shall not profit by his own wrong."

On the other hand, it stood "to reason that a person [could] not recover . . . [for] an inevitable accident. There [were] plenty of misfortunes to which people [were] subjected where they must suffer without recompense," and courts could not permit "sympathy, although one of the noblest sentiments of our nature," to "decide . . . questions of law" and thereby become a "basis of transferring the property of one party to another." In the words of the mid-nineteenth century case of Ryan v. New York Central Railroad, everyone in a "commercial" country "to some extent" ran the "hazard of his neighbor's conduct."

In short, judicially elaborated tort doctrine demanded that compensation be paid when a person was injured by another's wrongdoing, but not for an injury, however serious, resulting from innocent conduct. Two early cases are illustrative. In Laidlaw v. Sage, a thief entered the business premises of defendant Russell Sage, demanded

41. The No. 1 of New York, 61 F.2d 783, 784 (2d Cir. 1932).
43. The No. 1 of New York, 61 F.2d at 784.
49. 35 N.Y. 210 (1866).
50. Id. at 217.
51. Laidlaw, 52 N.E. at 679.
$1,200,000 and threatened to set off a bomb if he did not receive it. After he had discussed the matter with the thief, Sage positioned another employee, the plaintiff Laidlaw, between himself and the thief and then, in essence, refused the demand. When the thief set off his bomb, Laidlaw was severely injured but Sage was saved. Plaintiff recovered a jury verdict against Sage, but the Court of Appeals reversed, holding that the bomber had caused Laidlaw's injury and that there was "no evidence in the case of any necessary relation of cause and effect" between Sage's words and actions "and the explosion which caused his [Laidlaw's] injury."52

*Pardington v. Abraham*53 was analogous. In that case, the defendant department store owner maintained a swinging door which another customer pushed open, whereupon the door ricocheted back and struck and injured Eliza Pardington. In reversing a jury verdict for Pardington, the court found that the doors were no less safe than similar doors used in like establishments and that "carelessness in the use of any form of door may inflict injury upon one who happens to be sufficiently near it." The court continued, "No doubt the plaintiff has been the victim of a lamentable accident; but it is attributable, as it seems to me, not to any fault of the defendants, but rather to the hasty carelessness of a third person, over whose movements and conduct they had no control."54

By the opening decades of the twentieth century, however, traditional judicial doctrine could no longer claim to be the only plausible approach to issues of causation in tort. Randolph Bergstrom, whose valuable book on New York tort litigation55 covers a forty-year period almost immediately prior to the period here under study, shows that a competing "popular conception of liability" which its proponents "never clearly articulated"56 was emerging slowly in the years around and after the turn of the century. The evidence available to Bergstrom did not permit him to elaborate this popular paradigm in detail, but there can be little doubt, in view of a growing tendency of jury verdicts to

52. Id. at 689.
54. Id. at 671.
55. BERGSTROM, supra note 22.
56. Id. at 172.
diverge from judges’ views and of the hostile reaction of judges and leaders of the bar to the divergence, that a competing paradigm existed and disturbed profoundly those adhering to the traditional paradigm. In the words of Judge M. Bruce Linn, for example, the law was “menaced by those who would completely transform it,” with “no regard for its history; no reverence for its traditions; no conception of its obligations; and no appreciation for its ideals,” while Judge William Hornblower worried about the frequency with which juries “yield[ed] to local sentiment ... [producing] erroneous decisions in accordance with the popular idea of the demands of justice.”

This new “popular conception of liability . . . was never clearly articulated” by its proponents, at least in part because the juries which administered it could speak only through general verdicts. The best efforts at definition thus came from the mouths of lawyers who opposed the new view. Clearest of all, though guilty of exaggeration, was Eli Hammond, who wrote that the new popular conception was “in favor of looting any public or quasi-public treasury in aid of private suffering or private want.” The distinguished Elihu Root agreed that “[d]istorted and exaggerated conceptions [were] disseminated by men . . . overexcited by contemplating unhappiness and privation which perhaps no law or administration could prevent.” H.T. Smith agreed that “[j]uries are naturally sympathetic and . . . inclined to take the view that an employee should be compensated when injured no matter what the judge tells them about the law.”

As juries and others adopted the new paradigm holding

57. Id. at 142-43, 166, 171-78.
59. Id.
60. William B. Hornblower, New York State Bar Association Minutes, 1 AM. LAW. 49 (1893), quoted in BERGSTROM, supra note 22, at 171.
61. BERGSTROM, supra note 22, at 172.
62. Quoted in BERGSTROM, supra note 22, at 171 n.12.
that victims of injury should receive compensation from
some source, they simultaneously rejected the older, nine-
teenth century world view that injury, death and other sud-
den calamities were inevitable, random and frequent events
attributable to cosmic rather than human agency. Where-
as nineteenth century judges had not traced out complex
chains of causation in order to identify the human agent
most responsible for a disaster but had instead typically let
"losses . . . lie where they fell," early twentieth century
jurors "came to assign cause differently." The newly
emerging tort paradigm, to quote at length from the find-
ings of Randolph Bergstrom, had developed

an understanding of cause and effect that included a fuller sense
of remote causation—that actors not at the site of an event could
create the conditions that cause the event—and begun to assess
the liability of participants temporally and physically removed
from accidents. The scope of the search for liability was pushed
beyond immediate contact to outlying areas where those who
created the conditions that caused injury worked.

Understanding cause to spring from sources remote as well as
immediate, New Yorkers brought suit over injuries from common-
place causes that "ordinarily were never noticed hitherto," and
that had previously been considered the random working of fate.
In doing so, they defined anew the "inevitable" event as a com-
pendable injury, conceiving it as the cause and responsibility of
someone else.

By 1920, these newly emerging, though not uniformly
accepted, ideas of causation and tort liability had begun to
attain legitimacy even in judicial circles. As a result, tra-
ditional doctrine no longer provided easy answers in every
case, and judges began to recognize that issues of liability
and causation involved policy choice. Competition between
the new and old paradigms left no doubt that determining
when a plaintiff had "a legal right" or when a defendant
had committed "a wrongful act" required courts to consider
whether there was "a relationship between the parties of

66. Id. at 58.
67. BERGSTROM, supra note 22, at 175.
68. Id.
such a character . . . that as a matter of good faith and
general social policy” the defendant had a duty not to harm
the plaintiff. More specifically, the courts came to under-
stand that they had “to harmonize the necessities of a
competitive industrial system of business with the
 teachings of morality,” that is, with “the sense of universal
justice exemplified in the Golden Rule,” all “without too
radical a departure from recognized legal rules.”

The Court of Appeals sought to work out the tension
between the competing paradigms of liability in the pace-
setting case of Palsgraf v. Long Island Railroad. Not sur-
prisingly, the court did not adopt either paradigm whole-
sale, but instead strove to elaborate a middle position
entailing a policy compromise. Thus, it adhered to the
traditional doctrinal approach that “some culpability on the
part of a defendant” was the key factor that rendered
conduct tortious. At the same time, however, it defined cul-
 pability more expansively and thereby increased the range
of cases in which victims of injury could obtain compen-
sation.

Still studied by all first-year law students under the
rubric of proximate cause, the majority opinion in Palsgraf
authored by Chief Judge Benjamin N. Cardozo has never
been examined by scholars in the context of the ongoing
conflict between supporters of the new and supporters of
the old paradigm of tort liability. Such an examination
suggests that Cardozo wrote his Palsgraf opinion with the
 conflict in mind, that he embraced the new paradigm, but
that he also recognized a need to limit the range of liability
to which defendants might be subjected thereby.

The case arose when the plaintiff, Helen Palsgraf, who
had purchased a ticket from the railroad and was waiting
for a train, was injured when scales, dislodged as a result of
an explosion of fireworks at the other end of the station’s
platform, fell from their proper place. The explosion had
occurred when two railroad employees had knocked a small
package out of the hands of another passenger while
helping him board a moving train. The package contained

73. Id.
74. 162 N.E. 99 (N.Y. 1928).
the fireworks, "but there was nothing in its appearance to
give notice of its contents." 76

The traditional understanding of negligence and proximate cause was elaborated by Judge William S. Andrews in a dissent that would have affirmed the opinion of the Appellate Division directing judgment for the plaintiff. In Andrews' view, "[e]very one owe[d] to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." Negligence consisted in breach of this duty, and the railroad had been negligent in Palsgraf when its employees permitted a man to board a moving train and even assisted him in doing so. But "[o]bviously," as Judge Andrews himself observed in another case, negligence liability had to have "its limits." 77

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." 78 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." 79 In determining proximate cause, a court had 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." For Andrews, inquiries into proximate cause always involved "question[s] of fair judgment" and could lead at best not to a clear rule but only to "an uncertain and wavering line" that would yield "practical" results "in keeping with the general understanding of mankind." 80

Andrews' language about "public policy," "a rough sense of justice," and "practical politics" was not the language of the nascent legal realist movement, as other scholars have

76. Palsgraf, 162 N.E. at 99.
78. Palsgraf, 162 N.E. at 103.
79. Id. at 104. For a similar opinion by Judge Charles Clark viewing proximate cause as dependent on a judge's "values and his notions of sound and desirable social policy," see Pease v. Sinclair Ref. Co., 104 F.2d 183, 185 (2d Cir. 1939).
80. Palsgraf, 162 N.E. at 104.
suggested. It would be two more years before the movement would receive its name and its designation as an intellectual movement in Karl Llewellyn's famous article, *A Realistic Jurisprudence: The Next Step*, and, even then, legal realists did not often use the words quoted above that were used by Andrews. As I have urged elsewhere, Andrews' language was more typically the language of the descendants of the realists in the aftermath of World War II, not the language of first-generation realists in the decade of the 1930s. It makes more sense to understand Andrews to be describing conservative tort doctrine of recent decades, of which he was intimately aware, rather than a jurisprudential movement which had not yet occurred.

In addition to the *Sage* and *Abraham* cases discussed above, *Salsedo v. Palmer* was a 1921 Second Circuit precedent that strongly supported Andrews' views. The plaintiff was the widow of a deceased alien who had been arrested and imprisoned on the orders of Attorney General A. Mitchell Palmer. She alleged that her husband had been subjected to physical and mental torture by his federal captors until he committed suicide as the only means of escape. Nonetheless, two out of the three judges sitting on the Second Circuit panel voted to dismiss her complaint, declaring that it would be "a most unreasonable inference... to say that suicidal mania can be regarded as the natural and probable consequence of either mental or physical torture." The dissenter, in contrast, thought it obvious "that the infliction of such wrongs continuously over a long period of time might naturally and probably would lead to... self destruction." However, as the dissenting judge further observed, the concept of "natural and probable consequence" over which the court was battling was a mere "expression... to explain the reason for the decision on the facts" — a decision that must have resulted,

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81. See Horwitz, supra note 34, at 61; White, supra note 28, at 98-99.
82. 30 Colum. L. Rev. 431 (1930).
84. 278 F. 92 (2d Cir. 1921).
85. Id. at 99.
86. Id. at 100.
87. Id. at 99.
88. Id. at 100.
at least in part, from the judges' differing views on the propriety of Attorney General Palmer's anti-immigrant raids.

Other authorities also supported Andrews' digression in *Palsgraf* into proximate cause. In *McAleenan v. Massachusetts Bonding & Insurance Co.*, for example, the Court of Appeals had declared "that one who seeks to hold another responsible for neglect" had to show that the "neglect... directly resulted in damages measured by the value or amount of the rights which were lost by the default." Similarly the Court of Claims thought it "a well-settled rule of law" that a person guilty of negligence was "responsible for the natural and proximate consequence of his misconduct," but not "for a remote cause, and he is only liable when the injury resulting follows in direct sequence, without the intervention of a voluntary independent cause." Likewise, the law was "well settled" that an owner of land on which a fire began was responsible for its spread only to abutting lands and not to lands distant from the premises on which the fire originated, "as being too remote."

Of course, there was also authority for the reform principle favored by Cardozo and the *Palsgraf* majority, the principle that, "where one undertakes to do something involving a dangerous situation, he must do it with reasonable care." Cardozo himself had taken a preliminary step

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89. 133 N.E. 444 (N.Y. 1921).
90. Id. at 446.
toward that view in *Glanzer v. Shepard*, in which a public weigher who had weighed beans at the request of a seller was held liable to the buyer for weighing them erroneously. As Cardozo explained, the "controlling circumstance" in determining whether or not tort liability existed was "not the character of the consequence" but "the thought and purposes of the actor," and in *Glanzer*, the possibility of harm to the buyer should have been within the thoughts of the weigher. Thus, the weigher was liable.

Writing for the *Palsgraf* majority, Chief Judge Cardozo expanded on his holding in *Glanzer* and further embraced the position advocated by reformers as the underlying principle for the law of torts. Proclaiming that a finding of negligence "would entail liability for any and all consequences, however novel or extraordinary," the Chief Judge held that the doctrine of proximate cause would not limit liability as Judge Andrews' dissent suggested it had traditionally done in New York law. In Cardozo's words, "[t]he law of causation, remote or proximate, is thus foreign to the case before us." When this holding was added to the ruling in *Glanzer* that liability depended on the mental state of actors rather than the consequences of their actions, the reform principle was complete. Chief Judge Cardozo and a majority of the Court of Appeals had rendered people in positions of power responsible in damages if they foresaw harm resulting from their actions, however remote the harm might be and by whatever indirection it might be produced.

But, at the same time that Cardozo and his brethren brought the reform program to fruition, they also imposed

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94. 135 N.E. 275 (N.Y. 1922).
95. *Id.* at 276-77.
96. *Glanzer* was later read as support for a far-reaching rule that "a negligent statement may be the basis for a recovery of damages." *International Prods. Co. v. Erie R.R.*, 155 N.E. 662, 663 (N.Y. 1927). *See also* *Nichols v. Clark, MacMullen & Riley, Inc.*, 184 N.E. 729, 732 (N.Y. 1933), and that rule, in turn, was held to permit a damage suit by an African-American who purchased a bus ticket from Buffalo, New York to Montgomery, Alabama on an oral assurance of the ticket agent that he would not be discriminated against on the basis of his race. *See* *Battle v. Cent. Greyhound Lines, Inc.*, 13 N.Y.S.2d 357 (Sup. Ct. 1939).
98. Note should be taken of the parallelism between Cardozo's rulings in *Glanzer* and *Palsgraf*, on the one hand, and *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), on the other.
limits upon it. Cardozo and the other judges were not radicals, and they appreciated the uncertainties that entrepreneurs, who could always foresee harm, would face if they were liable in damages whenever harm, however remote and indirect, occurred. "Proof of negligence in the air," Cardozo thus wrote, would "not do." Defendants who were negligent would not be liable for all the harms in the world, but only for damages suffered by those at whom their negligence was directed. "Negligence," Cardozo continued, was not an open-ended concept, but "a term of relation," pursuant to which "[t]he plaintiff sue[d] in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." Cardozo concluded that no negligence had occurred toward plaintiff and hence she could not recover damages for her injury since, at least "to the eye of ordinary vigilance," the act of helping a passenger onto a moving train was "innocent and harmless . . . with reference to her."

In a line of cases before and after Palsgraf, the Court of Appeals elaborated the rule that in order "[t]o be negligent, a defendant must have acted or failed to act in such a way that an ordinary reasonable man would have realized that certain interests of certain persons were unreasonably subjected to a general but definite class of risks." Conversely, a person could not "be held liable in negligence for failing to provide against a danger he could not have reasonably foreseen." In a case decided in the same month as Palsgraf, the Court of Appeals, with only Judge Andrews dissenting, wrote that "[n]egligence is gauged by the ability to anticipate." "The risk reasonably to be perceived define[d] the duty to be obeyed." The "one fundamental rule," according to still another opinion from which only Judge Andrews dissented, was "that the act of a party sought to be charged is not to be regarded as a proximate cause . . . unless it could have been reasonably anticipated that the consequences complained of would result from the alleged wrongful act."

99. 162 N.E. at 99.
100. Id. at 101.
101. Id. at 100.
105. Saugerties Bank v. Delaware & Hudson Co., 141 N.E. 904, 905 (N.Y.)
In light of this principle, the court decided cases such as *Wagner v. International Railway,* where it found a railroad liable to a plaintiff who had gone upon a trestle to rescue his cousin who had fallen from a train. The reasoning, in another famous Cardozo opinion, was that "danger invites rescue." Since a rescue attempt was "within the range of the natural and probable" and hence foreseeable reactions to the possible peril of a man lying injured on railroad tracks, the court held the railroad liable when the person attempting the rescue was injured.

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106. 133 N.E. 437 (N.Y. 1921).
107. Id.
108. Id.
Of course, damage remained "the very gist and essence of the plaintiff's cause," and that damage had to flow "from an infraction of a duty, to the injured party, from an invasion of his legal rights," in order for "legal liability" to be imposed. There could "be no actionable negligence in


the absence of a legal duty to the plaintiffs.\textsuperscript{111} And, determining the scope of citizens' duties to each other was a difficult matter which could not "be tested by pure logic."\textsuperscript{112}

There were some matters on which the New York courts reached agreement. For example, they agreed that citizens were under no duty to provide assistance to each other, but that they came under a duty if they volunteered to provide help\textsuperscript{113} or entered into a contractual relationship.\textsuperscript{114} Indeed, a duty arising out of a contract could sometimes "inure to a third person," someone other than a party to the contract, "under certain circumstances."\textsuperscript{115} What, however, were those circumstances? When, for example, would a water company that had made a contract with a city to provide water to its residents be liable to the residents for damage resulting from a failure to provide the water? Or when would an accountant that had audited a firm's books be liable to a person who had lent money to the firm in reliance on the audit?

Chief Judge Cardozo addressed these questions in two of his leading opinions: \textit{H.R. Moch Co. v. Rensselaer Water Co.}\textsuperscript{116} and \textit{Ultramares Corp. v. Touche.}\textsuperscript{117} His concern was that the "field of obligation" not "be expanded beyond reasonable limits."\textsuperscript{118} Although "[t]he assault upon the citadel of privity," of tort upon contract, was "proceeding... apace,"\textsuperscript{119} Cardozo was unwilling to expose contracting parties to "the involuntary assumption of a series of new relations, inescapably hooked together"\textsuperscript{120} and thus "to a liability in an indeterminate amount for an indeterminate

\textsuperscript{112.} \textit{Comstock}, 177 N.E. at 432.
\textsuperscript{116.} 159 N.E. 896 (N.Y. 1929).
\textsuperscript{117.} 174 N.E. 441 (N.Y. 1931).
\textsuperscript{118.} \textit{H.R. Moch Co.}, 159 N.E. at 897.
\textsuperscript{119.} \textit{Ultramares Corp.}, 174 N.E. at 445.
\textsuperscript{120.} \textit{H.R. Moch Co.}, 159 N.E. at 899.
time to an indeterminate class," all out of concern that the "hazards of a business conducted on these terms" would be too "extreme." He was unwilling, in short, to permit large business entities to become vehicles for the redistribution of their shareholders' and customers' wealth to random sufferers of damage whose susceptibility thereto could not have been specifically foreseen and prevented. Cardozo was prepared to impose liability only on those who callously let others get hurt.

