Cardozo's Great Proximate Cause Decision?

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Kenneth S. Abraham & G. Edward White, *Recovering* Wagner v. International Railway Company, 34 **Tuoro L. Rev.** 21 (2018).

Featuring the memorable phrase "Danger invites rescue," Cardozo's opinion in *Wagner v. International Railway Co.* is engaging and beautifully written. The same can be said of *Recovering* Wagner v. International Railway Company (hereinafter "*Recovering* Wagner")?the recent study of *Wagner* by Ken Abraham and Ted White (hereinafter "AW"). Through historical research principally into the litigation of the case, they generate an important new interpretation of *Wagner*. According to AW, *Wagner* forced Cardozo to confront what lawyers then and now would call a "proximate cause" question. Yet his opinion does not explicitly mention proximate cause (or duty, for that matter). Instead, it employs a notion of relationality of risk. Indeed, AW powerfully argue, the whole point of *Wagner* is that relationality of risk is far more important than the idea of a "natural and probable" sequence from breach to injury, or any kind of remoteness criterion, in determining whether a defendant should be held responsible in negligence for a plaintiff's injury. Their larger point is that *Wagner* can be seen to encapsulate Cardozo's powerful influence on American negligence law.

Abraham and White's research confirms that Cardozo's depiction of the facts in *Wagner* is largely accurate. I follow their judgment that quoting Cardozo's account is the best way to re-acquaint readers with the facts of the case:

> The defendant operates an electric railway between Buffalo and Niagara Falls. There is a point on its line where an overhead crossing carries its tracks above those of the New York Central and the Erie. A gradual incline upwards over a trestle raises the tracks to a height of twenty-five feet . . . Then comes a turn to the right at about the same angle down the same kind of an incline to grade. Above the trestles, the tracks are laid on ties, unguarded at the ends . . . On the bridge, a narrow footpath runs between the tracks . . . .
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> Plaintiff [Arthur Wagner] and his cousin Herbert [Wagner] boarded a car at a station near the bottom of one of the trestles . . . The platform was provided with doors, but the conductor did not close them. Moving at from six to eight miles an hour, the car, without slackening, turned the curve. There was a violent lurch, and Herbert Wagner was thrown out, near the point where the trestle changes to a bridge . . . Plaintiff walked along the trestle, a distance of four hundred and forty-five feet, until he arrived at the bridge, where he thought to find his cousin's body . . . Reaching the bridge, he had found upon a beam his cousin's hat, but nothing else. About him, there was darkness. He missed his footing, and fell (P. 437).

Wagner holds that a person injured while trying to rescue a person who was imperiled by the defendant's negligence may himself recover from the negligent defendant. "Danger invites rescue" is widely understood to express the rule that, because it is foreseeable that someone will try to rescue another engulfed in a danger that the defendant negligently created, the defendant is liable to the rescuer if he is injured during the rescue attempt. AW are not especially concerned to contest this reading. Their thesis is that when we understand how the case was litigated at trial, and the precedents on which the case was decided, we learn a great deal about how Cardozo understood the basis of the defendant's responsibility.

On first blush, *Wagner* actually looked easy for the plaintiff on the law but difficult on the facts. On the law, it looked easy because the New York Court of Appeals had already prominently decided that a rescuer had a claim against the

source of the unreasonable risk imperiling the original victim. A key case was *Eckert v. Long Island R.R.*, but there were other applicable precedents too, both from New York and elsewhere. The actual facts of this case made it more difficult for the plaintiff. First, the plaintiff Arthur Wagner may well have been drunk. Second, his cousin was rescued by others, and the plaintiff was not even looking in the right place when he was injured. Third, and in many ways most importantly, the act of going to rescue his cousin was not an impulsive leaping to aid (as in *Eckert*), but a deliberate decision about how and where to look. Relatedly, there was a controversy at trial regarding whether Arthur was accompanied by (or perhaps led by) an employee of the defendant.

The Railroad was understandably eager not to depend exclusively on the (then-complete) defense of contributory negligence, as it was simply unclear what a jury would find on that front. AW show how the Railroad's lawyer, Edward Franchot, managed to use the aforementioned peculiarities of the fact pattern to generate another argument against liability (Pp. 36-39). Specifically, he persuaded the trial judge to instruct the jury that the alleged negligence of the Railroad in going around the bend and overpacking its train – the alleged negligence that caused Arthur's cousin Herbert to fall in the first place – *could not be the basis of Arthur's action.* Rather, the judge instructed the jury that Arthur could recover only a finding that the conductor had negligently instructed Arthur going on the trestle. This left the jury to weigh the conductor's testimony and Arthur's testimony with regard to what was said and done during the panicky moments following Herbert's fall. Arthur's testimony was evidently less credible to the jury than the conductor's, so the Railroad won the case.

