Existence of a Duty in Wisconsin Negligence Cases

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COMMENTS

THE EXISTENCE OF A DUTY IN WISCONSIN NEGLIGENCE CASES

The existence of a duty owed to the plaintiff by the defendant is one of the four basic elements required to establish liability in a negligence action, i.e., duty, breach, cause and harm.1 Obviously, if no duty exists, there can be no negligence on the part of the plaintiff and, hence, no liability. Although easily articulated,2 the concept of duty as a limitation upon legal responsibility has created confusion in those negligence cases which predicate liability upon the existence of a duty owed to a foreseeable plaintiff. This theory was originally adopted by Justice Cardozo in the majority opinion of Palsgraf v. Long Island Railroad3 to judicially limit liability in those cases where such a limitation was deemed necessary.

In recent years, the Wisconsin Supreme Court has attempted to alter this traditional concept of duty as a liability limiting tool by expressly adopting the rationale of the dissenting opinion in Palsgraf written by Justice Andrews, rather than the majority opinion. This comment will investigate the extent and validity of that alteration, and discuss the concept of duty as a limitation upon liability as it exists in Wisconsin today.

I. The Palsgraf Opinions

Any discussion of duty as a liability limiting technique in negligence actions necessarily starts with an analysis of

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1. See W. Prosser, Handbook of the Law of Torts § 30 (4th ed. 1971); Restatement (Second) of Torts § 281 (1965). See also Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976); Thomas v. Kells, 53 Wis. 2d 141, 191 N.W.2d 872 (1971). The Wisconsin Supreme Court has summarized that [to constitute a cause of action for negligence there must be:

   (1) A duty to conform to a certain standard of conduct to protect others against unreasonable risks;
   (2) a failure to conform to the required standard;
   (3) a causal connection between the conduct and the injury; and
   (4) actual loss or damage as a result of the injury.

Id. at 144, 191 N.W.2d at 873-74.


Palsgraf, which is, without question, the leading case in the area. The facts are well known, but worth repeating: a man, carrying an innocuous package, was running to board the defendant railroad's departing train. One of the defendant's guards assisted the hurrying passenger by pushing him while another guard pulled him onto the train. In the process, the package, which contained fireworks, was jostled from his grasp, fell to the ground, and exploded. The explosion caused a scale at the end of a platform to fall on Mrs. Palsgraf, who was standing on the platform some distance away. Mrs. Palsgraf sued the railroad for damages. 4

This unique factual situation produced a divided court and two noteworthy opinions. Justice Cardozo, writing for the majority, concluded that the defendant's employees were not negligent in the first instance, because the defendant railroad did not owe a duty to Mrs. Palsgraf. According to Cardozo, negligence is not a tort unless it involves the commission of a wrong, which is the violation of a protected interest. However, that violation of the plaintiff's interest must be foreseeable to the defendant to constitute negligence. In other words, if the injury to the plaintiff is not foreseeable, the defendant does not owe the plaintiff a duty to refrain from negligent conduct, and there is no liability, or negligence, because there is no wrong. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury." 5 In this instance, the plaintiff was denied recovery because the defendant could not foresee harm to her arising from the actual conduct which occurred.

In his dissent, Justice Andrews took issue with Cardozo's foreseeable plaintiff requirement, emphasizing the element of proximate cause rather than duty. Under this analysis, negligence exists whenever the defendant performs an unreasonable act which invades the protected interest of another, whether or not damage actually occurs. The duty owed by the defendant is one of due care to protect society as a whole from these unreasonable acts. In essence,

4. Id. at 340-41, 162 N.E. at 99.
5. Id. at 342, 162 N.E. at 99-100.
others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. . . . Harm to someone being the natural result of the act, not only that one alone, but all those in fact injured may complain. 6

The only limitation of liability under this general duty owed to the whole world is the requirement of proximate cause; that is, the damages must have been proximately or directly caused by the unreasonable act. Justice Andrews admitted that proximate cause is impossible to adequately define and that the court, based upon considerations of "public policy" and a "rough sense of justice" must arbitrarily refuse to extend causation and liability beyond a certain point.

Both opinions clearly have a central theme: at some point, the court must make a public policy decision which operates to limit the defendant's liability for damages caused by the negligent act. Cardozo sought to limit liability at the outset with a judicial analysis of the foreseeability of harm to a particular plaintiff. A lack of foreseeable harm to that plaintiff precludes liability, regardless of any actual negligent acts or damages. On the other hand, Andrews established a duty of due care owed to the whole world, and, if anyone is injured as a result of conduct breaching that duty, the negligent defendant is liable unless the injuries were too remote and, therefore, not proximately caused by the defendant's conduct.