Thus Cardozo, keeping true to *Palsgraf*, held that in the absence of "reckless and wanton indifference to consequences measured and *foreseen*" or of "reckless misstatement... or insincere profession of opinion... liability for negligence... [would be] bounded by the contract." Whether a defendant had acted insincerely or recklessly toward individuals who might be damaged by the negligent performance of a contract so as to become liable to them in tort presented a question of fact for juries and for future divisions on the Court of Appeals, the precise outcome of which could not readily be predicted.

Despite the difficulties involved in its application in borderline cases such as *Moch* and *Ultramares*, the foreseeability standard elaborated by the *Palsgraf* majority and numerous other New York cases during the 1920s and 1930s had significant doctrinal consequences in comparison with the alternative articulated by the *Palsgraf* dissent.

The first consequence was to restrict the freedom of trial judges and juries. The traditionalist approach of Judge Andrews in dissent required a jury first to inquire whether the defendant had committed an act that "unreasonably threaten[ed] the safety of others." Then, either the jury or the trial judge had to make a "fair judgment" about where to "draw an uncertain and wavering line" marking the point where "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." In performing these tasks, judges or juries would not have recourse to facts or

121. *Ultramares Corp.*, 174 N.E. at 444.
122. *H.R. Moch Co.*, 159 N.E. at 899 (emphasis added).
123. *Ultramares Corp.*, 174 N.E. at 448; see also *O'Connor v. Ludlam*, 92 F.2d 50, 53 (2d Cir. 1937).
"logic," but would be engaging in "practical politics." In contrast, the approach of Cardozo and most New York judges pointed juries to a coherent factual inquiry. That is, did the defendant know or have reason to know that its activities posed a risk of injury to the plaintiff or to the class of people of which the plaintiff was a member? This standard, which did not involve any "a balance of probabilities" but only "the existence of some probability of sufficient moment to induce action to avoid it," was a simple test that did not permit juries or judges to make any practical political decisions or other balancing judgments.

The second consequence of the Cardozo approach was an almost total absence of mention in the cases of today's popular calculus of risk standard, detailed by Learned Hand in the 1947 case of United States v. Carroll Towing Co. By not encouraging juries to balance the foreseeability of injury against the utility of the defendant's conduct, New York law during the 1920s and 1930s largely avoided utilitarian cost-benefit analysis as part of the negligence determination. During the two decades in question, New York negligence law almost uniformly was not utilitarian. Rather it rested on a simple moral insight that it was the obligation of those who used "numbers of people... for gain and profit, to be vigilant in their efforts to protect such people."

A federal admiralty case, The No. 1 of New York, makes this point with unique emphasis. In The No. 1 of New York, a New York City drawbridge operator had opened a bridge for a tug and its tow and then closed it to permit fire engines to pass, resulting in the bridge colliding with one of the barges in tow. The court held that "a bridge owner" who had once opened a bridge could "not withdraw his consent to the passage, even in the exigency of a

126. Id. at 103-04.
128. Of course, difficult issues could arise at the edges when it became necessary to determine whether a plaintiff was a member of the class on which risk was imposed or whether the injury was of the nature which the defendant should have anticipated. See, e.g., Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964).
129. 159 F.2d 169 (2d Cir. 1947).
131. 61 F.2d 783 (2d Cir. 1932).
demand by fire apparatus responding to an alarm, at a time when withdrawal should be foreseen as endangering the vessel." The noteworthy fact about this opinion is that the court, consisting of Judge Swan and the two Hand cousins, never asked what seemed quite likely, whether the harm that would have been done by not allowing the fire engines to pass outweighed the harm that occurred to the barge. All that mattered was that the bridge operator, having undertaken a duty to the tug and its tow, could not fail to perform that duty even when it could foresee that greater harm might result from its failure.

132. Id. at 784.

133. Only one case decided in the state courts prior to the 1940s ever hinted at a willingness to consider utilitarian reasoning, when it declared that "[t]he degree of care to be exercised is commensurate with the danger to be avoided." Roach v. Yonkers R.R., 271 N.Y.S. 289, 291 (App. Div. 1934). See also The John Carroll, 275 F. 302, 306 (2d Cir. 1921). Analysis of the case reveals, however, that the word "danger" meant no more to the court than foreseeability of harm, as is made clear by the fact that the examples given by the court of great danger involved highly foreseeable harm, while those of slight danger involved sudden, almost unforeseeable harm. In all the examples, the gravity of the harm was held constant, and never in its opinion did the court even consider the burden of avoiding the harm.

A somewhat similar federal case was Ex Parte Hicks, 52 F.2d 129 (2d Cir. 1931), which arose when a small launch immensely overcrowded with about 78 men in its small cabin was struck by ice in the Hudson River and sank with the loss of at least 35 lives. In this case, Judge Learned Hand declared that "[t]he degree of care exacted in any situation depend[ed], not only upon the likelihood of injury, but on its gravity if it comes." Id. at 132. Hand may have been starting in this case to think in terms of the calculus of risk, which he would outline only one year later. But on its facts Hicks was a simple foreseeability case, in which the operator of the launch knew that it could not navigate in ice, was aware of the possible presence of ice in the river, and should have recognized that 78 men could not escape in time from the launch's small cabin if it sank rapidly. On these facts, Hand concluded that grave harm, namely, death, was foreseeable and that the launch should not have been used.

A second federal case, which involved a man who hurried across a street to speak with a man on the other side, only to be struck by an oncoming vehicle, looked more explicitly to the calculus of risk. It declared that "[c]ontributory negligence involves taking a risk which the interest at stake does not warrant" and then held that the "interest in getting across to speak to a man who was awaiting ... was not sufficient to warrant taking the risk which the man took." Mortenson v. Hagg, 99 F.2d 803, 804 (2d Cir. 1938). Such a balancing of the utility of conduct against the risk of harm to which it might lead was not new, however, in contributory negligence cases; in New York, it dated back at least to the nineteenth century case of Eckert v. Long Island R.R., 43 N.Y. 502 (1871). Moreover, reasons of policy called for cost-benefit analysis in contributory negligence while prohibiting it in negligence. Declaring people contributorily negligent for taking risks warranted by self-interest would have interfered
Only one federal case, *Sinram v. Pennsylvania Railroad*, 1 cannot be reconciled with the New York mainstream. On the issue of whether a tug which rammed and damaged an empty barge above the waterline was liable for loss of a subsequently loaded cargo of coal which caused the barge to take on water through the damaged area and thereafter to sink, Judge Learned Hand declared that “we are not bound to take thought for all that the morrow may bring, even though we should foresee it.” Although a tug operator who thought enough about “the precise train of events” that might follow a collision would have foreseen the sinking, the foreseeability “canon,” according to Hand, was “more equivocal than appears on the surface,” and “ignore[d] the excuses for much conduct . . . likely to involve damage to others.” Duties, Hand continued, were “a resultant not only of what we should forecast, but of the propriety of disregarding so much of it as our own interests justify us in putting at risk.”

*Sinram* was an explicit, early statement of the calculus of risk standard later put forward by Hand in *Carroll Towing*. It implied that a tug operator’s interest in getting its job done quickly and efficiently, and the economic benefits that would flow therefrom, outweighed the costs of foreseeable but highly improbable accidents, such as the one that had occurred when the damaged barge was loaded without any inspection for potential leaks. *Sinram*, however, was the only case of its kind prior to the 1940s—the output of the mind of an unusually prescient judge who, perhaps because of his life-tenure appointment on the federal bench, did not participate in the more politicized effort of state judges like Cardozo to identify an underlying principle of tort liability.

Except for this one unusual opinion, however, New York tort law during the 1920s and 1930s, in the end, reflected a policy judgment that people who intended harm to others or who acted toward others in ways which they

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134. 61 F.2d 767 (2d Cir. 1932).
135. Id. at 771.
foresaw would produce harm were liable for any harm they brought about as a result. If harm to others was either intended or foreseen, no interest on the part of an actor, however strong that interest might be, would justify a refusal to pay damages for infliction of the harm. A harm was not compensable only if it was neither intended nor reasonably foreseeable.

By so depriving those who administered tort law of the capacity to engage in balancing and instead tying them to a strict principle of moral obligation, the New York courts insured that classes of people within the ordinary bounds of foreseeability, such as workers, consumers of most products and people on public highways, would recover damages when they suffered injury. They thereby transformed the doctrine of proximate cause, which had been a discretionary political principle available in a wide range of cases to prevent members of the underclasses from recovering damages against capitalist entrepreneurs of wealth and power, into an incomprehensible rule applicable only in weird cases. While insuring entrepreneurs that they would not be liable in an indeterminate amount for an indeterminate time to an indeterminate class merely by conducting business, New York judges made tort law consistent with popular assumptions, which had emerged in the early twentieth century, that victims of injury should recover damages from those who had created the conditions that had caused them to be hurt.

B. The Law of Personal Injuries, 1920-1940

1. Product Liability. Product liability law was one important area of tort that conformed almost precisely during the 1920s and 1930s to the culpability standard of Palsgraf. The then recently decided case of MacPherson v. Buick Motor Co., 136 which held a manufacturer liable to a purchaser of its product for negligent defects that had foreseeably led to injury, even when the purchaser had obtained the product through a retail dealer and thus was not in privity of contract with the manufacturer, was followed in several cases during the 1920s and 1930s. 137 In one

137. See Friedman v. Swift & Co., 18 F. Supp. 596, 598 (S.D.N.Y. 1937);
case, *Smith v. Peerless Glass Co.*, which held manufacturers of component parts liable to consumers for injuries caused by defects in the final manufactured product, the *MacPherson* rule was even extended.

In its adherence to *Palsgraf*, however, *MacPherson* applied only to products "inherently beset with danger and... reasonably certain to imperil life or limb if carelessly made," not to products where "injury was [merely] a possible consequence of the defective construction," but "not a probable result." A manufacturer could "not be charged with negligence where some unusual result" occurred that could not "reasonably be foreseen" and was "not within the compass of reasonable probability." Thus, failure to establish that a manufacturer could readily foresee dangers from products, such as a hair dye which injured a hair dresser but not a customer or cigarettes containing a steel blade, would result in dismissal of a plaintiff's product liability suit.

Other limitations on *MacPherson* were also consistent with the underlying purposes of the Court of Appeals in *Palsgraf*. For example, the limitation that the *MacPherson* rule applied only to suits involving physical injuries and not to commercial loss fit well with the underlying goals of

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tort reformers, who sought to protect workers, consumers and highway users, but not business entrepreneurs. A second limitation, that the rule applied only to claims of negligence and not to suits for breach of warranty, where privity of contract between consumer and manufacturer was still required,\textsuperscript{145} similarly reflected Cardozo’s concerns in \textit{Moch} and \textit{Ultramares} that the “field of obligation” not “be expanded beyond reasonable limits”\textsuperscript{146} and that contracting parties not be exposed to “the involuntary assumption of a series of new relations, inescapably hooked together,”\textsuperscript{147} since the “hazards of a business conducted on these terms” would be too “extreme.”\textsuperscript{148}

Finally, a plaintiff also had to satisfy the culpability standard by offering “direct proof” that a manufacturer’s negligence had resulted in a product defect,\textsuperscript{149} that is, that the “defect . . . might and ought to have been discovered by him.”\textsuperscript{150} “If a cause other than the negligence of the defendant might have produced the accident,” plaintiff had “to exclude the operation of such cause by a fair preponderance of the evidence” and could “not merely ‘deduce’” that the defendant’s product caused his or her injury.\textsuperscript{151} Thus, it would not suffice for physicians who treated an injury to testify that “they ‘think’ that the condition was caused by” the product. “Conjecture” was not enough.\textsuperscript{152} The plaintiff also had to show that the product was defective when it left the hands of the manufacturer.\textsuperscript{153} Questions as to a defendant’s negligence and to the adequacy of a defendant’s precautions normally were within the province of the jury.\textsuperscript{154}

\textsuperscript{146} \textit{H.R. Moch Co.}, 159 N.E. at 897.
\textsuperscript{147} Id. at 899.
\textsuperscript{148} \textit{Ultramares}, 174 N.E. at 444.
\textsuperscript{150} Licari v. Markotos, 180 N.Y.S. 278, 280 (App. Term 1920).
\textsuperscript{152} Karr v. Inecto, Inc., 160 N.E. 398, 399 (N.Y. 1928).
2. General Principles of Negligence. General negligence law, of course, was also consistent with Palsgraf, its controlling authority. In any negligence case, "the burden rest[ed] upon the plaintiff to show by a fair preponderance of the evidence" that an "accident was caused by the fault of defendant." More was required than proof of a "mere error of judgment", a plaintiff had to establish a defendant's

241 N.Y.S. 479, 480 (City Ct. 1930) (ruling that whether a product was dangerous was "sometimes... a question for the jury and sometimes a question for the court"). Jury verdicts for plaintiffs were sustained in cases involving electrical transformers, see Rosebrock v. Gen. Elec. Co., 140 N.E. 571 (N.Y. 1923); Sider v. General Elec. Co., 197 N.Y.S. 98 (App. Div. 1922), aff'd, 143 N.E. 792 (N.Y. 1924), sparklers, see Henry v. Crook, 195 N.Y.S. 642 (App. Div. 1922), and cans containing chlorinated lime, see Hallenbeck v. S. Wander & Sons Chem. Co., 189 N.Y.S. 394 (App. Div. 1921). By analogy, courts held that there would be sufficient evidence for a case to go to a jury in cases involving faulty design or maintenance of aircraft, see Gladstone v. Grumman Aircraft Eng'g Corp., 5 N.Y.S.2d 252 (App. Div. 1938); American Airways, Inc. v. Ford Motor Co., 10 N.Y.S.2d 816 (Sup. Ct. 1939), aff'd, 31 N.E.2d 925 (N.Y. 1940), mouse fragments in smoking tobacco, see Foley v. Liggett & Myers Tobacco Co., 241 N.Y.S. 233 (App. Term 1930), aff'd, 249 N.Y.S. 924 (App. Div. 1931), a pin in a sanitary napkin, see LaFrumento v. Kotex Co., 226 N.Y.S. 750 (City Ct. 1928), and a wrinkle in a shoe lining that led to a fatal blister, see Pearlman v. Garrod Shoe Co., 11 N.E.2d 718 (N.Y. 1937). On the other hand, complaints were dismissed or verdicts for plaintiffs set aside in cases involving a needle lodged in a carton, see Spiegel v. Libby, McNeill & Libby, Inc., 244 N.Y.S. 654 (Sup. Ct. 1930), pork infected with parasites causing trichinosis, see Dressler v. Merkel, Inc., 284 N.Y.S. 697 (App. Div. 1936), aff'd, 4 N.E.2d 744 (N.Y. 1936), and ammunition of greater than normal force manufactured by defendant, sold without special warning, and used by a plaintiff unaware of its special power, see Harper v. Remington Arms Co., 280 N.Y.S. 862 (Sup. Ct. 1935), aff'd, 290 N.Y.S. 130 (App. Div. 1936).

155. Lane v. City of Buffalo, 250 N.Y.S. 579, 582 (App. Div. 1931); see also Gildon Holding Corp. v. New York & Queens Transit Corp., 284 N.Y.S. 539, 541 (Mun. Ct. 1935). The law, unwilling to "assume, in the absence of proof" that a loss "was the result of negligence," In re Toukatley, 203 N.Y.S. 175, 177 (Sur. Ct. 1923), "demand[ed] more than mere speculation or surmise." Riley v. Larocque, 297 N.Y.S. 756, 771 (Sup. Ct. 1917); see also Hirsch v. Safian, 12 N.Y.S.2d 568, 570 (App. Div. 1939); Kalonczyk v. State, 285 N.Y.S. 623, 626 (Cl. Ct. 1936) (holding that allowing the plaintiff to recover when it has failed to establish that the accident was caused by the negligence of the state would be making an award based on mere conjecture); Adler v. Nelson, 210 N.Y.S. 437, 439 (App. Term 1923); Wass v. Western Union Tel. Co., 10 N.Y.S.2d 956, 959 (Mun. Ct. 1939). However, a "plaintiff was not required to offer evidence which positively excluded every other possible cause of the accident." Rosenberg v. Schwartz, 183 N.E. 282-83 (N.Y. 1932). The rule was "well settled that where there [were] several possible causes of injury, for one or more of which defendant [was] not responsible, plaintiff [could] not recover without proving the injury was sustained... by a cause for which the defendant was responsible." Digelorno v. Weil, 183 N.E. 360, 363 (N.Y. 1932); see also Ingersoll v. Liberty Bank of Buffalo, 14 N.E.2d 828, 830 (N.Y. 1938); Fearick v. Lehigh Valley R.R., 206 N.Y.S. 640, 644 (App. Div. 1924).
“[f]ailure to use ordinary precaution”\textsuperscript{157} or “to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation.”\textsuperscript{153}

The most notable exception to the ordinary requirement that plaintiffs provide evidence of fault occurred with the doctrine of res ipsa loquitur, which allowed negligence to be proved by less than “positive and direct evidence,” when “circumstances” could be “shown” from which a “reasonable inference” could be drawn that an “injury resulted from negligent acts.”\textsuperscript{159} The res ipsa rule rested on a pragmatic

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\textsuperscript{159} Warner v. New York, O. & W.R.R., 204 N.Y.S. 607, 609 (App. Div. 1924). Res ipsa loquitur, however, was a doctrine “of limited application,” by which “the fact of the occurrence of an injury” under “circumstances of control and management by the defendant” merely established “plaintiff’s prima facie case, and present[ed] a question of fact for the defendant to meet with an explanation.” Plumb v. Richmond Light & R.R., 135 N.E. 504, 505 (N.Y. 1922). “Shifting the burden... of going forward with the case, [however, did] not shift the burden of proof,” and “[i]f a satisfactory explanation [were] offered by the defendant, the plaintiff... [had to] rebut it by evidence of negligence or lose his case.” \textit{Id.} at 288. \textit{See also} In re McAllister, 53 F.2d 495, 501 (2d Cir. 1931); O’Brien Bros., Inc. v. City of New York, 36 F.2d 102 (E.D.N.Y. 1928), \textit{aff’d}, 36 F.2d 103 (2d Cir. 1929);
judgment that, in cases where an injured party had "no adequate means of ascertaining" the facts\textsuperscript{160} and where the instrumentality producing the injury was "within the exclusive possession, control, and oversight of the person charged with negligence," that person ought to be compelled to give an "explanation of the accident consistent with freedom from negligence." "[I]f he [did] not give it, a presumption [arose] against him."\textsuperscript{161} Ultimately, res ipsa loquitur advanced the new tort paradigm advocated by reformers—namely, that a defendant not be permitted to "carry on its undertaking without making good any loss that occurs to the business or property of another"\textsuperscript{162} and that no one be allowed "rightly [to] levy toll upon the legal rights of others" by carelessly and callously advancing his or her own.


interests. Cardozo and other judges also advanced the cause of tort reformers with their holdings concerning the weight to

be accorded to statutes, ordinances and custom. The basic rule, laid down by Cardozo in *Martin v. Herzog*, was that breach of a statute is "more than some evidence of negligence. It *is* negligence in itself." This rule, which was reiterated in many cases, reflected the extreme deference of New York judges during the 1920s and 1930s to legislative alterations of the usually pro-business rules of the common law. The consequence of the rule was that, whenever reformers had sufficient political success to obtain enactment of legislation on their behalf, they could count on the ready translation of that success into results in individual cases.