On appeal, Arthur's lawyer, argued quite plausibly that the New York Court of Appeals' own leading precedent – Gibney v. State – permitted liability to be predicated on the negligence of the railroad that led to Herbert's need for rescue. Franchot distinguished *Gibney* by arguing that that the rescuer's conduct in that case was an instinctive reaction, whereas in *Wagner* the attempted rescue was a deliberate act. The instinctiveness of the rescue in *Gibney* permitted the continuity between breach and injury that allowed a finding of proximate cause. Given the absence of comparable continuity in *Wagner*, Franchot argued that the railroad's original negligence was not the proximate cause of Herbert's rescue attempt. The judge's instructions to the jury were therefore correct.

In his opinion for the Court of Appeals, Cardozo confronted this argument head on, pointedly rejecting it:

> The defendant says that we must stop, in following the chain of causes, when action ceases to be 'instinctive.' By this is meant, it seems, that rescue is at the peril of the rescuer, unless spontaneous and immediate. If there has been time to deliberate, if impulse has given way to judgment, one cause, it is said, has spent its force, and another has intervened . . . We find no warrant for thus shortening the chain of jural causes. We may assume, though we are not required to decide, that peril and rescue must be in substance one transaction; that the sight of the one must have aroused the impulse to the other; in short, that there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences. If all this be assumed, the defendant is not aided. Continuity in such circumstances is not broken by the exercise of volition . . . The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion (P. 438).

Cardozo's opinion thus abandons the notion that a deliberate act inserted into the causal chain destroys the possibility of liability. Notably, while he does not use the phrase "proximate cause" or "legal cause," he does indeed use the phrase "the chain of jural causes," and he rejects the idea of shortening this chain because of intervening volitional action.

More generally, Cardozo embraces a risk-based notion of the connection between the injury and the underlying risk-creating action:

> The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who

> plunges to its aid (citing *Gibney)*. The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man (Pp. 437-38).

AW's article explains that Cardozo was, in effect, supplanting what was at the time the dominant way in which New York courts (and other courts) had formulated the proximate cause requirement: namely, whether the defendant's carelessness had led to the plaintiff's injury through a "natural and probable" sequence. Now the question is whether the injury complained of by the plaintiff was an actualization or realization of the risk negligently taken by the defendant (P. 57).

Abraham and White's reading of *Wagner* as having effected a tacit change in proximate cause law also supports a longstanding Twentieth Century reading of another Cardozo opinion – that of Harvard Professor Warren Seavey[1] in *Palsgraf v. Long Island R.R.* Seavey saw *Palsgraf* as a proximate cause case that hinged on Cardozo's quiet substitution of a risk-rule conception of proximate cause for the prevailing natural-and-probable-sequence conception. What rendered "negligent" the LIRR guard's pushing of the passenger was the risk of destroying the passenger's package, not the risk of physically injuring a woman down the platform, Seavey observed. Liability in negligence requires a match between the risk and the injury. In *Wagner*, the risk of a rescuer's injury is part of what made the Railroad negligent, so a plaintiff who suffered the realization of that risk has a claim based on the Railroad's negligent conduct in rounding the bend with open doors.

Once they have drawn the connection with Seavey's *Palsgraf* reading, AW arrive at their most striking scholarly claim: "We think the decision in *Wagner* contains virtually everything necessary to its more celebrated offspring, *Palsgraf*" (P. 56). They proceed to list these necessary ingredients: "the centrality of risk-analysis to questions involving what others had analyzed in terms of proximate cause"; "the causal-chain analysis that Judge Andrews would later employ in his *Palsgraf* dissent"; and the willingness to classify as a "matter of law" the question of which risks are associated with a defendant's negligence. "In a very real sense," they conclude, "it is*Wagner*, not *Palsgraf* that is Cardozo's seminal decision in this area of tort law" (P. 58). AW will not be surprised that I (a self-described *Palsgraf* maven) would wholeheartedly reject this particular conclusion, but that is a matter for another time; I concede that their case for *Wagner* as a *Palsgraf* preview is nicely laid out.

There are numerous reasons to regard AW's article as essential reading for Torts professors. Among these are the article's erudition and its reminder of the importance of detail in the analysis of canonical cases. There is also its recognition that relationality of risk can be (as it was in *Wagner*) a sword, and not just a shield (as it was in *Palsgraf*). Most importantly, AW's "recovery" of *Wagner* flags for all of us the important historical truth that proximate cause analyses were once very different than they are today. Foreseeability and relationality of risk played a lesser role, while "natural and probable" and "directness" played a greater role. In this vein, we should remember that courts were not always comfortable including within causal chains the voluntary conduct of the plaintiff or of third parties. Unforeseeable wrongful conduct today may sever liability via the doctrine of superseding cause, but for a large part of the 20th century, a far broader range of voluntary conduct would have severed liability via proximate cause. In this former world, we would not have seen *Tarasoff v. Regents of the University of California*, or Kline v. 1500 Mass. Ave. Those progressive duty cases were arguably only possible because a relationality if risk conception of "jural cause" replaced a more mechanistic and naturalistic one. Seen through the prism of AW's analysis, it was partly Cardozo's achievement in *Wagner* that made this possible.

1. Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 **Yale L. J.** 390 (1939).

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