Apparently, the key distinction between the two opinions is the time at which the limitation is invoked, rather than the methods employing the limitation, since both methods are admittedly founded upon considerations of public policy. According to Cardozo, the court makes the decision in the first instance which could conceivably arise upon a motion to dismiss or a motion for summary judgment based simply on the pleadings. 7 Under the Andrews theory, the jury first determines the elements of negligence, including causation, and the verdict is subject to review for a possible judicial limitation, unless the jury itself refused to extend liability due to a lack of the requisite causation.

6. Id. at 350, 162 N.E. at 103.
7. The Palsgraf case had gone to trial, and was heard by the New York Court of Appeals on the defendant's appeal from a verdict in favor of the plaintiff.
II. THE WISCONSIN APPROACH

A. Adoption of the Cardozo Majority Opinion

Obviously, some judicial mechanism is needed by the courts to limit liability in cases where, in the court’s opinion, liability simply should not be imposed regardless of the defendant’s negligent conduct. The Wisconsin Supreme Court, in search of such a mechanism, adopted the Cardozo majority opinion in Waube v. Warrington.8 The limitation adopted in Waube had been foreshadowed in Osborne v. Montgomery.9 In Osborne the court had recognized the need for such a mechanism, saying that:

The fundamental idea of liability for wrongful acts is that upon a balancing of the social interests involved in each case, the law determines that under the circumstances of a particular case an actor should or should not become liable for the natural consequences of his conduct.

Any rule which operates to limit liability for a wrongful act must be derived from judicial policy and its limits cannot be defined by any formula capable of automatic application but must rest in the sound discretion of the court.10

Waube provided the court with the ideal factual setting for the application of the Cardozo opinion. Mrs. Waube, while looking out of a window of her house, observed the defendant’s automobile strike and kill her daughter. She became extremely hysterical, took sick, and subsequently died. The decedent’s husband then brought suit against the driver of the car.11

The necessity of judicially limiting liability in such extreme cases was analyzed from the standpoint of the specific duty owed by the defendant to the plaintiff. The court rejected the Palsgraf minority’s reliance on causation, reasoning that liability should not be incurred as a result of extending the harm produced by defendant’s negligent acts through all possible pathways of causation. Rather, the defendant’s duty was to exercise reasonable care and avoid injuring those plaintiffs to whom harm was reasonably foreseeable, or, in this case, Mrs. Waube’s daughter. Under these circumstances, the defendant

8. 216 Wis. 603, 258 N.W. 497 (1935).
9. 203 Wis. 223, 234 N.W. 372 (1931).
10. Id. at 232, 237, 234 N.W. at 376.
11. 216 Wis. at 603-04, 258 N.W. at 497.
could not foresee harm to the mother sitting some distance away in her living room. Therefore, liability was precluded because of the "unusual and extraordinary" facts of this case. To find a duty extending to the mother under these circumstances would impose liability "wholly out of proportion to the culpability of the negligent tort-feasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point."

B. Rejection of the Cardozo Majority Opinion

In Waube the court justifiably employed Cardozo's foreseeable plaintiff requirement as a limitation of liability, both because of the remoteness or unforeseeability of the plaintiff from the actual negligent conduct of the defendant and the tenuous nature of the plaintiff's invaded interest, i.e., shock and fear for another's safety rather than her own. The stated policy factors were thereby used to judicially establish the extent of the defendant's liability when considered in conjunction with the plaintiff's right of recovery. However, in subsequent cases, the court was faced with the situation where these same public policy considerations applied, but the factual situation was such that harm to the particular plaintiff was reasonably foreseeable to the defendant.

Pfeifer v. Standard Gateway Theater, Inc.\textsuperscript{13} presented the court with just such a situation. The plaintiff was a patron in the defendant's theatre when he was struck in the eye by an anonymously thrown spitball. The jury held that the defendant was negligent in patrolling the premises, but such negligence was not a direct cause of the injury. In dicta,\textsuperscript{14} the court discussed the necessity of a judicial mechanism to limit liability. The discussion focused on the foreseeable plaintiff requirement of the Palsgraf majority opinion, and recognized its essential thrust as being primarily that of public policy: "Logic seems to be on the side of the dissenting opinion, yet the majority opinion can be justified from the standpoint that judicial policy warranted the result. The conscience of society might be

\textsuperscript{12} Id. at 613, 258 N.W. at 501.
\textsuperscript{13} 262 Wis. 229, 55 N.W.2d 29 (1952).
\textsuperscript{14} The supreme court had already found error in the trial court's instruction which intermingled foreseeability with the causation instruction.
shocked by imposing liability in such a case."\textsuperscript{15} However, any such limitation of liability forces the court to arbitrarily categorize the plaintiff as unforeseeable despite the obvious foreseeability of harm in this instance to patrons of the theatre. The implication of this dictum casts disfavor on the \textit{Waube} rationale.