164. 126 N.E. 814 (N.Y. 1920).
165. *Id.* at 815. Thus, in tort cases involving statutes, as the Court of Appeals explained, "[n]o element of ordinary negligence" had to be shown since "[v]iolation of the statute itself becomes the actionable default." Moreover, as a procedural matter, "[a] public statute... need not be pleaded," nor was "there any requirement that during the trial it shall be brought to the attention of the court or opposing counsel." Pine Grove Poultry Farm, Inc. v. Newtown By-Pros. Mfg. Co., 162 N.E. 84 (N.Y. 1928). Maintaining an action for negligence arising out of breach of a statute thus required no proof of negligence other than the fact of breach of the statute.


167. As the court recognized in *Martin v. Herzog*, however, negligence liability for breach of statutes was somewhat limited, and it was necessary for judges to be on their "guard... against confusing the question of negligence with that of the causal connection between the negligence and the injury." 126 N.E. 814, 816 (N.Y. 1920). It was "only in the case where a violation of a statute... ha[d] such a direct connection with the injury which ha[d] been received as to form and be a part of the act causing the injury" that recovery for negligence could be had. Klinkenstein v. Third Ave. Ry. Co., 158 N.E. 886, 887 (N.Y. 1927). *See also* Hamin v. Cleveland & Whitehall Co., 24 N.E.2d 136 (N.Y. 1939); LoGalbo v. Columbia Cas. Co., 255 N.Y.S. 502 (App. Div. 1932). In particular, the Court of Appeals held that engaging in an activity for which a license was required without first obtaining one normally would not constitute negligence absent a showing that the defendant lacked the necessary skill to engage in the activity. *See* Klinkenstein v. Third Ave. Ry. Co.,
Thus, legislation, a vital weapon in reform efforts to institutionalize a new tort paradigm, received special treatment from New York judges during the 1920s and 1930s. Local ordinances, in contrast, were given less weight than statutes: violation of an ordinance did not constitute negligence per se but was merely "some evidence of negli-

158 N.E. 886, 887 (N.Y. 1927); Corbett v. Scott, 152 N.E. 467 (N.Y. 1926); Brown v. Shyne, 151 N.E. 197 (N.Y. 1926). Similarly, the breach of a rule respecting the operation of elevators was held not to be the cause of death of a man struck by an ice box that fell out of an elevator. See Currie v. International Magazine Co., 175 N.E. 530 (N.Y. 1931). The absence of a hallway light required by the Tenement House Law was held not to be the cause of a fall down a dark stairway when there was "a total absence of proof of any causal connection between the accident and the absence of light" Wolf v. Kaufmann, 237 N.Y.S. 550, 551 (App. Div. 1929), appeal dismissed, 173 N.E. 882 (N.Y. 1930). Parking a truck on the wrong side of a street was held not related to a death of a boy killed when the truck pulled away. See Boronkay v. Robinson & Carpenter, 160 N.E. 400 (N.Y. 1928). And removal of a barrier for the purpose of doing work on an open elevator shaft ten minutes prior to plaintiff's fall into the shaft was held not to be the cause of the fall. See Korfanta v. Vanderbilt Ave. Realty Co., 184 N.Y.S. 503 (App. Div. 1920).

Nor would tort liability for breach of a statute arise unless the statute disclosed "an intention" on the part of the legislature "that from disregard of a statutory command a liability for resultant damages shall arise." Schmidt v. Merchants Despatch Transp. Co., 200 N.E. 824, 829 (N.Y. 1936). Determination of the legislature's intention depended, in turn, on whether the duty under the statute had been "imposed for the special benefit of a particular group of class of persons" or "in the interest of the general public," id.; see also Pine Grove Poultry Farm, Inc. v. Newtown By-Products Mfg. Co., 162 N.E. 84, 85 (N.Y. 1928), or alternatively on whether the statute altered or merely supplemented an existing common law rule, see Tedla v. Ellman, 19 N.E.2d 987 (N.Y. 1939). For some judges, as least, this focus on legislative intention became a device to hinder the reform agenda. In the view of one, for example, any statute alleged to "create... [tort] liability where otherwise none would exist, or [to] increase... a common-law liability,... [should] be strictly construed." Sardo v. Herlihy, 256 N.Y.S. 690, 693 (Sup. Ct. 1932). Others agreed, as they ruled that a statute "intended to protect against a particular hazard" would not create negligence liability when "a hazard of a different kind" occurred, DeHaen v. Rockwood Sprinkler Co., 179 N.E. 764, 765 (N.Y. 1932) (dictum); that speeding laws were inapplicable in the case of a vehicle out of control, see McCormick v. Merritt, 250 N.Y.S. 443, 446-47 (App. Div. 1931); that a statutory provision regarding passenger elevators was not applicable to freight elevators, see Sarconi v. One Hundred and Twenty-Two West Twenty-Sixth St. Corp., 150 N.E. 137, 138 (N.Y. 1925); and that provisions in the Labor Law protecting a business owner's employees did not apply when work was performed by an independent contractor, see Iacono v. Frank & Frank Constr. Co., 182 N.E. 23, 24 (N.Y. 1932). But see Nasca v. St. Mary's Roman Catholic Church Soc. of Dunkirk, 290 N.Y.S. 439 (App. Div. 1936), aff'd, 292 N.Y.S. 383 (App. Div. 1936); American Employers' Ins. Co. v. Brandt Masonry Corp., 299 N.Y.S. 984 (App. Div. 1937) (noting a distinction where the contractor had agreed to indemnify the owner).
The same rule applied to administrative regulations, and general usage or custom. Custom was also given less weight than statutes in the obvious way that statutes could change the law, whereas custom could at most supplement it. Moreover, the fact that a particular litigant routinely followed a practice did not establish the practice as a custom. Private rules of a business entity were also accorded little authority, and even that only if they were known to and relied upon by the public.

3. The Weight of Stare Decisis. At this point, a brief recapitulation seems appropriate. We have seen that, as the 1920s began, tort law was witness to a conflict between a traditional paradigm of tort liability, which permitted compensation to be paid only when a person was injured directly by another's wrongful act, and a newly emerging reform paradigm, which held that victims of injury should receive compensation from some source. During the 1920s and into the 1930s, the conflicting paradigms related to the legal system in complex ways. To understand the relationships, it is necessary to focus on three precise issues.

First, we must focus on the goal of judges with regard to the paradigms. Led by Benjamin N. Cardozo, who served as Chief Judge of the Court of Appeals during much of the


170. See T.J. Hooper, 60 F.2d 737 (2d Cir. 1932); National Land Co. v. City of New York, 45 F.2d 914, 917 (2d Cir. 1930); Levine v. Russell Blaine Co., 7 N.E. 673 (N.Y. 1937); Welch v. Enright, 15 N.Y.S.2d 339 (App. Div. 1939).


172. See In re Highlands Navigation Corp., 29 F.2d 37, 38 (2d Cir. 1928).

period, most of the judiciary strove to accommodate both paradigms. Cardozo, in particular, seems to have wanted both to preserve the fairness values underlying the traditional paradigm while simultaneously incorporating significant elements of the reform program into the body of New York case law.

Second, we need to inquire about the direction of legal change during the years in question. To the extent that courts reconsidered particular legal doctrines, they tended to adopt the newer reform values rather than the older traditional ones. Thus, it seems clear that the direction of doctrinal development in New York tort law during the 1920s and 1930s was toward the reform program and away from classic nineteenth century values.

Third, we need to examine the overall pattern of legal doctrine that confronted litigants during the decades in question. Focusing on this issue, it seems clear that, as a result of the doctrine of stare decisis, which meant that in the absence of explicit reexamination old law remained in place, litigants continued to confront mostly nineteenth century rules. Whatever changes occurred as a result of the efforts of reformers, they were overwhelmed in the larger picture of 1920s and 1930s by established rules which remained in place through sheer inertia. We must turn now to four sets of established rules, dealing with assumption of risk, contributory negligence, tort liability of landowners, and joint and vicarious liability, all of which continued to reflect the traditional paradigm's concern that people be held responsible only for harms they had directly caused.

a. Assumption of Risk. Pursuant to the doctrine of assumption of risk, it was "well settled," for example, that "an employee assumes the obvious risks of his employment." Thus, no recovery could be had by a window cleaner injured as a result of the visible absence of hooks on a window to which a safety belt could be attached or by a volunteer who assisted in unloading a truck he was under no duty to unload. Nor could participants in a sport such

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as swimming recover for hazards of which they were aware. In short, the archaic doctrine of assumption of risk continued to bar many injury victims from obtaining damage recoveries, although with some amelioration as a result of a ruling by the Court of Appeals that the doctrine typically raised an issue of fact for the jury rather than a legal defense for the court.

b. Contributory Negligence. Contributory negligence was also a total bar to recovery. Under New York law, the plaintiff had the burden of proving freedom from contributory negligence, except in wrongful death cases, where the burden was on the defendant. Normally contributory negligence was treated as an issue of fact to be decided by the jury, at least as long as the jury was instructed

178. See Frieze v. Rosenthal, 269 N.Y.S. 1010 (App. Div. 1934), rev’d, 264 N.Y.S. 378 (Sup. Ct. 1934). However, a golf caddy did not assume the risk of being struck by a ball which was hit by a player in violation of the game’s practices. See Povanda v. Powers, 272 N.Y.S. 619, 624 (Sup. Ct. 1934).
180. See Delaney v. Philbern Realty Holding Corp., 21 N.E.2d 507, 609 (N.Y. 1939); see also Nitti v. East River Mill & Lumber Co., 206 N.Y.S. 237 (App. Div. 1924) (holding that in case involving claim of contributory negligence, inadequate verdict resulting from apparent compromise by jurors had to be set aside). Contributory negligence was a bar to recovery not only in a negligence action for personal injuries but also in a suit for negligent misrepresentation, see Gould v. Flato, 10 N.Y.S.2d 361, 369 (Sup. Ct. 1938), but not in an action for “a willful or wanton” or otherwise intentional wrong, Nelligar v. State, 197 N.Y.S. 820, 823 (Ct. Cl. 1923), rev’d on other grounds, 200 N.Y.S. 840 (App. Div. 1923); see also Fardette v. New York & S. Ry., 180 N.Y.S. 179, 182 (App. Div. 1920) (dictum).
183. See Bauman v. Black & White Town Taxis Co., 263 F. 554 (2d Cir. 1920);
Recognizing that "[e]ach case is governed by its own conditions and circumstances" and that "[n]o two crossing acci-


dents are identical,” the Court of Appeals, in a per curiam opinion probably written by Chief Judge Cardozo, thus refused to be “influenced by the ‘stop, look and listen’ rule which was carried to such an extreme in Baltimore & O.R.R. Co. v. Goodman.”

There were occasional ameliorations of the rule that contributory negligence totally barred a plaintiff’s recovery, such as the doctrine of last clear chance and the statutory

185. Schrader v. New York, Chicago & St. Louis. R.R. Co., 172 N.E. 272, 274 (N.Y. 1930). Although its “rule of conduct [was] not standardized,” the court had nonetheless “stated repeatedly” that “[o]ne who approaches any crossing, at any time, or under any circumstances, without taking any precautions for his safety, is guilty of contributory negligence as a matter of law.” Id. The Court of Appeals adhered to the general rule that the issue of contributory negligence is one of fact for the jury even in cases where young children were plaintiffs. See Camardo v. New York State Ry., 169 N.E. 879 (N.Y. 1928); see also LaRosa v. Great Atl. & Pac. Tea Co., 278 N.Y.S. 368 (App. Div. 1935). But, once a jury found a plaintiff to be an infant, “that plaintiff [was] not held to such a high degree of care as an adult,” but was required only “to exercise a degree of care commensurate with her age and capacity.” Sheffield v. Yager, 11 N.Y.S.2d 673, 674 (App. Div. 1939); see also Gloshinsky v. Bergen Milk Transp. Co., 17 N.E.2d 766, 768 (N.Y. 1938); Armstrong v. Rapp, 1 N.Y.S.2d 219, 222 (Sup. Ct. 1937). Cf. Sherman v. Millard, 269 N.Y.S. 415, 421 (Sup. Ct. 1932) (person “in a dazed condition” held not to be “a responsible human being” and thus not “guilty of contributory negligence”), rev’d in part on other grounds, Sherman v. Leicht, 264 N.Y.S. 492 (App. Div. 1933). Note, however, that a plaintiff of “advanced age” was held to the ordinary standard of reasonable care. See Von Hulse v. Schmiemann, 223 N.Y.S. 921 (App. Div. 1927). There was one important exception to the pattern of deference to juries in cases involving children. That exception occurred in cases holding that parents as a matter of law were not guilty of contributory negligence when they entrusted their children to caretakers, see Longacre v. Yonkers R.R. Co., 140 N.E. 215 (N.Y. 1923), or sent them to school in the custody of older children, see Lamb v. Farrell, 209 N.Y.S. 365 (Sup. Ct. 1925).

186. See Dino v. Eastern Glass Co., 246 N.Y.S. 306 (App. Div. 1930). In cases where New York courts applied the doctrine of last clear chance, the defendant was in a better position to foresee and prevent harm than was the plaintiff. The doctrine of last clear chance was not applicable unless the defendant had actual knowledge of the plaintiff’s peril in sufficient time to take steps to avert injury. See Jerrell v. New York Cent. R.R. Co., 68 F.2d 856 (2d Cir. 1934); Storr v. New York Cent. R.R., 185 N.E. 407 (N.Y. 1933); Woloszynowski v. New York Cent. R.R. Co., 172 N.E. 471 (N.Y. 1930); Snyder v. Union Ry. Co., 255 N.Y.S. 155 (App. Div. 1932); Trbovich v. Burke, 255 N.Y.S. 100 (App. Div. 1932); Frazier v. Reinman, 245 N.Y.S. 32 (App. Div. 1930), aff’d, 177 N.E. 168 (N.Y. 1931). Knowledge of the plaintiff’s peril was required, even though it could be proved by circumstantial evidence. See Srogi v. New York Cent. R.R. Co., 12 N.Y.S.2d 45 (App. Div. 1939); Srogi v. New York Cent. R.R. Co., 286 N.Y.S. 215 (App. Div. 1936). But the doctrine of last clear chance would not apply if the plaintiff could prove only that the defendant should have had knowledge of his peril or when the negligence of both parties was simultaneous. See Panarese v. Union Ry. Co., 185 N.E. 84 (N.Y. 1933). The doctrine also did not apply in the case of a bailment, as when an
rule transforming contributory negligence into comparative negligence in FELA cases. Nonetheless, rules of contributory negligence protected by the doctrine of stare decisis continued to bar recovery for many prospective plaintiffs.

c. Liability of Landowners. Probably the most important set of nineteenth century, pro-defendant rules concerned the duty of landowners toward strangers entering upon their land. Black letter law divided the strangers into three categories—invitees, licenseees and trespassers.

Invitees were defined as people present on the premises

automobile owner parked his car in a garage and both parties were negligent in leaving the key in the ignition. See Fire Ass'n of Philadelphia v. Fabian, 9 N.Y.S.2d 1018 (City Ct. 1938). Nor did it apply in a case where the plaintiff was not negligent. See Lee v. Pennsylvania R.R. Co., 198 N.E. 629 (N.Y. 1935).


188. The rules discussed in this section applied only to persons in possession and control of premises. A landowner who parted with both possession and control of his premises had no duty to anyone for injuries occurring or resulting from activities on the premises. See Potter v. New York, O & W. Ry., 185 N.E. 708 (N.Y. 1933). Instead, the party who assumed possession and control also assumed the duty. This rule applied both to a mortgagee in possession of property, though not to a mere receiver of rents and profits, and to a tenant charged with maintenance of the premises. See Mortimer v. East Side Sav. Bank, 295 N.Y.S. 695 (App. Div. 1937); Wilson v. Neujan Bldg. Corp., 190 N.E. 648 (N.Y. 1934); Appel v. Muller, 186 N.E. 785 (N.Y. 1933).
for the purposes of the owner. As such, their susceptibility to injury could readily be foreseen. Included within the category of invitee were a customer or patron in a store, restaurant, park, public library, public swimming pool, parking garage or livery stable; a person delivering goods to a landowner, an employee or applicant for a job; or an employee of a contractor performing work on the owner's premises. A child of an employee who was present at the workplace with the employer's consent was also an invitee, as was a child playing at the home of a

189. See Gunnarson v. Robert Jacob, Inc., 94 F.2d 170, 171 (2d Cir. 1938); Radoslavich v. Navigazione Libera Triestina, S.A., 72 F.2d 367 (2d Cir. 1934).


191. See Frey v. Russian Village, Inc., 72 F.2d 261 (2d Cir. 1934); Damilitis v. Kerjas Lunch Corp., 300 N.Y.S. 574 (City Ct. 1937).


198. See Mideastern Contracting Corp. v. O'Toole, 55 F.2d 909, 910 (2d Cir. 1932); Standard Oil Co. v. Robbins Dry Dock & Repair Co., 25 F.2d 339 (E.D.N.Y. 1928), aff'd, 32 F.2d 182 (2d Cir. 1929).


friend. A plaintiff claiming the status of invitee had the burden of proving the requisite facts.

A landowner owed an invitee a duty of reasonable care and was obliged to make its premises reasonably safe. This requirement was totally consistent with the general standard of foreseeability. According to Chief Judge Cardozo, it was not one of "[e]xtraordinary prevision" gained by "[l]ooking back at the mishap with the wisdom born of the event," but "only the ordinary prevision to be looked for in a busy world." Thus, premises had to be made "reasonably safe for the purposes for which it was accustomed to be used," not for every "unexpected or unheard of event, or . . . every possible accident which might occur." An owner of an apartment house, for example, was required only "to guard the one invited from dangers known to the owner, but not to the invitee" and was "not required to reconstruct or alter his premises to remove known or obvious dangers," although "[o]ne entering a store, theater, office building, or hotel [was] entitled to expect that far greater preparations to secure his safety will be made than one entering a private building[,]" apparently on the theory that "[t]hose who collect numbers of people in one place, for gain and profit, [must] be vigilant in their efforts to protect such people[]." Whether a landowner had fulfilled the duty of reasonable care to an invitee was a
question of fact for a jury, with decisions being made both for and against plaintiffs, especially in slip and fall cases.

People who were not invitees were either trespassers or


licensees. What distinguished a licensee from a trespasser was that the licensee was present on premises with the "acquiescence" of the owner. A licensee was distinguished from an invitee, in turn, by the fact that an invitee "must come for a purpose connected with the business in which the occupant is engaged," and there "must be at least some mutuality of interest in the subject to which the [invitee's] business relates." The fact that the "[p]laintiff had been invited by defendant to the building where he was hurt" would not suffice to make the plaintiff an invitee. Thus, a person who came to premises as a social guest, as a salesperson or peddler, or to make some other gratuitous use of the premises was a licensee rather than an invitee. Even a fireman had the status of a mere licensee.

All courts agreed that a landowner was not liable to a licensee for an injury resulting from a defect in the premises attributable only to negligence on the part of the owner; the only duty to a licensee to which all courts would hold a landowner was to refrain "from inflicting intentional, wanton, or willful injuries." Two cases also indicated that

219. See Mendelowitz v. Neisner, 179 N.E. 378 (N.Y. 1932); Sanders v. Jacob Rand Realty Corp., 272 N.Y.S. 745, 747 (App. Div. 1934); Rosado v. Perch Realty...
landowners would be liable to licensees for injuries caused by pitfalls or hidden dangers, such as spring guns or kindred devices, while other cases declared that landowners also had a duty to refrain from affirmative acts of negligence, such as "enticing" a licensee "into places where there were inherently dangerous objects." The rules limiting the liability of landowners to licensees did not apply, however, when one licensee injured another licensee on land owned by some third party.

Trespassers—a category that comprised all who failed to sustain the burden of proving that they were either invitees or licensees—constituted the third group of strangers present on the land of another. "Toward mere trespassers," whose presence could not be foreseen, "the rule [was] well settled that the only duty owing to them by the owner . . . [was] to abstain from inflicting intentional, wanton or willful injuries." The rule was applied with special

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225. Ehret v. Village of Scarsdale, 199 N.E. 56, 60 (N.Y. 1935); see also Breeze v. City of New York, 292 N.Y.S. 716 (App. Div. 1937), aff'd, 11 N.E.2d 327 (N.Y. 1937); Gallagher v. Fordham & Lording Corp., 13 N.Y.S.2d 322, 324 (City Ct. 1939). Of course, a few exceptions existed to the rule of no duty to trespassers. The first exception was that a plaintiff injured by a defendant while trespassing on the land of a third person could recover from the defendant, though not from the third person. See Ehret v. Village of Scarsdale, 199 N.E. 56, 69-60 (N.Y. 1935). Similarly a landowner was liable to a plaintiff whom he injured while the plaintiff was travelling on a public highway, see Boyllhart v. DiMarco & Reimann, 200 N.E. 793, 794-795 (N.Y. 1936); Klepper v. Seymour House Corp. of Ogdensburg, 158 N.E. 29, 31 (N.Y. 1925); Hynes v. New York Cent. R.R. Co., 131 N.E. 988, 900 (N.Y. 1921); cf. Danna v. Staten Island Rapid Transit Ry., 300 N.Y.S. 437 (App. Div. 1937) (holding defendant liable for public passageway on defendant's land), aff'd, 14 N.E.2d 817 (N.Y. 1938); but see Frank v. Muller, 193 N.Y.S. 416 (App. Div. 1922) (holding landowner not liable for injuries occurring on a public way as a result of negligent conditions thereon), aff'd, 139 N.E. 726 (N.Y. 1923); even if the injury resulted when the plaintiff "by a slight deviation" incidentally trespassed on the defendant's land. Bennett v. City of Mount Vernon, 276 N.Y.S. 205, 207-08 (App. Div. 1934) (dictum). A question that arose with some frequency was whether a person maintaining a depression adjacent to a public way was liable to a passerby who fell into it. Cf. Bryan v. Hines, 281 N.Y.S. 420 (App. Div. 1935) (finding
harshness to child trespassers playing upon facilities such as railroad tracks, elevators, unfinished buildings, factory machinery, steel towers, and reservoirs, even when the child had entered the premises through an open gate or with permission from a watchman. As the Court of Appeals ruled, "the so-called doctrine of attractive nuisance [simply did] not apply in New York." To hold defendants to a higher duty of care toward trespassers would be "inefficient" and would "impose an unreasonable burden." As Judge Irving Lehman remarked for the Court of Appeals, the "play of boys" was "not without its hazards," and "it may hardly be said that the defendant was under a duty to protect the children from possibility of a fall from a flight of steps which presented no dangers greater than boys encounter in their usual play."

As Judge Lehman's remarks and the many other cases cited above show, the ancient rules limiting the liability of landowners continued to protect property owners from defendant liable, with Kraus v. Wolf, 171 N.E. 63 (N.Y. 1930) (finding defendant not liable). Thus, a landowner was liable for golf balls or bullets shot out of his land into a public way, see Ford v. Grand Union Co., 197 N.E. 266 (N.Y. 1935); Gleason v. Hillcrest Golf Course, Inc., 265 N.Y.S. 886 (Mun. Ct. 1933); unless the person who took the shot was a trespasser in respect to whom the landowner could not foresee any danger, see De Ryss v. New York Cent. R.R. Co., 9 N.E.2d 788 (N.Y. 1913).

236. O'Callaghan v. Commonwealth Eng'g Corp., 159 N.E. 884, 885-86 (N.Y. 1928). An exception, perhaps, was that an owner might be liable to a trespassing child whom he knew to be playing in a dangerous fashion on his land. Grant v. Hausman, 261 N.Y.S. 595 (App. Div. 1933).
liability and to prevent injury victims from recovering damages. In regard to landowner liability, in short, the doctrine of stare decisis and the old common law rules continued to produce especially harsh results.

d. Vicarious and Joint Liability. The final body of ancient, generally pro-defendant law arose in regard to doctrines of joint and vicarious liability. The basic starting rule was that, except for statutory extensions, "a person [was] responsible only for his own torts," and then only to the individual who was injured. There were other exceptions to this general rule, however, and expansive interpretations of those exceptions would have had a tendency to undermine the basic pro-defendant rule. On the whole, though, the exceptions were construed narrowly during the 1920s and 1930s.

The first exception arose in "[the case of master and servant]," where "the negligence of the servant, while acting within the scope of his employment, [was] imputable to the master." Cases of master and servant which gave rise to vicarious liability had to be distinguished, however, from cases involving independent contractors. Thus, a general contractor was not liable for the torts of a subcontractor if the general had delegated all its duties to the sub and had surrendered all control and superintendence. A contractor was also not liable for the general maintenance of the land on which it was working, for work it had completed once

that work had been accepted by the owner,\textsuperscript{242} or for work it performed in accordance with plans which the owner had provided.\textsuperscript{243} Nor was a vendor of realty liable to people injured on the property after it had been sold and possession had been delivered to a vendee.\textsuperscript{244}

The principle of vicarious liability also was in issue in litigation growing out of automobile accidents, which frequently involved people other than the negligent drivers of vehicles in question. One set of issues revolved around the liability of car owners for damage resulting from drivers' negligence. At common law, a vehicle "owner was not liable for the negligence of a person to whom he had loaned his car, whether a member of his family or a stranger, while the car was being used upon the business or pleasure of the borrower."\textsuperscript{245} The owner would be liable, however, if he was present in the vehicle and thereby had the right to control its operation\textsuperscript{246} or if the vehicle was being used by the driver to accomplish the owner's purposes.\textsuperscript{247} The common law rule


245. Gochee v. Wagner, 178 N.E. 553 (N.Y. 1931) (dictum), \textit{overruled by} Kalechman v. Drewe Auto Parts Rental Inc., 308 N.E.2d 886 (N.Y. 1973). \textit{Cf.} The Lafayette, 269 F. 917, 925-26 (2d Cir. 1920) (holding that negligence of navigator of ship not imputed to persons on board); Fischer v. Inter'l Ry. Co., 182 N.Y.S. 313 (Sup. Ct. 1920) (holding that a driver's negligence is no bar to an owner's suit against a third party for damage to an auto).


was changed by a reform-oriented statute in 1924, which reflected

the concept that an automobile negligently operated upon a highway is an inherently dangerous instrument, and that a person who sends it upon the highway should not be permitted to escape liability for its negligent operation, merely because the operator of the automobile was not his servant, acting within the scope of his authority.\(^\text{248}\)

But the statute was construed narrowly so as not to authorize suit by a passenger against the owner of a negligently driven auto\(^\text{249}\) or by a third party when a driver used a vehicle for some purpose other than one to which the owner had consented.\(^\text{250}\) After some initial doubts,\(^\text{251}\) the statute was also construed to bar suits by the owner of a negligently driven vehicle against the owner of a second vehicle.\(^\text{252}\) Finally, the statute was applied only to automobiles and thus did not alter the general common law rule that parents were not liable for the torts of their children.\(^\text{253}\)

\(^{253}\) See Frellesen v. Colburn, 281 N.Y.S. 471 (County Ct. 1935). A related set of issues, which fell under the rubric of imputed liability, concerned the effect of a driver's negligence upon suits for personal injuries by occupants of a vehicle. As a general rule, a guest in an automobile could sue a driver for his negligence in driving; see Ottmann v. Inc. Village of Rockville Centre, 9 N.E.2d 862 (N.Y. 1937); Wormuth v. Wormuth, 299 N.Y.S. 380 (App. Div. 1937); Mencher v. Goldstein, 269 N.Y.S. 846 (App. Div. 1934); Wright v. Palmison, 260 N.Y.S. 812 (App. Div. 1932); Atwell v. Winkler, 188 N.Y.S. 158 (App. Div. 1921); Wilmes v. Fournier, 180 N.Y.S. 860 (Sup. Ct. 1920), although not for his negligence in maintaining the vehicle, see Galbraith v. Busch, 196 N.E. 36 (N.Y. 1935). The negligence of a driver was also not imputed to a guest if the guest sued the driver or owner of another vehicle involved in the accident, see Sturman v. New York Cent. R.R. Co., 19 N.E.2d 679 (N.Y. 1939); Anderson v. Burkhardt, 9 N.E.2d 929 (N.Y. 1937); Kabosius v. State,
If two or more people had control over an instrumentality and both acted negligently in operating it or if the negligence of two or more people otherwise "concurred in contributing to the accident," then all or both might be liable. It was "established that there [might] be two proximate causes of an injury," if "each was an efficient one without which the injury resulting would not have been sustained" and if the damages from the contributing causes could not be separated. Even when "the wrongful


257. See Mateo v. Abad, 267 N.Y.S. 436, 439 (App. Div. 1933); Brush v. Lindsay, 206 N.Y.S. 304, 309 (App. Div. 1924). If the damages were separable, each defendant would be liable only for those he or she had caused. See Parchefsky v. Kroll Bros., Inc., 196 N.E. 308 (N.Y. 1935).
acts of... two defendants were not precisely concurrent in point of time, the defendants... [would] nonetheless be joint tortfeasors” if “their several acts of neglect concurred in producing the injury.”

However, absent “some sort of community in wrongdoing,” parties could not be “joint tortfeasors.” In many cases community in wrongdoing was absent, and then plaintiffs would have the burden of establishing how much each unrelated defendant had contributed to their injuries.

Although the rules of joint liability were not as pro-defendant as those of vicarious liability, landowner liability, contributory negligence and assumption of risk, they too underwent little alteration during the decades of the 1920s and 1930s. They thus remained part of an archaic mass of doctrine protective of the existing distribution of wealth and resources and kept in place by stare decisis.

258. Hawkes v. Goll, 9 N.Y.S.2d 924, 925 (App. Div. 1939). Joint tortfeasors “were all jointly and severally liable,” Murphy v. Rochester Tel. Co., 203 N.Y.S. 669, 672 (App. Div. 1924), which meant that the plaintiff was entitled to sue and recover damages from any one or all of the tortfeasors, see Lever Bros. Co. v. J. Eavenson & Sons, Inc., 7 T.Supp. 679, 681 (S.D.N.Y. 1934); Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 745 (N.Y. 1933); Fidel v. Brooklyn & Queens Transit Corp., 274 N.Y.S. 796 (App. Div. 1934); Kapossky v. Berry, 207 N.Y.S. 719 (App. Div. 1925), although the injured party could, of course, have only one recovery, see Kinsey v. William Spencer & Son Corp., 300 N.Y.S. 391, 396 (Sup. Ct. 1937). Even where concert of action between two tortfeasors was lacking, each was responsible for the entire result and the plaintiff could elect to sue either or both. See Hancock v. Steber, 204 N.Y.S. 258 (App. Div. 1924). But see Fraser v. Copake Lake Pure Ice Corp., 216 N.Y.S. 498 (Sup. Ct. 1926) (holding that liability of wrongdoers is several if acting separately and not in concert). Judges had discretion to permit joinder of tortfeasors in a single action (but ordinarily, such discretion would not be exercised), see Warren v. May, 276 N.Y.S. 520 (App. Div. 1935); Haines v. Bero Eng’g Constr. Corp., 243 N.Y.S. 657 (App. Div. 1930), provided those added to a suit were liable to plaintiff on the same cause of action as the original defendant, see Nichols v. Clark, MacMullen & Riley, Inc., 184 N.E. 729 (N.Y. 1933). If joinder were inappropriate or a trial court declined to exercise its discretion in favor of joinder, the fact that one tortfeasor would not be held accountable would not operate to discharge the other. Wold v. Elder, Dempster & Co., 206 N.Y.S. 591 (App. Div. 1924).

259. The Ross Coddington, 6 F.2d 191, 192 (2d Cir. 1925).
II. Efficiency as the Basis of the Law of Tort, 1940-1980

A. The New Awareness of Human Power over Accidents

During the 1920s and 1930s, as we have seen, much of the law for remedying personal injuries reflected an accommodation between a traditional paradigm of tort liability, which permitted compensation to be paid only when a person was injured directly by another's wrongful act, and a newly emerging reform paradigm, which held that victims of injury should receive compensation from some source. Although personal injury law moved during the 1920s and 1930s in the direction of the reform paradigm, the totality of personal injury doctrine remained in equipoise. As the 1930s came to a close, much doctrine derived from the older paradigm thus remained in place, despite the decades of efforts by judges like Cardozo to change it.

The years of World War II marked a watershed in tort law and ultimately in the elaboration of tort doctrine. A random sample extracted from trial court records in the four federal districts of New York and in the four counties of Erie, Tompkins, New York and Nassau shows that a

260. The sample was gathered by the author and a series of research assistants working in the localities in which the records of the courts in question were maintained. An effort was made to include 80 to 100 cases in the sample for each year for each jurisdiction.

261. Erie is an upstate industrial county containing the city of Buffalo; Tompkins is a rural upstate county; New York County is coextensive with Manhattan Island; and Nassau County is a suburb of New York City located immediately east of the City on Long Island. Data from Erie County are not included in the statistics that follow since the Erie County records did not adequately describe the nature of the cause of action in civil cases in the relevant years under study.

Data was gathered for separate jurisdictions rather than for a single statewide sample in order to facilitate comparisons between jurisdictions. Conclusions were based upon statistical research methods of the author and a series of research assistants. Superficially, the comparisons show that tort litigation was more prevalent downstate, where it amounted to 19.12% of all cases, than upstate, where it amounted to only 9.51%, and was more prevalent in federal courts, where it was 17.52% of all cases, than in state courts, where it was only 12.10%. But these comparisons are misleading. In fact, tort cases were 23.64% of all filings in the Southern and Eastern Districts of New York, and only 10.98% in the two upstate districts. Indeed, in all jurisdictions other than the Southern and Eastern Districts, tort constituted 11.68% of all civil cases.

Why was tort litigation so prevalent in federal courts in Manhattan and
statistically significant increase in tort litigation began to occur in 1946. Thus, tort litigation rose from 8.69% of all civil filings in the sample for 1945 to 14.46% in 1946, and from 12.71% of all filings in the ten-year period 1936-1945 to 18.30% during the ten years beginning in 1946.\footnote{Total populations were created by aggregating samples in each of the seven jurisdictions counted, as per note 261 supra, and thereby creating a fraction consisting of total sample tort cases in the numerator and total sample cases in the denominator. Using standard statistical methods, see John E. Freund, Modern Elementary Statistics 341 (7th ed. 1988), it can be stated at a 95% level of confidence that the tort population for the ten-year interval, 1936-1945, ranged between 11.79% and 13.63%. In the following ten-year period, 1946-1955, tort population ranged between 17.24% and 19.36% at the same level of confidence. At the 95% confidence level, tort cases in 1945 ranged between 6.21% and 11.17% of all cases, while in 1946 tort cases ranged from 11.39% to 17.53%.}{\footnote{Again, the percentages stated in the text are derived from a total of only 111 cases, which is too small to make the percentages statistically reliable.}} At the same time, the sample shows that the median value of tort verdicts stated in 1955 dollars rose from $2982 during the earlier decade to $6000 during the later one.\footnote{Unfortunately, the random sample produced only 65 cases in which the amount of the jury verdict was stated, out of a total population of over 800,000 filings. Thus, the sample is too small to perform any year-by-year calculations, and the statistical reliability of the numbers stated in the text cannot be guaranteed.}{\footnote{See U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, at 720 (1975) [hereinafter Historical Statistics of the United States].}}

There does not appear to have been any equally sharp increase in the number of injuries. Automobile highway deaths in the United States in 1948, for example, were the same as in 1930—about 32,000 per year.\footnote{Nor can the increase in the number of tort cases be explained on the theory that plaintiffs sued more often because they were more likely to win their cases after than before 1945. On the contrary, plaintiffs enjoyed greater success during the earlier decade, winning 79% of jury verdicts during the 1936-1945 decade and only 70% during the 1946-1955 decade.}\footnote{Changes in insurance law also seem not to have been a determinative variable: the key change in New York—a requirement that all operators of motor vehicles have compulsory insurance or comparable financial secur-
ity—did not occur until 1956.266

Finally, the increase in tort litigation beginning in 1946 does not appear to have resulted from doctrinal changes beneficial to plaintiffs. The great transformation of tort doctrine resulting in a body of pro-plaintiff law occurred chiefly during the 1960s and 1970s in New York. The pro-plaintiff doctrinal changes surely did not cause the post-World War II increase in tort litigation. On the contrary, the doctrinal changes occurred after the litigation rise and may even have been produced by it, as judges brought formal rules into harmony with broad public and professional attitudinal changes. There is good reason to think that the experience of the war itself contributed to the increase in tort litigation.