After the \textit{Pfeifer} decision, the court lacked a clear method for judicially limiting liability. \textit{Waube} stood as clear precedent for the Cardozo opinion, but \textit{Pfeifer} seemed to discredit that reliance on the \textit{Palsgraf} majority. \textit{Klassa v. Milwaukee Gas Light Co.}\textsuperscript{16} squarely addressed the Cardozo and \textit{Waube} "no-duty" approach. As in \textit{Pfeifer}, \textit{Klassa} involved a plaintiff who was foreseeable to the defendant. The plaintiffs alleged that the defendant, while installing a gas regulator in Mrs. Klassa's home, negligently allowed gas to escape, ignite, and cause a fire in the basement. The plaintiffs, Mrs. Klassa and her sister, and two of Mrs. Klassa's sons were all in the home at the time. The plaintiffs claimed that their injuries arose from shock and fear for their own safety. The defendant argued that the plaintiffs were not in personal danger from the explosion, but rather had suffered the resulting shock and fear from anxiety over the safety of the two sons in the basement.\textsuperscript{17}

The claim for relief in \textit{Klassa} was quite similar to that of \textit{Waube}, with one major exception. The plaintiffs' physical position in the home at the time of the explosion was such that the defendant could readily foresee injury to them arising from the negligent installation of the gas regulator. To judicially preclude liability under the \textit{Waube} doctrine, the court would have been forced, as in \textit{Pfeifer}, to arbitrarily negate the obvious foreseeability of the plaintiffs in order to comply with the foreseeability limitations of the \textit{Palsgraf} majority. Recognizing this inconsistency, the court categorized \textit{Waube} simply as a decision grounded upon public policy, regardless of the means actually used to limit liability. "Whenever a court holds that a certain act does not constitute negligence because there was \textit{no duty} owed by the actor to the injured party, although the act complained of caused the injury, such court is making a public

\textsuperscript{15} 262 Wis. at 239, 55 N.W.2d at 34.
\textsuperscript{16} 273 Wis. 176, 77 N.W.2d 397 (1956).
\textsuperscript{17} Id. at 180-81, 77 N.W.2d at 400.
This rationalization of Waube was necessary to minimize the "no-duty" holding without discrediting the basic rule of the case, i.e., prohibiting recovery for emotional distress and/or shock caused solely by the fear of personal injury to the person or property of another when there was no actual physical impact to the person seeking damages. As a result, recovery was denied in Klassa based on the substantive case law established in Waube, rather than the "no-duty" limitation contained therein.

C. Development of the Public Policy Doctrine

With the Klassa and Pfeifer decisions, the court succeeded in distinguishing the foreseeable plaintiff limitation of the Palsgraf majority out of Wisconsin case law, recognizing that it strained the accepted definitions of duty to preclude liability on grounds of foreseeability when harm to the plaintiff was in fact foreseeable under the existing circumstances. Cardozo's foreseeable plaintiff theory only functioned well in unique factual situations, such as Palsgraf and Waube. It did not provide a good limiting mechanism in "ordinary" negligence cases which because of their nature, required a judicial limitation of liability. A series of these "ordinary" cases followed Klassa, laying the foundation for a new limitation mechanism in Wisconsin, based on general public policy considerations instead of the Palsgraf theories.

The fundamental theory of limiting liability via public pol-

18. Id. at 183, 77 N.W.2d at 401 (emphasis in original). Dean Prosser has suggested this analysis:

There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. . . .

The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none.


19. See, e.g., Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957); Longberg v. H.L. Green Co., 15 Wis. 2d 505, 113 N.W.2d 129, aff'd on rehearing, 114 N.W.2d 435 (1962); Ide v. Wamser, 22 Wis. 2d 325, 126 N.W.2d 59 (1964); Schilling v. Stockel, 26 Wis. 2d 525, 133 N.W.2d 335 (1965); Mehost v. Mehost, 29 Wis. 2d 537, 137 N.W.2d 395 (1966); Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 150 N.W.2d 460 (1967); Johnson v. Chemical Supply Co., 38 Wis. 2d 194, 156 N.W.2d 455 (1968); Scheeler v. Bahr, 41 Wis. 2d 473, 164 N.W.2d 310 (1969); Kemp v. Wisconsin Elec. Power Co., 44 Wis. 2d 571, 172 N.W.2d 161 (1969); Kornitz v. Earling & Hiller, Inc., 49 Wis. 2d 97, 181 N.W.2d 403 (1970).
icy considerations can be traced back to the Osborne and Waube decisions. In fact, several early decisions dismissed the Waube reliance on Cardozo as simply being another means of expressing the public policy rationale: "In Klassa v. Milwaukee Gas Light Co. we reaffirmed the decision of the Waube Case, as grounded on sound considerations of public policy, pointing out again that the Palsgraf determination of lack of duty to plaintiff was itself a judicial determination of policy."  