Throughout the long course of human existence, death, illness and injury were a random part of life that could strike tragically at any time. In 1900, for example, nearly one in every two hundred people in the United States died from influenza and pneumonia, while another one in every two hundred died from tuberculosis.267 Even more devastating was a well-recorded 1878 yellow fever epidemic in Memphis, Tennessee, in which death came to 5150 people out of a total population of 38,500, while 20,000 deserted the city.268 As one family was starkly described, the mother was dead “with her body sprawled across the bed... black vomit like coffee grounds spattered all over ... the children rolling on the floor, groaning.”269

Accidents were even more devastating than disease. In the nineteenth century, approximately 10% of all coal miners died in mine accidents during the course of their careers,270 while at the turn of the century one in every 5000 factory employees died annually from accidents.271 The worst victims of all were railroad employees: in 1901, one out of every 399 railroad employees was killed in an

269. Leslie’s Weekly, quoted in id.
270. The annual rate of fatal accidents in British mines in the 1850s was 4 per 1000 employees. See YAIR AHARONI, THE NO-RISK SOCIETY 47 (1981). Over a 25-
year career, a miner would thus have a 10% chance of death.
271. See id. Today mines are ten times safer and factories are four times safer.
accident, while one out of every 26 was injured. For train crews in that year, one out of every 137 was killed, which translated into a nearly 20% probability of accidental death over a twenty-five year career. These high accident rates resulted from coupling industry's "cavalier attitude" that "[t]here's a dozen [new workers] waiting when one drops out" as a result of "his own bad luck," with the real "hazards of axles, mules, stinging insects, boiling laundry kettles, tetanus-inducing rusty implements and barbed wire, impure water, and spoiled food." Given the pattern of accidents and illness, it is not surprising that as late as 1920 average life expectancy in the United States was only 54.1 years.

Against the background of these realities, New York tort law had adhered during the 1920s and 1930s mainly to inherited doctrine granting compensation to victims only of physical injuries resulting directly from wrongdoing on the part of the defendant; this inherited rule was designed to limit, and did limit, the capacity of judges to redistribute wealth as part of the tort compensation process. Judges did give some effect to a new popular paradigm of causation, which recognized that actors not at the site of an injury could create the conditions that caused it and thus should be liable for it, but this new reform conception did not become dominant. Judges also recognized the need for legal rules that facilitated the smooth functioning of business and thereby preserved economic opportunity for upwardly mobile entrepreneurs. But this concern for business efficiency had even less impact on tort doctrine as a whole. Prior to the 1940s, the dominant motif of tort was limited recovery only for injuries resulting directly from wrongdoing, with the goal of preventing judicial redistribution of wealth.

World War II inaugurated a new era. War had always been a most opportune occasion for illness, injury, and death, but the American military, "believ[ing] that American soldiers were sustaining avoidable casualties,"

272. See ALLEN, supra note 267, at 56.
273. BETTMANN, supra note 268, at 71.
275. See AHARONI, supra note 270, at 47.
changed all this in World War II, reducing deaths from approximately one in every ten men under arms during the Civil War to about one per hundred in the 1941-1945 war.²⁷⁷ More important for present purposes than the reality of this accomplishment was popular awareness of it resulting from a comprehensive public information campaign focused around two main themes: (1) that with proper training few men would be injured, and (2) that with proper medical treatment, death could be largely eliminated and most of the injured could be nursed back to health.

The military, believing that an “army... [was] most sparing of human lives when its training [was] soundest,” continually reiterated its “determin[ation] that if combat should ever come, the soldier of today will be prepared for it, and will not be a needless casualty.”²⁷⁸ Thus, it told soldiers that when they got “to the front,” they would “be so well trained that” they could “count” their “chances of survival very high.”²⁷⁹ In addition to teaching basic skills, two objectives were an especially important part of military training.

The first was to teach every soldier to be part of a team. “During World War II many sociologists in the armed forces were impressed with the crucial contribution of cohesive primary group relations” to “combat effectiveness.”²⁸⁰ In particular, the army focused on “[t]he ‘buddy’ relationship”—a cohesive unit built around the minimization of risk; a buddy was a person a soldier felt he could rely on in case of danger.”²⁸¹ Aware, however, that “cohesive primary groups [did] not just occur but [were] fashioned and developed” through indoctrination and training,²⁸² the army undertook “[i]n the early stages of training” to emphasize “the importance of this kind of relationship... at times... with a vehemence.”²⁸³ Soldiers were taught “loy-
ally to the squad as a whole and to each member of it;” they learned to be “[o]ne for all, and all for one.”

The second objective of military training was to teach soldiers “to act calmly with sound judgment regardless of noise, confusion, and surprise.” The military had learned through experience that raw “trainees” had a “tendency . . . to neglect” their duty “during the excitement” of battle, it set out to correct the tendency, in part through realistic training simulations but also through explicit teaching of a training course entitled “Protection against Carelessness.”

The military knew that “Uncle Sam’s soldiers must be alert” members of “an alert team” to function efficiently and avoid casualties. The twenty-two million veterans of the wartime and postwar military, along with some significant portion of the American public, accordingly learned when soldiers “get careless, . . . there are tremendous . . . casualty rates.”

The military made a determined effort to reduce not only battle injuries but also the number of deaths resulting from injuries and illness. It promised that “hundreds of thousands of men, who would have died in any previous war, won’t die in this one,” and new medical developments, in the form of drugs such as sulfa and penicillin, of blood transfusions, of new surgical techniques, and of new methods for delivering medical help, made the promise come true.

Military men had the opportunity and used it

284. KENDERDINE, supra note 278, at 36.
285. Id. at 60.
286. BELL I. WILEY, The Building and Training of Infantry Divisions, in PROCUREMENT, supra note 276, at 449.
287. William R. Keast, The Training of Enlisted Replacements, in PROCUREMENT, supra note 276, at 365, 387; see also JANOWITZ, supra note 280, at 91.
290. See ALAN GREGG, CHALLENGES TO CONTEMPORARY MEDICINE 68 (1956).
292. ALBERT Q. MAISEL, MIRACLES OF MILITARY MEDICINE x (1943).
293. See generally id.; JOSEPH R. DARNALL & V.I. COOPER, WHAT THE CITIZEN SHOULD KNOW ABOUT WARTIME MEDICINE (1942); MEDICINE AND THE WAR (William H. Taliaferro ed. 1944); Gerald Wendt, WHAT HAPPENED IN SCIENCE, IN WHILE YOU
"wonderfully... to demonstrate the value of... medical measures."\(^{294}\) "The experience of World War II, when the whole matchless armory of American medicine, surgery, and dentistry were put at the disposal of the humblest private" proved decisively that Americans were living "in an age and land of medical miracles."\(^{295}\) "[M]edicine ha[d] made progress to a degree... that it offer[ed] the means for modern man to have life... abundantly."\(^{296}\) Thus, whenever illness persisted or premature death occurred, there was reason to conclude that the "loss" could have been "either prevented, alleviated, or cured... [or] at least shared financially."\(^{297}\)

The lessons learned from World War II were readily transferable from military to civilian contexts. It seemed obvious, for example, that "[o]ur new knowledge of war medicine [would] prove immeasurably helpful... in fighting industrial accidents."\(^{298}\) Such hopes led "[i]nevitably" to "the demand that the great scientific problems of peacetime be... attacked," as the problems of war had been, "under government leadership."\(^{299}\) In short, the remarkable victories of World War II, not only over military enemies but over illness, injury and even death, convinced the American people that their "destinies" were not "written in the stars and beyond mortal control," but were, "in large part, subject to [their] own volition." Americans had learned that they were "not the passive objects" of fate "but the active manipulators of... [the] forces" of nature and that they could control those forces if they faced them "with courage, determination, and calm intelligence."\(^{300}\)

World War II transformed Americans' vision of society from one where "insecurity was inherent" and perhaps even "useful, for it drove men... to render their best and most efficient service" by visiting "severe punishment on those

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294. See Gregg, supra note 290, at 36.
296. Gregg, supra note 290, at 4.
297. Id. at 38.
299. See Wendt, supra note 293, at 272.
who did not,"\textsuperscript{301} to one backed by "a complete system of governmental security."\textsuperscript{302} "Social fatalism . . . vanished" with the war, as Americans grew "less willing to suffer hardship, whether the risks of unemployment, pollution, or inadequate health care," and more "confident . . . that these problems can be solved and risks can be avoided." "In the post-World War II period," the received societal wisdom came to be that "no individual [should be] allowed to suffer the consequences of . . . personal disaster;" if "an ever growing array of untoward events" arising from "faulty products, . . . criminals, . . . acts of nature, . . . misconcocted serums" and the like could not be prevented, they ought at least to be the subject of insurance and, if they occurred, compensation.\textsuperscript{303}

This faith that calm intelligence could reduce personal disasters and injuries to an optimal level did not seem absurd to a generation which had entered World War II "drifting about aimlessly" in "an environment marked by hopelessness, lack of opportunities and a sense of failure" but had come out of the war convinced that it had "faced the test of mastering a historic challenge—and succeeded."\textsuperscript{304} Americans of the postwar era "felt themselves to be standing at the threshold of a promising new era"\textsuperscript{305} in which the "sense of wonderful possibilities ahead kept breaking into every part of living."\textsuperscript{306} In the language of the future Chief Justice, Fred Vinson, who in 1945 was Director of War Mobilization and Reconversion, the American people were "in the pleasant predicament of having to learn to live 50 percent better than they have ever lived before,"\textsuperscript{307} while Chester Bowles, the last wartime director of the Office of Price Administration, promised that Americans had to "all learn to live constantly better, a lot better" with "unlimited opportunity for health, recreation and good living . . . an end to poverty and insecurity."\textsuperscript{308} Using tort law not to make

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  \item \textsuperscript{301} John Kenneth Galbraith, The Affluent Society 98 (1958).
  \item \textsuperscript{302} Lerner, supra note 295, at 129.
  \item \textsuperscript{303} See Aharoni, supra note 270, at 47-50.
  \item \textsuperscript{304} Geoffrey Perrett, Days of Sadness, Years of Triumph: The American People, 1939-1945, at 442-43 (1973).
  \item \textsuperscript{305} Id. at 408.
  \item \textsuperscript{307} Id. at 14.
  \item \textsuperscript{308} John Morton Blum, V Was For Victory: Politics and American Culture During World War II, at 326-27 (1976).
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a statement of justice but to provide people with the optimal balance of health and good living was but a small part of the postwar American dream.

The New York Court of Appeals on a number of occasions gave explicit verbal expression to these emerging cultural values of the postwar era, which on a superficial analysis appeared to mirror the goal of prewar reformers of increasing compensation for injuries. In Philpot v. Brooklyn National League Baseball Club, Inc., for example, the court reiterated an old dictum that "[o]ne who collects a large number of people for gain or profit must be vigilant to protect them" and held that the Dodgers had not been sufficiently vigilant in protecting a spectator from being struck by a broken glass bottle. In later years, the court declared that "the policy of this State has been to reduce rather than increase the obstacles to the recovery of damages for negligently caused injury or death" and took note of "the broadening of tort liability concepts to reflect economic, social and political developments." Lower court judges echoed similar thoughts. Thus, one trial judge took note of the State’s "public policy that one injured through negligence should have recourse to a financially responsible defendant," while the Appellate Division wrote that "in many instances, the tort-feasor who is at fault may be unable to recompense the victim for the injuries that he has caused" and that "[t]herefore, as a means of social insurance, in certain situations liability ha[d] been imposed irrespective of fault."

Concerns that injuries be reduced and that victims of injury receive recompense also produced important changes in specific legal doctrines. For example, traditional doctrines of municipal and charitable immunity were overruled, and municipalities and charities, such as hos-

309. 100 N.E.2d 164 (N.Y. 1951).
310. Id. at 166. See also United States v. FMC Corp., 572 F.2d 902, 907 (2d Cir. 1978); Seligson v. Victory Pool, Inc., 66 N.Y.S.2d 453, 455 (App. Term 1946); Covey v. State, 106 N.Y.S.2d 18, 20 (Ct. Cl. 1951).
315. See Bernardine v. City of New York, 62 N.E.2d 604 (N.Y. 1945). One consequence of the end of municipal immunity was that a series of cases came up to the Court of Appeals in which municipalities were held liable for police insensitively and brutality. See Parvi v. City of Kingston, 362 N.E.2d 960 (N.Y.
pitals,\textsuperscript{316} were held fully liable for the torts of their servants. Another change in doctrine instituted by the Court of Appeals was to hold parties strictly liable for blasting\textsuperscript{317} and other ultrahazardous activities.\textsuperscript{318} The Court of Appeals also facilitated recovery of damages for injuries by ruling that wives as well as husbands could sue for loss of consortium\textsuperscript{319} and by easing the procedural process by which plaintiffs who had recovered judgments could collect them from companies that had insured defendants.\textsuperscript{320}

Most of the doctrinal changes just noted were achieved quickly and easily, usually through the medium of a single Court of Appeals decision. Other changes in the law facilitating recovery for injuries, in contrast, occurred much more slowly and through complex processes. It is to these more gradual changes that we must next turn, beginning with the discrete areas of product liability law and the law of landowners' liability to entrants on their property. Then, we shall turn to various doctrines associated more generally with the law of negligence.

B. The Law of Product Liability

During the middle of the century, the New York Court of Appeals did not assume a leadership role like that of the California Supreme Court in expanding consumers' remedies for product defects. \textit{MacPherson v. Buick Motor Co.},\textsuperscript{321} authored by Cardozo in 1916, had placed New York in the forefront of remedial expansion, but during the next four

\textsuperscript{316} See Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957); Dillon v. Rockaway Beach Hospital & Dispensary, 30 N.E.2d 375 (N.Y. 1940).
\textsuperscript{318} See Doundoulakis v. Town of Hempstead, 368 N.E.2d 24 (N.Y. 1977); see also United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (finding strict liability under federal law for death of birds from highly toxic pesticide manufactured by defendant).
\textsuperscript{319} See Millington v. Southeastern Elevator Co., 239 N.E.2d 897 (N.Y. 1968).
\textsuperscript{321} 111 N.E. 1050 (N.Y. 1916).
decades the New York courts engaged in "judicial curtailment of the . . . [MacPherson] doctrine" and were "shackled by meaningless technicalities." As a result, little in the way of liberalization of product liability law occurred in New York until the years around 1960.

Many of the old limitations on MacPherson were restated and reaffirmed in the leading 1950 case of Campo v. Scofield,323 where a farm worker using an onion topping machine had his hands mangled when they were drawn into steel rollers that were without any guard and could only be stopped by a switch that was inaccessible to someone using the machine. In affirming the Appellate Division's dismissal of the complaint, the Court of Appeals first reiterated the rule that, in the absence of "privity of contract between the defendant manufacturer and plaintiff," suit could not "be sustained on any theory of implied warranty" but only on a theory of "negligence." This meant that, if a manufacturer did "everything necessary to make the machine function properly for the purpose for which it [was] designed, if the machine [was] without any latent defect, and if its functioning create[d] no danger or peril that [was] not known to the user, then the manufacturer ha[d] satisfied the law's demands." A manufacturer did not have a "duty of producing an accident-proof product"325 or "a machine" that would not "wear . . . out after long use."326 "All that the manufacturer

323. 95 N.E.2d 802 (N.Y. 1950), overruled by Micallef v. Meihle Co., Div. of Meihle-Gross Dexter, Inc., 348 N.E.2d 571 (N.Y. 1976); see also Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir. 1959). Existing law was also reaffirmed in Prokopowicz v. 11 W. Forty-Second St. Corp., 45 N.E.2d 906 (N.Y. 1942), which held that the need for safety devices was normally a question of fact to be determined by a jury. On the fact-finding powers of juries, see Mazzi v. Greenlee Tool Co., 320 F.2d 821, 827 (2d Cir. 1963); Beckhusen v. E.P. Lawson Co., 174 N.E.2d 327 (N.Y. 1961).
was required to do [was] to guard against injury that [was] reasonably probable.\textsuperscript{327} Desirable as it might be "to equip complicated modern machinery with all possible protective guards or other safety devices," the effectuation of "so fundamental a change" was "the function of the legislature rather than of the courts."\textsuperscript{328}

In order to establish negligence, a plaintiff had to prove that the defendant's conduct "had possibilities of danger . . . apparent" to a person of ordinary foresight.\textsuperscript{329} Thus, a common carrier that improperly handled or stored drums of caustic soda without being aware of their contents was not liable for damage resulting from leaks.\textsuperscript{330} Likewise, wholesalers, retailers and other middlemen through whose hands a product passed were not liable for injuries that the product caused when they had no reason to know of its potential dangerousness,\textsuperscript{331} unless they had held themselves out as manufacturers of the product.\textsuperscript{332} Since product liability cases required proof of negligence, evidence of the customary practice of the industry was relevant to establishing due care or want thereof.\textsuperscript{333} Custom was equally relevant in determining the adequacy of warnings about a product's potential dangers.\textsuperscript{334} None of this was new law.\textsuperscript{335}

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\textsuperscript{328} 95 N.E.2d at 805.
\textsuperscript{329} McFall v. Compagnie Maritime Belge S.A., 107 N.E.2d 463, 469 (N.Y. 1952); see also Katz v. Swift & Co., 276 F.2d 905 (2d Cir. 1960).
\textsuperscript{330} See Blumetti v. Carman & Co., 81 N.Y.S.2d 748 (Sup. Ct. 1948).
The first small sign of change occurred in 1957, when the Court of Appeals in *Inman v. Binghamton Housing Authority* declared that "there is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure" and accordingly authorized suits even in the absence of privity against those who had designed or constructed buildings as long as negligence on their part could be shown. The authorization was mere dictum, however, since the court dismissed plaintiff's complaint for failing to allege facts required to make out a claim of negligence.

A more important extension of doctrine occurred in *Mueller v. Teichner*. There a middleman was held liable to a plaintiff injured by an exploding soda bottle even though, as the dissent observed, the middleman "was neither the manufacturer nor the assembler of the finished product, which was not sold to the public on his name or reputation," and the operation which the middleman performed "had nothing to do with the accident." *Mueller* had little precedential impact, however, since it merely affirmed without opinion an Appellate Division order, which, in turn, had without opinion affirmed a trial court judgment rendered without opinion.

Lower courts also got away with a few hesitant small steps. For example, a divided Appellate Division held that a plaintiff's misuse of a product did not bar recovery against its manufacturer if the misuse occurred under orders of the plaintiff's foreman. A Supreme Court judge allowed a victim of a soda bottle explosion to serve a complaint against three retailers and six firms engaged in distribution and/or bottling of the soda when the plaintiff did not know which of the nine defendants was responsible for her injury.

The causes of this judicial hesitancy emerged with

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335. A case that did establish restrictive new law was *Ancelmo Trucking Co. v. Durkee*, 203 N.Y.S.2d 345, 348 (App. Div. 1960), which held that product liability law applied only to cases where damage occurred through accidental means.