The general guidelines for limiting liability through public policy considerations were outlined in Colla v. Mandella, wherein the court refused to limit the defendant's liability after discussing these policy considerations. In Colla, after being parked at the top of a hill, the defendant's truck rolled down the incline and struck the plaintiff's home, causing slight damage to the house. The plaintiff, asleep inside, was rudely awakened, aggravating a pre-existing heart condition which resulted in his death ten days later. The trial court denied the defendant's motion for summary judgment, and the supreme court affirmed, emphasizing that a determination of the existence of liability should not be made upon a judicial declaration of a lack of duty, but rather upon the stated public policy considerations, which were not sufficiently present in this case:

It is recognized by this and other courts that even when the chain of causation is complete and direct, recovery against the negligent tort-feasor may sometimes be denied on grounds of public policy because the injury is too remote from the negligence or too "wholly out of proportion to the culpability of the negligent tortfeasor," or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way to fraudulent claims, or would "enter a field that has no sensible or just stopping point."  

Schilling v. Stockel firmly established these public policy

21. 1 Wis. 2d 594, 85 N.W.2d 345 (1957).
22. Id. at 598-99, 85 N.W.2d at 348. The Colla decision cites Palsgraf as the leading case standing for the proposition that liability should be limited in some situations for public policy reasons.
23. 26 Wis. 2d 525, 133 N.W.2d 335 (1965).
factors as being a viable liability limiting mechanism. The plaintiff was driving with his left elbow extended out the open window of his car. A large crate blew off the defendant’s passing truck and injured the plaintiff’s arm. The jury found both parties to be fifty percent negligent, barring any recovery by the plaintiff.\textsuperscript{24} The court recognized that the jury was entitled to find the plaintiff negligent in this instance, but, through judicial recognition of the existing public policy factors, he was not to be held accountable for that negligence.\textsuperscript{25} This was one of those “unusual cases” when a judicial limitation is necessary to protect a party from the effects of his negligent conduct:

When the court determines that liability should not attach even though a negligent act has been committed, our decisions since 1952 direct that nonliability be based on considerations of public policy rather than couched in terms of an absence of duty.

We cannot hold Mr. Schilling’s conduct to be nonnegligent as a matter of law or hold that there was no duty on his part to use reasonable care. Nevertheless, upon these facts, public policy precludes the attachment of liability for his conduct.\textsuperscript{26}

Several later cases\textsuperscript{27} adopted the public policy considerations advanced in \textit{Colla} and \textit{Schilling}, firmly establishing that theory as the dominant judicial limiting mechanism in Wiscon-

\textsuperscript{24} At that time, recovery was allowed only if the plaintiff’s negligence was “not as great” as that of the defendant. Wis. Stat. § 895.045 (1965).

\textsuperscript{25} 26 Wis. 2d at 594, 133 N.W.2d at 339. The \textit{Schilling} decision traced the history of the foreseeable plaintiff requirement and its interrelationship with duty:

Commencing in 1952, with \textit{Pfeifer v. Standard Gateway Theater, Inc.}, we ruled on a number of cases in which we rejected “the no-duty formula of Palsgraf and Waube. . . .” Duty is still an important factor in determining whether an act is negligent. However, once an act has been found to be negligent, we no longer look to see if there was a duty to the one who was in fact injured. \textit{Id.} at 531, 133 N.W.2d at 338 (citations omitted).

\textsuperscript{26} \textit{Id.} at 532-34, 133 N.W.2d at 339. See also Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970) (applying policy factors in refusing to extend the liability of a tavernkeeper to include injuries sustained by a guest in a drunken patron’s car); Padilla v. Bydalek, 56 Wis. 2d 772, 203 N.W.2d 15 (1973) (sustaining against a public policy argument a complaint which alleged that the defendant negligently allowed the plaintiff to lay a loaded gun on the ground close to two excitable hunting dogs); 74 Wis. 2d 46, 246 N.W.2d 916 (1976) (denying recovery in the second appeal of the same case upon the plaintiff’s failure to prove the foreseeability of the injury at trial).

\textsuperscript{27} See cases cited in note 19 \textit{supra}. 

sin, as opposed to the court's earlier reliance in Waube on the Palsgraf majority theory.

D. A.E. Investment and the Palsgraf Minority

In A.E. Investment Corp. v. Link Builders, Inc., Justice Heffernan analyzed the cases relying on public policy and decided that in reality they adopted the Palsgraf minority opinion. In this case, the plaintiff alleged that the defendant builders and architects were negligent in the construction and design of a building in which the plaintiff was a tenant. The defendant architects demurred to the complaint and subsequently appealed from the order overruling the demurrer, denying responsibility for the plaintiff's economic loss on the theory that no duty was owed to the plaintiff, and hence the complaint failed to state a cause of action.

The court ruled that architects, as a class, may be liable for negligence to third persons occupying a building designed by them, even in the absence of privity of contract between the architect and tenant. The lack of contractual privity in and of itself was not a sufficient public policy justification to deny liability. Furthermore, an analysis of the duty actually owed by the architects revealed that

[the duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act. This is the view of the minority in Palsgraf. . . . This court, by implication at least, adopted that view in Pfeifer . . . and expressly adopted the Palsgraf minority rationale in Klassa.

Thus, the Pfeifer and Klassa decisions were construed as adopting the Palsgraf minority opinion. As a result, duty is defined in the terms of the minority, and exists when

it can be said that it was foreseeable that [the defendant's] act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to
someone is foreseeable. Once negligence is established, the defendant is liable for unforeseeable consequences as well as foreseeable ones. In addition, he is liable to unforeseeable plaintiffs.\textsuperscript{31}

This definition of duty is historically correct, although reliance on the \textit{Palsgraf} minority is misplaced for two reasons. In the first place, the discussion of \textit{Palsgraf} in \textit{A.E. Investment} was primarily dicta, because the appellant's claim of no duty was based on the lack of privity, and that argument was rejected on other grounds. Secondly, and more importantly, the facts in this case placed the court in the same dilemma which, except for \textit{Waube}, had fostered the original defection from the Cardozo opinion: the injured plaintiff was clearly foreseeable under the alleged facts.\textsuperscript{32} The \textit{Palsgraf} majority "foreseeable plaintiff" could not be invoked to limit liability in this case, as in the others, without arbitrarily and artificially declaring a foreseeable plaintiff to be unforeseeable. \textit{Waube} remains the only "unique" factual situation in Wisconsin to parallel \textit{Palsgraf} and constitute a truly unforeseeable plaintiff.

The \textit{A.E. Investment} decision confused elements of foreseeability in determining negligence and rejecting the unforeseeable plaintiff theory. Wisconsin has never deviated from the rule that an act must foreseeably cause harm to someone before it is considered a negligent act.\textsuperscript{33} This aspect of the foreseeability of harm is another fundamental requirement of negligence. However in \textit{Palsgraf}, Justice Cardozo created an independent judicial limitation by requiring the existence of a foreseeable plaintiff before any determination of negligence is made. Therefore, under the Cardozo scheme, before the remaining elements of negligence are considered, the defendant's conduct must have: (a) injured a foreseeable plaintiff, and (b) been the type of act or omission which the defendant could reasonably foresee as resulting in harm to someone within that judicially

\textsuperscript{31} \textit{Id.} at 484, 214 N.W.2d at 766.

\textsuperscript{32} Harm to the tenants of a negligently constructed building was certainly foreseeable to the architect of that building.

\textsuperscript{33} Every person is negligent when, without intending to do any wrong, he does such an act or omits to take such a precaution that under the circumstances present he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm. Osborne v. Montgomery, 203 Wis. 223, 242, 234 N.W. 372, 379 (1931) (emphasis added). Except for \textit{Waube}, the Wisconsin court has never limited the concept of duty to specific plaintiffs.
established circle of foreseeable plaintiffs. If the court initially determines that the defendant owed no duty to the plaintiff, then there can be no liability. The foreseeability of harm to someone arising from the defendant's actions does not matter, because the actual determination of negligence, i.e., duty owed and breach of that duty, is never made.

Justice Heffernan mistakenly considered the second determination of duty (the foreseeability of harm to someone) to be the central theme of the Andrews dissenting opinion. Such is not the case. Both the majority and the minority of *Palsgraf* are concerned with the same result—limiting liability. Cardozo judicially performed this function at the initial stage of the negligence formula, before any determination of the existence of a negligent act is actually made.

On the other hand, the Andrews dissent limited liability through causation. The only limitation on liability is the necessity of a proximate causal connection, or substantial factor, between the negligent act and the injury. In essence, the defendant owes a duty to the whole world, which is identical to the duty existing in the majority opinion, after the policy determination requiring a foreseeable plaintiff has been made. Once the defendant has acted negligently, which is determined before any limitation of liability, then the defendant is liable to anyone whose injuries were proximately caused by those acts or omissions.

The *A.E. Investment* decision incorrectly attempted to distinguish the concept of duty in the two *Palsgraf* opinions without recognizing that Cardozo was concerned with a duty to foreseeable plaintiffs only at the initial stage of the negligence formula. Once Cardozo judicially established these parameters of foreseeability, the defendant owed a duty to all persons within those parameters, because all such persons were foreseeable. In the minority opinion, Justice Andrews chose to limit liability on the basis of proximate or direct cause, with the limits of causation being determined by the jury. In defining and limiting the elusive definition of causation, Andrews relied upon the naturalness or foreseeability of the harm arising from the negligent act:

> [T]he natural results of a negligent act—the results which a prudent man would or should foresee—do have a bearing upon the decision as to proximate cause.
Surely, given such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. . . . Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.\textsuperscript{34}

Under this theory, liability follows the negligent act if the requisite causation is present. Any decision to limit liability is made by the jury when determining proximate cause, rather than by the court prior to the determination of negligence. Elements of foreseeability enter into the determination of causation, rather than into the determination of duty owed. In either theory, the defendant's liability is limited by foreseeability.