337. Id. at 898.


339. Id. at 15.


sharp clarity in *Greenberg v. Lorenz*, where a fifteen-year-old girl had been injured by a metal sliver packed in canned salmon which her father had purchased for her at her request. She brought suit against the retailer who had sold the can of salmon. Established law made it clear that the girl could not recover against the retailer on a negligence theory, since the retailer was not negligent. Nor could she recover for breach of implied warranty, since she had no privity of contract with the retailer. Nonetheless, the "injustice of denying damages to a child because of non-privity" seemed to the court "too plain for argument." Indeed, the "unfairness of the restriction ha[d] been argued in writings so numerous as to make a lengthy bibliography," and some "20 States ha[d] abolished ... privity." *Greenberg v. Lorenz* was as "convincing a showing of injustice" as could be imagined. Still the court wanted to "be cautious and take one step at a time," since there were "two sides to the problem" and any broadening of liability, as the court had decided only a decade earlier in *Campo v. Scofield*, "must be left to the Legislature." It was "just as unfair to hold liable a retail grocer[man] ... innocent of any negligence ... for some defect in a canned product which he could not inspect and with the production of which he had nothing to do" as to deny relief to an innocent consumer. Only the legislature could "determine the policy of accommodating those conflicting interests," and it would be inappropriate for the court to "assume their powers and change the rules," especially since the Legislature had in three separate years refused to enact bills that would have extended the benefit of implied warranties to members of buyers' households. All things considered, the court found it best to "be cautious and take one step at a time," and accordingly it held only that lack of privity did not bar a child's cause of action merely because her parent had purchased the defective product on her behalf.

Further steps toward the liberalization of doctrine produced division on the court and shifting majorities. Thus, in *Langner v. Jessup Holding Co.*, three dissenters...
were prepared to hold an elevator maintenance company liable for an elevator accident on the ground that it was negligent for not warning the elevator's owner of the elevator's unsafe condition, but the majority would not go along since the case had not been tried or presented to the jury on that theory. Similarly, in *McLaughlin v. Mine Safety Appliances Co.*, two judges on the Court of Appeals were prepared to hold a manufacturer of a heating device liable for failing to warn of its propensity to burn users, but four judges were not since the injury in question had been brought about by the gross negligence of an intervening agent. In contrast, a four-judge majority in *Randy Knitwear, Inc. v. American Cyanamid Co.* was prepared to declare broadly that, since manufacturers placed their "product[s] upon the market and, by advertising and labeling" them, represented their "quality to the public in such a way as to induce reliance," the "policy of protecting the public from injury... resulting from misrepresentations outweigh[ed] allegiance to [the] old and out-moded technical rule" requiring privity to maintain a strict liability breach of warranty suit. But a three-judge minority "concur[red] in result only" and did "not agree that the so-called 'old court-made rule' should be modified to dispense with the requirement of privity without limitation."

In *Goldberg v. Kollsman Instrument Corp.*, a 4-3 majority took "another step toward a complete solution of the problem partially cleared up in *Greenberg v. Lorenz... and Randy Knitwear, Inc. v. American Cyanamid Co.*," which "at least suggested that all requirements of privity ha[d] been dispensed with in our State." It was clear, according to the majority, that a breach of warranty was "not only a violation of the sales contract out of which the warranty arises but... a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer." Thus, the majority held the manufacturer of an airplane strictly liable to the estate of a passenger killed in a crash, although it refused "for the present... to extend this rule" to the

351. *Id.* at 402.
352. *Id.* at 404-05.
354. *Id.* at 81-82.
conceptual limit to which negligence liability had extended in the 1930s, so “as to hold liable the manufacturer... of a [defective] component part” which caused the crash. Its reason was an efficiency judgment that “[a]dequate protection [was] provided for the passengers by casting in liability the airplane manufacturer.”

The three dissenters in Kollsman argued that “the counsel of prudence” required them “to be slow to cast aside well-established law in deference to a theory of social planning that is still much in dispute.” The dissent observed that prior to Kollsman, a suit could be brought for death or injury arising out of a plane crash only on a theory of negligence. It wondered whether “the additional risk” resulting from the imposition of strict liability on airplane manufacturers could “be effectively distributed as a cost of doing business”—a question that could “be intelligently resolved only by analysis of facts and figures compiled after hearings in which all interested groups have an opportunity to present economic arguments” and “classically within the special competence of the Legislature to ascertain.” Any such displacement “of the law of negligence from its ancestral environment involve[d] an omniscience not shared by” the dissenters, and the decision to impose strict liability on the manufacturer of the airplane rather than either the airline or the manufacturer of the defective component part “involve[d] a principle of selection which [was] purely arbitrary.”

Both the Kollsman majority and the three dissenters were advocating positions derived from the World War II era assumption that human effort could reduce personal injuries. The majority was closely attuned to the postwar faith that injuries could be reduced by requiring those with the capacity to prevent them to take action to do so. The dissenters, on the other hand, had begun to articulate what would soon emerge as a competing value—a desire for efficiency. As better efficiency calculators, the dissenters knew that injuries could not be eliminated entirely, but only reduced to some optimal level. They recognized that court-mandated product safety would eventually increase product costs and that the increased costs, at some point, might

355. Id. at 83.
356. Id.
357. Id. at 86-87.
exceed the benefits from increased safety. But the dissenters did not know how that point could be identified and, indeed, were convinced that, as judges, they were ill equipped to make the required cost-benefit analysis.

While both the majority and dissenting judges in *Kollsman* derived their approaches from the World War II assumption that injuries could be reduced, their ideologies related very differently to the prewar struggle between those who had sought to increase compensation for injuries and those who had striven to protect the existing distribution of wealth. The majority's approach of requiring manufacturers to pay for all product-related injuries overlapped the prewar reform paradigm, which required compensation by anyone even remotely causing harm. Although the prewar paradigm rested on a conception of social justice and the postwar approach grew out of concerns for efficiency, both led to the same practical result.

In contrast, there was much less overlap in the dissenters' approach. The nineteenth century tort paradigm, which authorized compensation only if harm resulted from someone's moral fault, led to very different results from those produced by a law and economics standard, which authorizes compensation up to the point that costs begin to exceed benefits. At least in terms of the language used in *Kollsman*, the dissenters linked themselves to an efficiency rather than a wealth-protective view.

As these two camps on the Court of Appeals mobilized, even narrow holdings on insignificant issues that made little new law led to disagreement. Thus, when the court held that a seller of an air conditioning unit who delegated to a subcontractor its express contractual duty to keep the unit in repair was responsible for any negligence by the subcontractor, two judges dissented. Likewise a holding that a manufacturer of a malfunctioning oxygen mask was liable for the death of a co-worker who attempted to rescue the wearer of the mask produced an opinion by two judges "concurring in result only," since they "envision[ed] a myriad of situations where the application of the doctrine [announced by the majority] would result in unjustified liability to manufacturers."

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Lower court and federal judges, who took their law from the Court of Appeals, sensed the ambivalence of its judges and behaved accordingly. Occasional cases eased the burden of plaintiffs in product liability cases. One trial judge, for example, after concluding that a "monumental trilogy of cases [Greenberg, Randy Knitwear, and Kollsman] had revolutionized this area of the law," held that a manufacturer of nails which shattered when struck was strictly liable to an injured user, while the Appellate Division reached a comparable result in regard to a pair of fence pliers that chipped and became imbedded in a user's hand.

*Bolm v. Triumph Corp.*, the first design defect case decided in New York in favor of a plaintiff, permitted a motorcyclist who suffered genital injuries when he was thrown forward in an accident over a luggage rack placed several inches higher than the front seat to present to the jury his claim of negligent design.

Most judges, however, continued to apply older, more pro-defendant rules. *Bolm*, in particular, was unusual, as most New York judges rejected design defect claims. New York and federal judges were equally hostile to the imposition of a duty to warn, observing that a manufacturer did not need to warn "against every injury which may ensue from mishap in the use of his product," especially against "common dangers."

New York judges also resolved cases in a pro-defendant direction when they held that a product was not defective if it caused allergic reactions in only twenty-five out of 270,000 users, that a product manufacturer

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361. Id.


was not liable for a defect unless it existed when the product left the manufacturer's hands and the manufacturer had notice of it, and that a retailer ordinarily had no duty to inspect merchandise for latent defects.

By the early 1970s, however, a new Court of Appeals majority had become dissatisfied with the laggardness of the New York judiciary in adopting modern product liability standards. In its next major foray into the field—Codling v. Paglia—it indicated its dissatisfaction with clarity and unanimity. Codling differed from earlier Court of Appeals decisions in two respects. The first was that the court no longer believed strongly in the superiority of legislative over judicial law reform: the court had become willing to engage in social engineering. The second was that the judges in Codling had finally come to a unanimous agreement about the efficiency policies product liability law should be advancing and were prepared to act to advance those policies.

No one in Codling questioned the appropriateness of a judicial imposition of strict liability standards in product cases. A second issue in the case, however, was whether the judiciary should abolish contributory negligence as a defense in product liability suits and in its place substitute the doctrine of comparative negligence. The majority was unwilling "at this time" to make such a substitution, apparently because the legislature was then considering the large issue of comparative negligence and the court did not want to get in its way. Two judges bristled at even this limited level of judicial deference, though, with the observation that "examination of the record in other jurisdictions reveals that the assumption of legislative superiority is too patently a theoretical one" and that "courts are at least as well situated as Legislatures to inform themselves about the factors that should be taken into account in promulgating a rule of comparative negligence."

Even more important than the new disinclination of the

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371. Indeed, two years after Codling, new legislation on comparative negligence actually went into effect. See infra notes 476-82 and accompanying text.

372. 298 N.E.2d at 631 (concurring opinion).
judges to defer to the legislature was their sense that "the erosion of the citadel of privity ha[d] been proceeding... even more rapidly in other jurisdictions" than in New York, "all with the enthusiastic support of text writers and the authors of law review articles." As a result, all seven judges agreed "that the time ha[d] now come when our court, instead of rationalizing broken field running, should lay down a broad principle" that would impose pressure "on the manufacturer... , who alone has the practical opportunity, to turn out useful, attractive, but safe products." The judges added that this imposition "on the manufacturer should encourage safety in design and production; and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if thereby he is given added assurance of his own protection."373

With this agreement on policy, a unanimous court held manufacturers strictly liable to anyone who came into contact with their products, even mere bystanders. Codling also marked a turnaround in the Court of Appeals' jurisprudence in a third respect. Whereas the Court after Kollsman had left the elaboration of product liability law to inferior courts, deciding only three cases in the decade between 1963 and 1973, the Court after Codling remained an active force, deciding nine cases over the next seven years. To insure that the lower courts would not subvert Codling as they had ignored Kollsman, the Court of Appeals assumed a direct supervisory role over product liability cases.

It began that role when only months after deciding Codling it reinstated a jury verdict against an elevator maintenance company which the Appellate Division had set aside. The court's theory was that, once the company had agreed to maintain the elevator, it had a duty to use reasonable care to discover and correct dangerous conditions and could be held to that duty even in the absence of direct evidence of negligence.374 In short, manufacturers of potentially dangerous instrumentalities and other comparable defendants were strictly liable for their safety. Next, in Velez v. Craine & Clark Lumber Corp.375 the court ruled that

373. Id. at 626-28.
a disclaimer of warranties would not bar a strict liability
suit by users of a product who were strangers to any con-
tact of purchase and sale. Two years later, in Victorson v. 
Bock Laundry Machine Co. the court made it clear "that 
strict products liability sound[ed] in tort rather than in con-
tract" and thus that the statute of limitations began to 
run not when a product was placed on the market but at 
the subsequent date when injury occurred.

The march continued with Micallef v. Miehle Co., which 
overruled Campo v. Scofield and held that a 
manufacturer, "who stands in a superior position to recog-
nize and cure defects," is "obligated to exercise that degree 
of care in his plan or design so as to avoid any unreasonable 
risk of harm to anyone who is likely to be exposed to . . . 
danger when the product is used in the manner for which 
the product was intended," even if the user was contribu-
torily negligent. Next, Halloran v. Virginia Chemicals, 
Inc., after noting that the "issue merits little discussion," 
held that

[i]n a products liability case it is now established that, if plaintiff

373, 374 (App. Div. 1979) (stating strict liability distinct theory from negligence); 
warranty distinct theory from express warranty). But see Dickey v. Lockport 
breach of warranty "are, in effect, the same cause of action"); DeCrosta v. A. 
plaintiff's suit on strict liability theory after judgment for defendant on prior suit 
claiming negligence and breach of warranty); Jerry v. Borden Co., 358 N.Y.S.2d 
426 (App. Div. 1974) (allowing plaintiff to prove strict liability under complaint 
alsegregating negligence and breach of warranty).

378. See also Lindsay v. Ortho Pharm. Corp., 637 F.2d 87, 95 (2d Cir. 1980); 
Thornton v. Roosevelt Hosp., 397 N.E.2d 1002, 1003 (N.Y. 1979); Ribley v. Harso 
Corp., 394 N.Y.S.2d 741, 743 (App. Div. 1977); Rivera v. Berkeley Super Wash, 
380. 95 N.E.2d 802 (N.Y. 1950).
(E.D.N.Y. 1979); Langford v. Chrysler Motors Corp., 373 F. Supp. 1251, 1255 
(E.D.N.Y. 1974) (stating that failure to wear seatbelt no bar to recovery but could 
provide basis for mitigation of damages). For an earlier case that reached the 
opposite result from Micallef, see Bass v. Firestone Tire & Rubber Co., 497 F.2d 
1223 (2d Cir. 1974).
has proven that the product has not performed as intended and excluded all causes of the accident not attributable to defendant, the fact finder may, even if the particular defect has not been proven, infer that the accident could only have occurred due to some defect in the product or its packaging.\footnote{383}

With doctrine such as this “predicated largely on considerations of sound social policy… including consumer reliance, marketing responsibility and the reasonableness of imposing loss redistribution”\footnote{384} and designed to make “unnecessary the distortions previously required to permit injured plaintiffs to recover from those who put defective products into the stream of commerce,”\footnote{385} product manufacturers became virtual insurers who could avoid liability only by convincing the fact finder that something other than a defect in their product, such as a subsequent modification made by someone after the product left the manufacturer’s possession and control,\footnote{386} caused the plaintiff’s injury.\footnote{387}

The Court of Appeals’ support for the expansion of product liability law after \textit{Codling} was so strong that it even induced lower courts to expand doctrine in some respects. For example, the lower courts recognized the existence of a duty to warn,\footnote{388} allowed business entities as well


387. For a Court of Appeals case upholding a jury verdict in favor of a manufacturer, see Torrogrossa v. Towmotor Co., 376 N.E.2d 920 (N.Y. 1978).

as natural persons to bring product liability suits, \(^{389}\) and held used car dealers liable for safety defects in their cars in violation of "the policy of this state to protect purchasers of used vehicles from being sold defective vehicles." \(^{390}\) The lower courts also resolved an important evidentiary issue in favor of plaintiff users by holding admissible in evidence a defendant's recall of a product \(^{391}\) or modification of a design \(^{392}\) after a plaintiff suffered injury. \(^{393}\)

C. The Law of Landowners' Liabilities

Another area that developed gradually in the direction of increased compensation for injuries, with the development coming to final fruition in the 1970s, was the law dealing with landowners' liability to people entering on their land. Until the final fruition, many cases continued to reiterate the traditional New York rule that a landowner


\(^{393}\) At the same time, the lower courts also decided at least some cases in favor of defendant producers. On occasion, they even reached pro-defendant decisions without having any principled basis for doing so, as in the cases where they ruled that suppliers of blood would be held only for negligence but not to a strict liability standard for any contamination. See Iannucci v. Yonkers Gen. Hosp., 399 N.Y.S.2d 39 (App. Div. 1977); Jennings v. Roosevelt Hosp., 372 N.Y.S.2d 277 (Sup. Ct. 1975); Steinik v. Doctors Hosp., 385 N.Y.S.2d 767 (Sup. Ct. 1975); see also Samuels v. Health & Hosp. Corp., 591 F.2d 195 (2d Cir. 1979). In other cases, lower courts upheld the government contract defense, see In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 792-94 (E.D.N.Y. 1980); Casabianca v. Casabianca, 428 N.Y.S.2d 400 (Sup. Ct. 1980), ruled that a plaintiff could not recover purely economic loss in a product liability action, see Steckmar Nat'l Realty & Inv. Corp. v. J.I. Case Co., 415 N.Y.S.2d 946 (Sup. Ct. 1979), and decided that the duty to warn was satisfied when a manufacturer offered to sell an optional safety feature to a user but the user declined to spend the extra money, see Biss v. Tenneco, Inc., 409 N.Y.S.2d 874, 876 (App. Div. 1978). Finally, lower courts held that strict liability would not apply in cases involving principally the rendition of a service rather than a sale, such as the repair of a truck, see Nickel v. Hyster Co., 412 N.Y.S.2d 273, 276 (Sup. Ct. 1978), the performance of architectural services, see Queensbury Union Free Sch. Dist. v. Jim Walter Corp., 398 N.Y.S.2d 832, 834-35 (Sup. Ct. 1977), or the isolated lease of an airplane by a lingerie manufacturer, see Nastasi v. Hochman, 396 N.Y.S.2d 216 (App. Div. 1977).
was not liable for injuries inflicted on a trespasser or a licensee as a result of mere negligence, even if that trespasser was a child. At the same time, however, received doctrine was being slowly undermined as the courts made it incrementally easier for those injured on the land of another to recover damages.

One way in which the courts broke down traditional doctrine was by establishing special categories of people entitled to relief after being injured on another’s land even where they were present without the landowner’s permission and for purposes other than those of the owner. The first such special category was created for public officials. Classically, officials were regarded as mere licensees to whom a landowner, at most, owed a duty first, to refrain from creating traps and second, to warn of hazards known to the owner into which the official might “unknowingly walk[ ]. . . .” With the onset of World War II, however, courts dealt with a series of cases involving injuries to air-raid wardens—civilian volunteers who at times suffered injury in their efforts to insure “complete compliance with black-out regulations.” “The protection afforded to life and property by the air raid warden service [was] a community enterprise,” which had to be performed “with thoroughness


and speed" and with which failure "to cooperate" was "incomprehensible."  

Voluntary performance of this patriotic duty transformed a warden into "more than a bare licensee on defendant's premises; his relationship bordered on that of an invitee, to whom defendant owed the duty of reasonable care under all the circumstances."  

After the war, the principle of the air-raid warden cases was extended to the entire "sui generis class of persons privileged to enter upon the land for a public purpose," such as ambulance corps members, police officers, fire personnel and even census takers. A public official within this sui generis class, "being neither a trespasser nor a bare licensee was, nevertheless, rightfully there, engaged in the business of the public," and the landowner "[u]nder such circumstances . . . was under a duty . . . to keep and maintain" its premises "in a reasonably safe condition."  

Laborers were another group given sui generis treatment and authorized to recover from landowners for their injuries whether they came on the land as invitees, licensees or trespassers. Much of this special law was created by statute. One statute that was a subject of frequent litigation imposed on owners a nondelegable duty to furnish a safe workplace to anyone engaged in constructing, repairing, painting or cleaning a building. The purpose of this

400. Id.
404. Id. at 652.
statute was "not alone to provide remedies for laborers but more particularly to prevent accidents causing the injuries by "compel[ling] a high standard of care."

Another statute required owners of factory buildings to provide all stairways with handrails.

In addition to statutory duties, a "common-law duty rested on an owner ... to provide a safe place to work" for any laborer.

The courts also developed other techniques to expand the liability of landowners for injuries occurring on their premises. One such technique was to hold owners who transferred title to their property liable for injuries occurring after such transfer until such time as the transferee had the opportunity to assume control of the land.


Another technique was to bar a mere user of land, who lacked a full possessory interest, from asserting the rights of a landowner against trespassers. Observing that "the common law of this State is not an anachronism, but . . . a living law which responds to the surging reality of changed conditions," judges even expanded the liability of landowners to invitees, overruling old cases that did not require outdoor lighting on public buildings and holding that even a church had a duty to provide such lights.

The most important change occurred, however, when judges manipulated the rule that a landowner could not impose intentional or wanton injury or act in an affirmatively negligent fashion toward licensees and trespassers. Arguing that the "rigid rules of an action at law for negligence bend before a situation where the life of a person is imperilled," one court held that leaving a car parked on an incline was active rather than merely passive negligence that rendered a landowner liable to a social guest struck by the car. Similarly, leaving a pool of oil on a driveway was held to be an act "of an affirmative nature, in the sense that the pool of oil was not a danger inherent in any defect in the property, but was placed there by an affirmative act." Under such an approach, all that was necessary to hold a landowner liable, at least to a licensee, was the existence of "a dangerous condition on the premises, which was known to him, but not to plaintiffs." Licensees and trespassers were also aided in their suits against landowners by procedural rules that construed allegations in their complaints.

413. Id. at 907.
broadly and left all fact questions about a plaintiff's status and a defendant's negligence to the jury.

Comparable developments occurred in cases involving infant plaintiffs. Despite an occasional judgment for a landowner and an awareness by judges of "the statements contained in much of our case law... as to the degree of care owing to those stated to be trespassers, invitees, and bare licensees," which had grown out of "the necessities of industry and enterprise, and also perhaps the preservation of a freedom for one to do as he pleases with his own," judges knew that "facts made the law." Accordingly the general approach of the courts was that, as long as juries were properly instructed, they had a free hand in deciding questions of status and negligence.

It was easy to transform this approach into a new body of doctrine allowing children to recover from landowners on whose premises they suffered injury. The case of Mayer v. Temple Properties, wherein a jury returned a verdict for a child who fell into a fifty-five-foot-deep pit, will illustrate. In sustaining the jury's verdict, the Court of Appeals declared that:

to cover a hole... with "flimsy" pieces of wood that quickly crumbled under the feet of the infant decedent, plunging him to his death in the boiler room far below, constitutes an affirmative creation of a situation pregnant with the gravest danger to life or limb, and a deceptive trap to the unwary, as perilous as an explosive bomb, highly inflammable material, a spring gun, or kindred devices. This bringing about of an inherently hazardous

situation... is tantamount to a reckless disregard of the safety of human life equivalent to willfulness, and an utter heedlessness of care commensurate with the risk involved. 424

Other cases in which the courts found landowners to have created perilous traps or to be guilty of affirmative negligence that rendered them liable to youthful licensees or trespassers, involved drip pails containing flammable liquids, 425 a wooden garage door barrier, 426 a conveyer belt, 427 a building that was “decayed, rotted, [and] without doors, windows or barricades,” 428 and an unattended lawn mower. As the Court of Appeals summarized doctrine, “the ‘trespass’ theory... had lost force... as a rigid concept by which all such cases are to be at once dismissed,” 430 and landowners now owed children whom they knew to be present on their land a duty “to disclose... dangerous defects known to defendant and not likely to be discovered by plaintiff.” 431

Other cases decided between the 1950s and the early 1970s continued to muddy the waters. For example, one case held that a ten-year-old boy who placed fish which he was buying for his mother into a grinder was protected by the child labor laws; 432 a second case stated that evidence of a landowner’s acquiescence in a pattern of trespasses could turn the trespassers into licensees; 433 a third case ruled that a child who was playing in a residential swimming pool while his father discussed business with the residence’s owner was an invitee rather than a social guest; 434 and a fourth case determined that the duty of homeowners toward an elderly woman whom they were nursing in their home “was not measured by what their duty would have been to a

424. Id. at 915.
social guest as a mere licensee." Two other cases declared that "[o]ne in control or possession of . . . premises has the duty to control the conduct of those permitted . . . to enter upon the premises," while an earlier case had taken the view, without focusing on the categories of invitee, licensee, or trespasser, that "the owner of property who expressly or by implication invites an individual or the public generally upon his land . . . must see that the property itself and the facilities thereon do not subject those invited to foreseeable harm." A leading Court of Appeals case similarly held "that the proper standard of care owed [even] to trespassers by a property owner, in refraining from willful, wanton or intentional acts or their equivalents, [was] to be determined from the pertinent facts and relevant circumstances of each case." Thus, by the end of the 1960s, the "classical common law distinctions as they relate to the duty owing to trespassers, licensees and invitees" had been transformed into matters "of degree and not of substance!"

In Basso v. Miller, the Court of Appeals "pause[d] . . . to reflect" on the doctrinal transformation that occurred in the law of landowners' duties toward trespassers, licensees and invitees, "reconsider[ed] the necessity for such classification," and held "that the distinctions need no longer be made." "Rather than to demand continued attempts to fit a plaintiff into one of the three rigid categories," the Court of Appeals "abandoned the classifications entirely and announced [its] adherence to the single standard of reasonable care, under the circumstances"—a standard "no different than that applied in the usual negligence action." When the Court of Appeals reiterated "the all-

441. Id. at 871.
442. Id.
443. Id.
embracing standard of reasonable care and the lower courts followed along, the special rules holding landowners to a lower than ordinary standard of care toward trespassers and nonbusiness guests were eliminated. Instead, everyone received the benefit of the same broad standard of liability which, at one time, only invitees had enjoyed. The only exceptions remaining to the standard of reasonable care were the special situations, generally created by statute, where landowners were held to a higher standard of strict liability.

D. Assumption of Risk and Contributory Negligence

The law of negligence constituted a third area of doctrinal change, much of it facilitating easier recovery of damages, during the decades after World War II. The most important developments occurred through the amelioration of the assumption of risk and contributory negligence defenses.

Significant amelioration occurred in the assumption of risk doctrine, which came to be viewed as a valid defense only in cases where a plaintiff made a thorough investigation and with full knowledge made a decision to engage in activity for some economic profit. The defense was eliminated, however, in certain statutory areas, such as FELA cases and suits by firemen. Moreover, its scope was constricted in other areas by procedural rules, such as one requiring that a defendant wishing to raise the defense


“must specifically allege... [it] as an affirmative defense.” Even more important were emerging rules stipulating that assumption of risk could not be found if a plaintiff “did not fully perceive the risk involved” and, even where the risk was perceived, could not be upheld if the plaintiff was merely acting as the defendant had instructed or expected him to act.

Even more remarkable was the judiciary’s effort to ameliorate the harshness of the contributory negligence doctrine. Certain courts continued to bar plaintiffs from recovering damages on the basis of contributory negligence, as they ruled that one who chose a foreseeably risky approach over an approach that was comparatively risk-free was guilty of contributory negligence. As one judge said, it was a “general rule that a plaintiff who has equal knowledge with a defendant... is guilty of contributory negligence.”

Far more significant, however, were the cases rejecting or limiting the doctrine. For example, a long line of cases held that contributory negligence was inapplicable in cases where plaintiffs’ rights were grounded in a statute making a defendant strictly liable, as was true in the case of much

labor legislation guaranteeing a safe place to work and legislation giving firemen a right to recover for injuries.

Courts also held that infants of tender years, as well as others of similarly limited mental capacity, could not be contributorily negligent and thereby barred from recovery for injuries.

Three additional “common-law attempt[s] to alleviate the harsh consequences of strict adherence to the traditional contributory negligence rule” were the doctrine of last clear chance, the doctrine allowing a person to place him or herself in danger to rescue another in imminent


peril, and the rule that contributory negligence would not bar a plaintiff's recovery if it was not a proximate cause of the plaintiff's injuries. Yet other cases held that when a superior directed a workman on a job "to proceed under circumstances recognizable as dangerous, the subordinate workman had little, if any, choice in the matter but to obey" and would not be contributorily negligent; that a plaintiff whose life had been threatened did not become contributorily negligent by appearing in a location where he had no particular reason to believe the threat would be carried out; that failure to discover a hidden defect did not constitute contributory negligence; that having three drinks of scotch by itself was not contributory negligence; and that ordinary contributory negligence would not bar recovery for wanton negligence.

A final line of cases held that, even when a person's negligence barred his or her own recovery, it would not be imputed to others with whom the negligent individual had a relationship so as to bar their


recovery for any injuries they may have suffered.\textsuperscript{469}

These various ameliorations "of the recognized harshness of the contributory negligence doctrine"\textsuperscript{470} led one judge as early as 1957 to urge the legislature to "recognize the need for a rule of comparative negligence."\textsuperscript{471} By the early 1970s, judges were more strongly suggesting "that a view of contributory negligence which makes it an absolute bar to a plaintiff's recovery cannot survive" and that "the applicability of the comparative negligence rule . . . [should] be examined" by the courts.\textsuperscript{472} Other judges went even further and held "that contributory negligence doctrine is no longer the law of this state,"\textsuperscript{473} while the Appellate Division expressed concern that trial judges might "mislead the jury into employing a standard of comparative negligence."\textsuperscript{474} In the end, however, the change to comparative negligence was finalized not through common law adjudication but by legislation.\textsuperscript{475}

A new statute, which despite lower court holdings to the contrary did not apply retroactively and did not take effect until 1975,\textsuperscript{476} sought "to ameliorate the harsh result when a plaintiff is slightly negligent and fairly to apportion damages among the parties."\textsuperscript{477} Resting on a view that


\textsuperscript{475} \textit{See} Laws of 1975, ch. 69 (1975), codified in N.Y. C.P.L.R. § 1411-13 (McKinney 1997).


"fundamental fairness does not require an all-or-nothing rule which exonerates a very negligent defendant for even the slightest fault of his victim," the 1975 legislation "melded contributory negligence and assumption of risk into the term ‘culpable conduct’ and determined that such conduct" would not bar a plaintiff's suit but only result in "diminution of any damages a plaintiff might otherwise be entitled to recover." Courts read the legislation broadly and applied it to a wide variety of suits including commercial cases, derivative causes of action and bailment cases.

E. Joint Liability

Corresponding to the supplanting of contributory negligence and assumption of risk with the less harsh doctrine of comparative negligence was a change in New York law regulating contribution among joint tortfeasors. As late as the middle of the twentieth century, New York's courts severely limited a tortfeasor's ability to obtain contribution against joint tortfeasors in the absence of a contract of indemnification. A starting rule was that, "[w]here separate acts of negligence combine[d] to produce directly a single injury each tortfeasor was responsible for the entire result." A plaintiff was free to sue whichever tortfeasor he or she wished, and the ability of a defendant "held liable

823 (Sup. Ct. 1978).
for negligence... [to] pass that liability on to another negligent party [was] closely circumscribed.”

One requirement was that there be a joint money judgment against the tortfeasor seeking contribution as well as the tortfeasor from whom it was sought, and thus a tortfeasor who had not been sued or against whom suit had been dismissed could not be made to contribute.487 A second rule was that a tortfeasor who had been actively negligent could not recover from joint tortfeasors who had only been passively negligent any portion of a judgment paid to an injured plaintiff.

Three cases decided in 1972 transformed doctrine. The first, Dole v. Dow Chemical Co.,489 held that “where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party,” either in a separate action or by joining the third party in the original, main action.490 Three months later, Kelly v. Long Island Lighting Co.491 held that even an active tortfeasor could recover contribution from another joint tortfeasor. The third case, Hall v. E.I. Du Pont de Nemours & Co.,492 continued the trend toward equitable apportionment of damages among potential defendants by permitting infant plaintiffs injured by blasting caps to join fifteen manufacturers of the caps and their trade association in a single suit even though the plaintiffs did not know which manufacturer had produced the particular cap that had injured them. The decision was based on the theory either that the “defendants... [had] exercise[d] actual collective control over a particular risk-creating product or activity” or that “liability...
[should be] imposed on the most strategically placed participants in a risk-creating process. Since each manufacturer was liable under at least one of these theories for some negligence, they were proper parties to a suit, as well as proper contributors to a judgment under Dole.

F. Res Ipsa Loquitur

Res ipsa loquitur was another subject of pro-plaintiff development. Basic doctrine, permitting a jury to infer negligence if the injury is the type which ordinarily does not occur without the neglect of some duty owed to the plaintiff and the defendant is in exclusive possession and control of the instrumentality, remained constant, and the decisive issue in most reported cases always involved the sufficiency of evidence. But some significant developments did occur.

One development was the gradual erosion of the rule arising out of dictum in the 1938 case of Ingersoll v. Liberty

493. Id. at 376. Joint liability would not be imposed on parties who were merely engaged in an activity together, such as playing in a touch football game, if their activity was not inherently dangerous. See Beaver v. Batrouny, 419 N.Y.S.2d 391 (App. Div. 1979).

494. An analogous and overlapping body of doctrine in New York dealt with circumstantial evidence. Although an occasional case drew a distinction between decisions on the basis of circumstantial evidence and decisions grounded in res ipsa loquitur, see Markel v. Spencer, 171 N.Y.S.2d 770, 780 (App. Div. 1958), most cases mixed the two approaches together with the observation that "[t]he doctrine of res ipsa loquitur is not an arbitrary rule . . ., but a common-sense appraisal of the probative value of circumstantial evidence." George Foltis, Inc. v. City of New York, 38 N.E.2d 455, 459 (N.Y. 1941).


Bank of Buffalo that, in cases involving more than one possible cause of injury for only one of which a defendant was responsible, the requirement of exclusive control prevented a plaintiff from recovering if it was equally probable that the injury resulted from one cause as from another.

The first step in the rule’s atrophy occurred in a 1944 case involving the collapse of a barricade erected by one of two defendant construction companies engaged in renovating the defendant owner’s business premises. Resting at the close of the plaintiff’s case, the defendants offered no evidence as to who constructed the barricade, but the Court of Appeals nonetheless held the doctrine of res ipsa applicable to all three defendants—the owner and the two construction companies. The court explained that, “[w]here, as here, one or some or all of three interdependent defendants are in control..., it is for them to explain their action and conduct.” Undermining of the rule continued with the court subsequently holding that in cases where two or more defendants had a “shared or dual duty” toward a plaintiff, “the application of res ipsa loquitur against either or both” was appropriate. With the Court of Appeals indicating its opposition to “[r]igidity of legal rules” in negligence cases, its preference for “more legal flexibility on what is negligence,” and its direction that “the question” of negligence should be “left open to factual judgments of the jury,” lower courts found “[e]xclusive control” to be “a concept which is not ‘absolutely rigid,’” particularly in cases where “defendants came forward with no explanation overcoming the implications of plaintiff’s proof.” Thus, courts held that in cases “[w]here there is more than one cause of an injury, the injured party,” if he or she wished,
could bring suit against only one defendant and "need only show that the injury was sustained wholly or in part by a cause for which th[at] defendant was responsible." In the end, courts failed to apply the requirement of exclusive control "overliterally."  

A second change favoring injury victims occurred in the rule that, when a plaintiff has some specific evidence about how an injury occurred, he or she was required to elect whether to rely on res ipsa loquitur or to present the specific evidence to the jury. The rule had never enjoyed unanimous acceptance, however, and the Court of Appeals ruled in Abbott v. Page Airways, Inc. that a plaintiff could proceed simultaneously both with specific evidence of negligence and on a res ipsa theory, except in cases where witnesses and other specific evidence were readily available. Lower courts, of course, followed suit.  

The central issue in the res ipsa cases, of course, was always one of how best to allow a party without access to evidence to present a case and to compel a party in possession of evidence to come forward with proof. Throughout the middle of the twentieth century, New York courts leaned toward an increasingly "common-sense" approach, by holding, for instance, that a plaintiff with amnesia as a result of the events causing an injury would be held to a lesser degree of proof than a plaintiff who could have testified. Almost invariably this realist posture made it easier for victims of injury to maintain their actions for damages.

G. A *New Choice of Law Theory*

A final development generally favorable to injury victims occurred with the rejection of the traditional choice of law rule, which had provided that liability in tort depended on the substantive law of the jurisdiction where the alleged tort occurred.\(^5\) The traditional rule had always contained an exception against the application of foreign law contrary to the public policy of New York,\(^6\) and in the first case signaling a departure from the old rule, the Court of Appeals had refused to apply a $15,000 limitation on wrongful death recoveries contained in a Massachusetts statute. The case involved an airplane carrying a New York resident which crashed in Massachusetts during a flight that had originated in New York. As the court observed:

Modern conditions made it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. The number of States limiting death case damages has become smaller over the years but there are still 14 of them... An air traveler from New York may in a flight of a few hours' duration pass through several of these commonwealths. His plane may meet with disaster in a State he never intended to cross... The place of injury has become entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters.

Two years later *Babcock v. Jackson*\(^6\) expanded the public policy exception into a new choice of law test, giving "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised." This approach allowed New York courts "to apply 'the policy of the jurisdiction most intimately connected with the outcome of [the] particular litigation,'" including "New York's policy of requiring a tort-feasor to

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513. See Coster, 46 N.E.2d at 511.
compensate . . . for injuries caused by his negligence.\textsuperscript{516}

Once the Court of Appeals adopted this new choice of law test, it typically applied it in ways that promoted compensation to accident victims. Judges expressed their concerns that "the wife and children of a New York decedent . . . be compensated for the economic loss they have suffered as a result of the wrongful killing of their 'bread winner,'"\textsuperscript{517} that New York residents not become "public charge[s]," since if they did it would be "the people of New York—whose services will go uncompensated and whose tax dollars will be charged in the form of welfare payments—who will feel the repercussions . . . and not the distant and unconcerned residents of the state of injury,"\textsuperscript{518} or alternatively that "the negligent defendant's assets are not dissipated in order that . . . blameless . . . [persons] will not have their right to recovery diminished."\textsuperscript{519} At the same time, however, the Court of Appeals "caution[ed] against parochialism in selecting the proper choice of law rule," and observed "that our courts 'should accord [to foreign law] the recognition which comity between enlightened governments requires.'"\textsuperscript{520} In applying Babcock's new "'center of gravity' or 'grouping of contacts'\textsuperscript{521} approach, lower courts appear to have done an adequate job accommodating the Court of Appeals' conflicting concerns.\textsuperscript{522}

H. The Meaning of Negligence: The Calculus of Risk

Most of the rest of New York's law of negligence underwent little, if any, change after the Second World War. One rule which remained fixed was that, unless no

\textsuperscript{516} Id. at 283-84.
\textsuperscript{517} Miller v. Miller, 237 N.E.2d 877, 880 (N.Y. 1968).
\textsuperscript{518} Dym v. Gordon, 209 N.E.2d 792, 797, 800 (N.Y. 1965) (dissenting opinion).
\textsuperscript{519} Id. at 794 (majority opinion).
\textsuperscript{520} James v. Powell, 225 N.E.2d 741, 745 (N.Y. 1967).
facts were in dispute, the resolution of all issues relating to negligence was solely within the province of the jury. As the Court of Appeals noted on one occasion, "[o]nly a jury is constitutionally endowed with the right to pass on conflicting evidence."