Wisconsin, on the other hand, has clearly eliminated all elements of foreseeability from the determination of proximate cause (substantial factor) in negligence cases.\textsuperscript{35} "If it be kept in mind that foreseeability under our law as it now stands applies only to the question of negligence or the failure to exercise ordinary care, and not to limit the liability for the consequences of the wrongful act, much confusion should be done away with."\textsuperscript{36} In other words, if a duty and breach are found to be present, then the defendant is responsible for all consequential damages flowing from the breach, whether or not the damages were foreseeable, provided there was no break in the chain of causation.

This interpretation of causation quite literally results in liability for any injury caused, even if remotely, by the defendant's acts. Causation therefore does not and cannot provide a sound basis for limiting liability. Because of this, the Wisconsin court has formulated and adhered to a system of limitation founded upon considerations of public policy rather than the Palsgraf minority view.

E. Post-A.E. Investment Adherence to Public Policy

Howard v. Mt. Sinai Hospital, Inc.,\textsuperscript{37} was decided in the

\begin{itemize}
  \item \textsuperscript{34} 248 N.Y. at 355-56, 162 N.E. at 104-05.
  \item \textsuperscript{36} Osborne v. Montgomery, 203 Wis. 223, 242, 234 N.W. 372, 379 (1931).
  \item \textsuperscript{37} 63 Wis. 2d 515, 217 N.W.2d 383, aff'd on rehearing, 219 N.W.2d 576 (1974).
\end{itemize}
same term as the *A.E. Investment* case. In *Howard*, the same public policy considerations were utilized to limit the defendant's liability. An intern at the defendant hospital had broken a catheter when inserting it into the plaintiff's shoulder. Two small pieces could not be located, and hence were not removed. The plaintiff developed a phobia, fearing the future development of cancer as a result of this admittedly negligent conduct. However, the public policy factors of *Colla* were invoked by the court to preclude liability. These factors were simply characterized as an element of causation and, hence, were inserted into the negligence formula at that particular point in the determination of negligence. The court noted that in *Colla* and other cases, "these public policy considerations are regarded as an element of the legal cause, although not a part of the determinations of cause in fact, which this court refers to as 'substantial factor'."38

Although several decisions subsequent to *Howard* have cited the *A.E. Investment* rationale,39 they actually do little more than recite the definition of duty stated therein. None of these decisions make any attempt to actually apply the *Palsgraf* minority opinion. Therefore, in spite of *A.E. Investment* and several statements to the contrary, Wisconsin firmly adheres to the public policy theory of limiting liability.

*Howard* clearly included these public policy considerations as an element of causation. Although considered a part of the general scheme of causation, the policy factors are not involved in determining cause in fact or substantial factor causation.

38. Id. at 518-19, 217 N.W.2d at 385.

By such standard of ordinary care, we mean the standard that is used in all other negligence cases in Wisconsin. . . . Under that test, as we have repeatedly stated, negligence is to be determined by ascertaining whether the defendant's exercise of care foreseeably created an unreasonable risk to others. That test is to be applied at the negligence phase of the analysis to the world at large and not to the particular plaintiff. In this respect, our analysis of negligence does not follow the Cardozo majority opinion in *Palsgraf*. . . . We rather rely upon the Andrews dissenting rationale that, if the defendant has been negligent under that standard, the question is one of cause-substantial factor, i.e., cause in fact, and proximate cause, which may include policy factors that may exclude liability in the particular circumstances.

Antoniwicz v. Reszczynski, 70 Wis. 2d 836, 857, 236 N.W.2d 1, 11 (1975).
The defendant's negligence must be a substantial factor in producing the injuries claimed by the defendant in order for liability to attach. There may, in some cases, be more than one substantial factor causing the injuries, and in that case, the comparative negligence formula weighs and allocates the percentage of total cause to each factor. This causal relationship is a necessary prerequisite to establishing any liability for the plaintiff's injuries.

Determinations of cause in fact and public policy are necessarily separate, since public policy considerations operate to preclude liability in instances where the defendant's negligent conduct is found to be a substantial factor in producing the plaintiff's injuries:

[N]egligence plus an unbroken sequence of events establishing cause-in-fact does not necessarily lead to a determination that the defendant is liable for the plaintiff's injuries. The determination to not impose liability [because of remoteness of cause] in instances where a negligent act has been committed and the act is a "substantial factor" in causing the injury rests upon considerations of public policy.

Therefore, public policy factors are invoked to limit liability in cases where all elements of negligence are present. Howard correctly characterized this limitation as an element of causation, simply because the factors, as enunciated in Colla, go primarily to the remoteness of the injury from the actual conduct, regardless of cause. Although A.E. Investment and its progeny correctly restate the theory of duty in Wisconsin as it has existed over the years, any reliance on the Palsgraf minority to limit liability is misplaced. Wisconsin employs a completely different mechanism to limit liability, and, as opposed to Palsgraf, this policy determination is made after the requisite elements of duty and cause have been established.

III. APPLICATION OF THE PUBLIC POLICY DOCTRINE

As noted above, the public policy determination is made by the court at a point in time after the elements of duty and

causation have been established. In other words, the plaintiff has already succeeded in proving his or her case. As a result, the defendant faces great difficulty in avoiding liability through judicial intervention before a complete determination of the factual issues at trial. This aspect of timing distinguishes the Wisconsin theory from both of the Palsgraf opinions.

Under the Andrews theory, the jury makes the determination of proximate cause, and liability results if the necessary causation is present. In order to judicially limit liability, after the jury has found the necessary proximate cause the court must arbitrarily reverse that finding and declare that the requisite causation was lacking. Conversely, Cardozo made a judicial determination of liability based on the existence or nonexistence of a duty at the outset, before a full trial. This method affords the defendant a chance of success on either a motion to dismiss or a motion for summary judgment. The minority theory only allows the defendant a pretrial opportunity to limit liability if the court declares as a matter of law that the necessary cause is lacking.

Under the Wisconsin public policy approach, the court will seldom make the policy limitation without a full factual resolution at trial. "While this court has decided the public policy issue on demurrer, it is usually better practice to submit the issue to the jury insofar as determining the issues of negligence and causation in the same manner as in the ordinary case."45

The court's hesitance to invoke the policy limitation before trial is evidenced by the fact that only a few factual situations have given rise to such a pretrial limitation of liability. One of these cases, Rieck v. Medical Protective Co.,46 involved the failure of a defendant doctor to diagnose the plaintiff's preg-

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43. See Wis. Stat. § 802.06(2) (1975).
44. See Wis. Stat. § 802.08 (1975).
45. Padilla v. Bydalek, 56 Wis. 2d 772, 779, 203 N.W.2d 15, 20 (1973). Similarly, the court has noted:

The application of public policy considerations is solely a function of the court . . . and does not in all cases require a full factual resolution of the cause of action by trial before policy factors will be applied by the court. There may well be cases, of course, where the issues are so complex, or factual connections so attenuated, that a full trial must precede the court's determination.

Hass v. Chicago & N.W. Ry., 48 Wis. 2d at 326-27, 179 N.W.2d at 888.
46. 64 Wis. 2d 514, 219 N.W.2d 242 (1974). In addition, see Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970), see note 26, wherein the court dismissed the plaintiff's complaint on public policy grounds.
nancy. Deprived of the opportunity for an abortion, the plaintiff sued the doctor for the costs of raising the child. Applying the Colla public policy factors, the court dismissed the plaintiff's complaint and found the defendant to be not liable as a matter of law in this instance.

In another case, Hass v. Chicago & North Western Railway, the plaintiff, a firefighter, sued a railroad for the negligent starting of a fire. The plaintiff was injured in the course of fighting the fire. The supreme court reversed the trial court’s denial of the defendant’s demurrer, reasoning that to allow liability in this instance contravened public policy. The court noted that many fires are admittedly started by negligent conduct, and to allow liability in such a case puts too great a burden on homeowners or other owners of land, even though it is perfectly foreseeable that firefighters will be summoned and perhaps injured in fighting the blaze. Consequently, it ordered the granting of the defendant’s demurrer to the complaint on the ground of public policy.

In the vast majority of cases, however, the Wisconsin Supreme Court has refused to limit liability on public policy considerations without a full factual resolution of the issue at trial.

Requiring a full trial of the issues obviously has a marked effect upon defense strategy. With Wisconsin’s broad definition of duty, a claim of no duty may be successfully asserted by the defendant upon a motion to dismiss or for summary judgment only in those rare instances when no harm arising from the defendant’s conduct is foreseeable to anyone. If this lack of duty, in the broad sense, is not clear from the pleadings, and the necessary elements of breach, cause and harm are arguably present, the defendant has little chance for a pretrial limitation of liability via the motion to dismiss or summary judgment. Nevertheless, if a legitimate public policy argument exists, se-

47. 48 Wis. 2d 321, 179 N.W.2d 885 (1970).
48. Id. at 327, 179 N.W.2d at 888. But cf. Clark v. Corby, 75 Wis. 2d 292, 249 N.W.2d 567 (1977) (involving essentially similar facts and approving of the Hass result, but upholding a plaintiff’s complaint where it was alleged that the homeowner failed to warn the firefighter of a hidden hazard).
49. See, e.g., Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W. 2d 132 (1976); A.E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214 N.W.2d 764 (1974); Weiss v. Holman, 58 Wis. 2d 608, 207 N.W.2d 660 (1973); Padilla v. Bydalek, 56 Wis. 2d 772, 203 N.W.2d 15 (1973).
rious consideration should be given to making both those motions, the former on the pleadings and the latter on submitted affidavits, if for no other reason than to lay a solid foundation for seeking a judicial policy limitation after the trial.