To get a case to the jury, a plaintiff did not have to negate "remote possibilities that factors other than the negligence of the defendant may have caused the accident;" it was enough to show "facts and conditions from which the negligence of the defendant . . . may be reasonably inferred." Thus, a plaintiff seeking to show that her decedent died as a result of the failure of the police to furnish medical assistance after arresting him needed only to present testimony that injuries at the time of the arrest with "reasonable medical certainty . . . contributed" to the death; she did not need to "eliminate . . . all other possible causes."

Rules regarding the impact in negligence cases of legislation, administrative regulations and custom also underwent little change. Thus, it remained "well settled that the


527. Id. at 876-77. For other cases holding governmental entities liable for police negligence in apprehending suspects, see Parvi v. City of Kingston, 362 N.E.2d 960 (N.Y. 1977); Flamer v. City of Yonkers, 127 N.E.2d 838 (N.Y. 1955); McCormick v. State, 229 N.Y.S.2d 441 (Cl. Ct. 1962).
unexcused violation of a statute "[was] negligence in itself," although a court, before mechanically applying the statute had to take recourse to "the intent of the Legislature" to determine "if the person seeking redress [came] within the protective orbit of the statute." Violation of an administrative regulation or an ordinance of a municipality, in contrast, was not negligence per se but merely some evidence of negligence. Likewise, except where "courts [were] sure enough of their ground to overrule the customs of a calling," conformity or nonconformity with the customary practices of an industry, in the words of Judge Learned Hand, "measure[d] the proper standard." Basic definitions of negligence also remained firm. "Negligence [was] defined, broadly and generally speaking,

528. Petrosa v. City of New York, 383 N.Y.S.2d 397, 400 (App. Div. 1976); see also Walter v. State, 65 N.Y.S.2d 378, 384 (Ct. Cl. 1946). Indeed, in VanGaasbeck v. Webatuck Cent. Sch. Dist., 254 N.E.2d 243 (N.Y. 1967), the Court of Appeals held that violation of a statute "gives rise to absolute liability" if the statute, like the sections of the Vehicle and Traffic Law dealing with the discharge of children from school buses, "is designed to protect a definite class of persons from a hazard of definable orbit, which they themselves are incapable of avoiding." Id. at 244, 246. The only operative difference between negligence per se and absolute liability is that contributory negligence was a defense to the former but not to the latter. Id.


as the failure to employ reasonable care—the care which the law's reasonably prudent man should use. It was not "a mere error of judgment," especially when made in an emergency. "Negligence was not a stereotyped thing, but...[was] a matter of time, place and circumstance" and could arise out of a variety of factors, ranging from improper performance of work under a contract to failure to discover or failure to remedy a hazard.

Despite this superficial continuity in the definition of negligence, change nonetheless began to occur at a deeper level. On the one hand, traditional conceptions of negligence were put to new and more expansive uses. The most extensive new use for negligence doctrine occurred in the increasingly vast field of medical malpractice, which included cases of unique claims like wrongful life. Another important extension was in the increasing number of suits against accountants, architects, surveyors and others charged with negligence in the construction of

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532. McLean v. Triboro Coach Corp., 96 N.E.2d 83, 83 (N.Y. 1950), which held an instruction that a defendant common carrier owed "a very high degree of care" error, albeit harmless error. Id. at 84. For another case on a higher than reasonable standard of care, see People v. Eckert, 138 N.E.2d 794, 797 (N.Y. 1956).


buildings. Novel claims of negligence were also advanced by a widow against an insurance company that failed to put a policy into effect although informing her that it had, \(^{542}\) by a business against an exhibitor that failed to construct a display for trade shows, \(^{543}\) by a traveler against a travel agent who failed to provide promised limousine service following completion of an airline flight, \(^{544}\) by the buyer of a horse against a racing association that failed to properly list its sex, \(^{545}\) and by a seventeen-year-old boy against a bartender because the boy fell after the bartender had served him thirteen drinks within a one-hour period. \(^{546}\)

On the other hand, Cardozo's valiant *Palsgraf* synthesis of negligence and proximate cause under the single rubric of foreseeability began to come apart with the adoption of Learned Hand's utilitarian calculus of risk. And, as it did, the post-World War II emphasis on reducing injuries, which at first blush served to justify compensation in all cases in which injury occurred, was transformed into an efficiency principle that could be used to deny compensation as often as to dispense it.

As already mentioned, the first clear announcement of the utilitarian calculus occurred in Hand's opinion for the Second Circuit in the 1932 case of *Sinram v. Pennsylvania Railroad*. \(^{547}\) For a decade thereafter, Hand's calculus of risk test was ignored, except arguably in a 1934 state case, which declared that "[t]he degree of care to be exercised is commensurate with the danger to be avoided." \(^{548}\) For reasons already noted, \(^{549}\) however, the word "danger," as used in this case, probably referred only to the likelihood but not the magnitude of harm.

But there was no ambiguity when Judge Hand decided to revive the calculus of risk test in two mid-1940s cases. In the first, a 1943 case involving the loss of a shipment of

\(^{542}\) See *Cavallo v. Metro. Life Ins. Co.*, 262 N.Y.S.2d 618 (Sup. Ct. 1965). This novel problem, of course, was also the old one of *Thorne v. Deas*, 4 Johns. 84 (1809).


\(^{547}\) 61 F.2d 767 (2d Cir. 1932).


\(^{549}\) See *supra* note 133.
cotton aboard a railroad car float in New York harbor in the midst of a hurricane, Hand held unambiguously that “[i]n all actions for negligence the decision depends upon the risk imposed on the person who eventually suffers, matched against the prejudice or expense necessary to avoid it.” He further stated that the “prejudice and... expense were no more than the delay of a few hours; on the other hand the risk was most substantial,” and he therefore reversed the judgment below that the tug operator was not negligent.

Then, in 1947, Judge Hand published his now famous opinion in United States v. Carroll Towing Co., wherein he described a tug owner’s duty to provide against injuries as “a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.” “[L]iability depend[ed] upon” an efficiency calculation of whether the cost of preventing the injury was greater or lesser than its gravity multiplied by the probability that it would occur; if the cost of prevention was less, a defendant would be negligent for not bearing that cost and would be liable for injuries occurring as a result, but if the cost of prevention were greater, a defendant would not be negligent and would have no liabilities.

The Second Circuit continued to follow this efficiency approach, when Chief Judge Thomas Swan, citing Carroll Towing and an earlier Hand opinion, dismissed a claim of negligence after observing that “[n]egligence may be measured as a product of the gravity of the injury, if it occurs, multiplied by the factor of its probability.” Similarly, Judge Henry Friendly observed in 1966 that “[a]s the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less” for a defendant to be negligent, and Judge Irving Kaufman wrote in 1968 that “[i]n determining whether a course of conduct is reasonable, the probability and gravity of injury must be balanced against the ease of taking effective preventive

551. Id.
552. 159 F.2d 169 (2d Cir. 1947).
553. Id. at 173.
554. Id.
measures." The calculus of risk standard was also held applicable on the issue of contributory negligence.

Despite continued dicta that "[o]ne who collects a large number of people for gain or profit must be vigilant to protect them," and that, whenever an individual recognizes that he or she is "caus[ing] danger of injury to the person or property of... [an]other, a duty arises to use ordinary care and skill to avoid such injury," New York's state appellate courts joined the federal bench in accepting Judge Hand's utilitarian calculus. The leading case was Bennett v. New York & Queens Electric Light & Power Co., a 1945 case in which the Court of Appeals opined that the "protective measures" required of a defendant "were proportioned to the danger" which its activity "created." This language was taken to require courts and juries in negligence cases to balance the gravity and probability of harm against the cost of preventing the harm. Likewise, the Appellate Division declared that negligence "involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger." It also ruled in product liability design defect cases, where "there is almost no difference between a prima facie case in negligence and one in strict liability," that a judge's task is one of "balancing of the alternative designs available against the existing risk while taking into account the cost of the proposed alternative.

An especially telling Court of Appeals decision was Pulka v. Edelman, involving the issue of whether parking garage owners should be liable to pedestrians struck by

561. 62 N.E.2d 219 (N.Y. 1945).
562. Id. at 220-21.
drivers carelessly exiting from garages. The court held that liability should not be imposed "where the realities of every day experience show us that, regardless of the measures taken, there is little expectation that the one made responsible could prevent the negligent conduct." What requires attention is the mindset of the Pulka court, which focused on the efficiency question of whether the cost to garage owners of trying to stop drivers from exiting their garages negligently would exceed whatever safety benefits their efforts might bring. The majority did not pay any heed to the fairness argument noted by the dissent in reliance on "the classic language of Palsgraf" that "the nature of... [being in] business as a public garage operator attracted the flow of automobile traffic across the public sidewalk" for profit and thereby imposed a duty on the operator not to "close his eyes to... pedestrians who are thereby imperiled." With Cardozo's Palsgraf synthesis undermined and Hand's utilitarian calculus of risk entrenched as the definition of negligence, judges again struggled with the issue of how to make sense of the requirement of foreseeability, as well as the concept of proximate cause. Some judges simply reiterated without thought the old language of Palsgraf that "[t]he risk reasonably to be perceived defines the duty to be obeyed" and hence the liability for injuries that a wrongdoer would incur. Others, wishing to use proximate
cause as a "concept stemming from policy considerations... in order to place manageable limits upon the liability that flows from negligent conduct," took the view that "negligence and proximate cause," although they "frequently overlapped," were "not the same conceptually." And, if they were not the same, then simple foreseeability could not be the test for proximate cause, since foreseeability was already an element of the negligence calculus of risk.

For this reason, many judges turned back to a classic definition of proximate cause as one "which, in a natural sequence, unbroken by any new cause, produces... [an] event, and without which that event would not have occurred." This definition, however, merely raised a new issue: namely, when a "new cause" would be deemed to have broken a "natural sequence?" Other judges, like...
Henry Friendly, focused not on breaks in the chain of causation, but more directly on foreseeability. In doing so, however, they defined foreseeability for purposes of proximate cause differently than they defined it for negligence, suggesting that, while an ability to foresee harm of any type might render an actor negligent, the proximate cause requirement would be met only if harm of the same general sort resulted to the same general class of persons from the same general type of physical forces that required an actor, in the first place, to take care. The appellate courts failed to eliminate this confusion on the subject of proximate cause in holding that "[n]o particular formula [was] required" when trial judges gave "instructions on the subject of causation.

All of this was good calculation of efficiency, which entailed the interpolation of three doctrinal requirements into personal injury law. The first was the Hand calculus with its call for cost-benefit analysis that encouraged action when the benefits exceeded the costs but deterred it when the costs were greater. The second was the demand for manageable limits on negligence liability so that the law would not interfere with business productivity. The third, at least for the best of judges like Henry Friendly, was the sense that the limits had to grow out of a concept of foreseeability that was defined in a fashion that would enable business to engage in rational planning—the only

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576. Karlson v. 305 East 43rd St. Corp., 370 F.2d 472 (2d Cir. 1967); see also Curko v. William Spencer & Son, Corp., 294 F.2d 410, 414 (2d Cir. 1961) (holding that a "but for" charge on the issue of causation "which equated actual cause with proximate cause . . . adequately informed the jury"). Cf. United States v. Standard Oil Co., 81 F. Supp. 183, 190 (S.D.N.Y. 1948) (ruling that causation should be "understood as the man in the street . . . would understand it"), rev'd on other grounds, 178 F.2d 488 (2d Cir. 1949).
sort of planning consistent with the achievement of efficiency.

The most striking quality, however, in the calculus of risk cases and related ones like *Pulka* was a shift in emphasis. *Palsgraf* was ultimately about fairness: it directed juries to apply a word with moral connotations—negligence—to people who, foreseeing that a particular action on their part would cause physical injury to others, nonetheless went forward with the action in an effort to benefit themselves. Moreover, *Palsgraf* empowered juries to make fairness judgments and declare people morally blame-worthy without inquiry into the efficiency of conduct that was foreseeably harmful. *Pulka*, on the other hand, was not about moral blame but about deterrence. The *Pulka* court reached its decision on the premise that garage owners could do little, if anything, to reduce accidents when cars were being driven out of their garages and accordingly, without engaging in any fairness analysis, refused to impose any duty on the garage owners.

No case, however, better illustrates the efficiency concerns of the late twentieth century Court of Appeals than *Boomer v. Atlantic Cement Co.* The case arose when plaintiffs sought to enjoin the operation of a cement plant in the vicinity of Albany, New York. The Atlantic Cement Co., which owned the plant, sought to operate it even though it imposed dirt, smoke and vibrations on the plaintiffs and other neighboring landowners. *Boomer* presented a clear case of an industrial firm which, "at the time the plant commenced production... was well aware of... the probable consequences of its contemplated operation[,]" yet "still chose to build and operate the plant." Nevertheless, the court denied an injunction because of "the large disparity in economic consequences" that an injunction would create: the defendant's investment in the plant, which employed some 300 workers, exceeded $45,000,000, whereas the injury to plaintiffs amounted to only $185,000. Under such circumstances, the result of granting an injunction "would be to close down the plant at once" at great cost to the area's economy. Instead, the court granted

578. Id. at 877 (dissenting opinion).
579. Id. at 872.
580. Id. at 873.
In focusing on economic consequences rather than fairness, the judges in *Boomer*, like other post-World War II judges, adhered to the central policy goal underlying the era’s tendency toward doctrinal reform in the interests of efficiency. Like other Americans in the postwar era, the judges internalized the lesson of wartime medicine and wartime training that calm and intelligent human effort could reduce injury, illness and premature death, since these accidents were a product not of fate but of human carelessness and error. The judges recognized that accidents could be greatly reduced if people ceased to act in the ways that produced them. However, as they pursued the goal of reducing accidents, judges arrived at a point where accidents could not be further reduced without ceasing activity which was socially valuable. At that point, they concluded that the goal of tort law should be the deterrence not of all accidents but only of those accidents whose cost outweighed the benefits of the conduct that produced them. With that conclusion, judges modified the postwar emphasis on efficiency from one that counseled increased compensation for injuries to one that put the brakes on compensation.

**CONCLUSION**

Thus, in personal injury law, the prewar struggle over whether compensatory justice demanded protection of property or compensation for injuries was transformed after World War II into an analogous efficiency debate over whether to promote injury deterrence by imposing costs on victims or alternatively on others involved, perhaps only peripherally or distantly, in causing the injuries. This shift from a vision of personal injury law grounded in fairness to one grounded in efficiency was not, however, linear. Two complexities need to be mentioned.

Initially, the concern for efficiency seemed to be a plaintiff development. In the years immediately following World War II, the concern induced victims of injury to
search out and sue those who had wronged them, and over the next thirty years it led to a significant number of doctrinal developments that imposed increased liability on defendants. But, as an analytical matter, efficiency is neither a pro-plaintiff nor a pro-defendant concept. Thus, it is not surprising that, while plaintiffs brought more tort suits in the aftermath of the war, the percentage of jury verdicts in their favor declined.

The second complexity concerns the relationship between the concepts of efficiency and fairness. The conception of fairness propounded by the judiciary in the years around 1900 severely curtailed the tort liability of entrepreneurs and other potential defendants. Under this pro-defendant judicial conception, victims of injury were likely to be required to bear their own burdens far more often than under any scheme of efficiency designed to deter the occurrence of accidents. On the other hand, the conception of fairness favored by early twentieth century tort reformers authorized recovery of damages in a greater number of cases than a scheme designed to reduce accidents to some optimal level would have done.

At the time of World War II, tort doctrine reflected some balance between the older conception of limited entrepreneurial liability and the newer reform conception that Cardozo and the Court of Appeals began to incorporate into the law through Palsgraf. Assuming, however, that the balance continued to tilt strongly in the direction of the older conception, then the concept of efficiency appeared congruent in the aftermath of World War II with the reformers' conception of fairness. Proponents of continuing tort reform along the lines begun by Palsgraf could, that is, add an argument about efficiency to their existing argument about fairness without any sense of inconsistency. In cases like Carroll Towing decided in the context of the 1940s, Judge Hand's articulation of the calculus of risk could appear as yet another pro-plaintiff progressive development toward increased fairness.

But, as tort doctrine moved increasingly in the direction urged by early twentieth century reformers, the concept of efficiency became increasingly less congruent with the reform conception of fairness, and began instead to act as a conservative brake on further pro-plaintiff doctrinal development. Scholars like Richard Posner began to appreciate
the restraining implications of the Hand calculus, and cases like Pulka began to codify them. Conflict between fairness and efficiency thus emerged in cases where the cost of foreseeable injury discounted by its probability was lower than the profit obtainable from entrepreneurial activity, as advocates like Posner argued against the award of those damages which the reform conception of fairness demanded in such cases.

With the development of efficiency as a concept for restraining further expansion of tort liability, the late nineteenth century conception of fairness, which had severely limited the tort liability of entrepreneurs and other potential defendants, largely disappeared from discussion. In part, its disappearance resulted from the fact that lawyers arguing against expansion of tort liability could turn to efficiency arguments to halt liability's ever widening scope. The disappearance was also related to a larger phenomenon—the final demise under the pressures of World War II and the postwar world of the nineteenth century precepts against redistribution of wealth which had underlain so much of the common law. But, in today's world, as defense lawyers search for arguments to roll back tort liability beyond the level demanded by conceptions of efficient accident deterrence, some reactionary conception of fairness may again be needed. And, with the growth of distrust of government-supported redistribution, the old nineteenth century conception may even reemerge.

In conclusion, it is necessary to emphasize again that tort law is a social construct which grows out of the needs and ideas of the people, ranging from victims to judges, who participate in its creation. It is not a product solely of the reasoned elaboration of any single concept, whether of fairness or efficiency, nor is it an unmediated product of community will. During the course of this century, tort law has changed in response both to the changing needs and interests of its creators and to their articulation of old ideas and their invention of new ones. It will continue to so change in the century to come.

584. Id.