Should those motions be denied, the defendant must also consider the fact that the supreme court has permitted a pretrial limitation of liability in only a handful of instances. Numerous other cases have been returned for trial, leaving the public policy determination for a later date. Obviously, if the defendant proceeds to trial and the plaintiff fails to prove any element of his or her case, the issue is moot, which is undoubtedly the court's underlying rationale in requiring a full trial before making the policy determination.

Therefore, under the liberalized pleading rules the plaintiff is relatively assured of a trial without judicial intervention limiting liability on policy grounds. That limitation is virtually always made after a factual resolution of the issues fully clarifies any policy considerations which may affect the liability of the defendant.

IV. Conclusion

Despite assertions to the contrary, the judicial limitation of liability in Wisconsin does not follow either the Palsgraf majority or minority opinions, but rather establishes a separate mechanism based upon public policy considerations. Waube v. Warrington is the only Wisconsin case to specifically utilize the foreseeable plaintiff rule of the majority, thereby allowing the defendant to avoid liability in the first instance. However, an analysis of Wisconsin negligence cases reveals that Waube is also the only case to involve an unforeseeable plaintiff, which places the decision along with Palsgraf in a class of "freak accidents." The Waube decision has never been overruled and

50. 216 Wis. 603, 258 N.W.2d 497 (1935).
51. In discussing the viability of Palsgraf as precedent, Dean Prosser noted, "We are in a field of freak accidents, of crazy concatenations of circumstances, no one of which ever has been duplicated or ever will occur in exactly the same way again. It is not likely that there will be another Mrs. Palsgraf before judgment day. As a precedent her case is utterly worthless unless we can extract from it some generalization, some guide to a method of dealing with freak accidents, some prediction for the unpredictable. But freak accidents, in the aggregate, follow no pattern at all; and even where some superficial resemblance can be found, the details will vary so greatly and significantly from case to case that
is still good law in these cases which can be classified as "freak accidents," although the decision was later reclassified in Klassa as primarily a public policy decision, quietly removing the foreseeable plaintiff requirement of Palsgraf from the realm of "ordinary" negligence.

Although several later cases purport to adopt the Andrews dissent, they succeed only in restating a definition of a duty which had previously been established as the standard in Wisconsin. Although differing from both, the public policy mechanism created by the court has the same effect as both the majority and minority opinions in Palsgraf—a judicial limitation of liability above and beyond the jury determination of negligence. Palsgraf is, at its very essence, a public policy decision, and the Wisconsin court simply altered the means employed to achieve the same result, without encountering or creating problems of declaring a foreseeable plaintiff to be unforeseeable or reversing a jury finding of proximate cause or cause in fact. This judicial limitation of liability based on public policy considerations should be recognized as just that, instead of confusing the issue by claiming reliance upon a case decided almost fifty years ago.

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we may very well come to different conclusions. A rule for the unpredictable is itself a contradiction in terms.

PROSSER, supra note 18, at 28; see also Pulka v. Edelman, 40 N.Y.2d 781, 358 N.E.2d 1019 (1976) (reaffirming the Palsgraf rationale, but emphasizing that the doctrine applies only to the scope of a duty and not to the existence of a duty in the first instance).
COMMERCIAL ARBITRATION AGREEMENTS: LET THE SIGNERS BEWARE

I. APPLICABLE LAW

[The remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State . . . . The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury . . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . . .]

Arbitration is a consensual, private and nonjudicial method of settling disputes which has important ramifications on the legal rights of the parties involved. Because of the finality usually accorded arbitration proceedings, the agreement to arbitrate is, essentially, an agreement to waive many of the protections one would have if litigating in a public forum. Yet, despite the “informalities and looser approximations as to the enforcement of their rights,” arbitration can provide an economic and efficient method of dispute resolution which meets the needs and desires of the parties involved. Thus, long before courts and legislatures endorsed arbitration as a matter of public policy, businessmen were agreeing to arbitrate disputes.

A. Historical Development

Historically, courts were reluctant to enforce arbitration agreements. At common law, agreements to arbitrate were revocable until the time of the award: “[E]ven if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it is still revocable and countermandable, by either party, before the award is actually made, although not afterwards.” By 1915 the various attitudes toward irrevocable agreements to arbitrate future disputes had crystalized. The